

**SOUTH AFRICAN LAW COMMISSION**

**Project 106**

**JUVENILE JUSTICE**

**REPORT**

**July 2000**

To Dr PM Maduna, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on **Juvenile Justice**.

**Madam Justice Y Mokgoro**

**Acting Chairperson**

**July 2000**

## **INTRODUCTION**

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

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## **SUMMARY OF DRAFT BILL**

Following upon the ratification of the United Nations Convention on the Rights of the Child in 1995, the South African Law Commission was requested to undertake an investigation into juvenile justice and to make recommendations to the Minister of Justice for the reform of this particular area of the law. An Issue Paper was published for comment during 1997 which proposed that a separate Bill should be drafted in order to provide for a cohesive set of procedures for the management of cases in which children are accused of crimes. The Issue Paper was the subject of consultation with both government and civil society role- players. Towards the end of 1998 the Commission published a comprehensive Discussion Paper, accompanied by a draft Bill (referred to in this Report as “Bill A”). Wide consultation was held regarding this document, with all the relevant government departments and non-governmental organisations providing services in the field of juvenile justice being specifically targeted for inclusion in the consultation process. The draft Bill encapsulated a new system for children accused of crimes providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing, including record-keeping and special procedures to monitor the administration of the proposed new system. The workshops and seminars held regarding the Discussion Paper, as well as the written responses received, garnered substantial support for the basic objectives of the Bill as well as for the proposed structures and procedures. Many of the submissions and discussions included constructive criticisms and helpful suggestions as to how the Bill could be improved.

The Report contains a final proposed draft Bill (referred to in the Report as “Bill B” to differentiate it from the draft Bill which accompanied the Discussion Paper) entitled the Child Justice Bill. This Bill

embodies the recommendations of the South African Law Commission for the reform of the law relating to children accused of crimes in South Africa.

The long title of the draft Bill (Bill B) describes what is included in the legislation, namely to -

- C establish a criminal justice process for children accused of committing offences which aims to protect children's rights as provided for in the Constitution and the UN Convention on the Rights of the Child;
- C provide for the minimum age of criminal capacity of such children;
- C describe the powers and duties of police and probation officers in relation to such children;
- C describe the circumstances in which such children may be detained and to provide for their release from detention;
- C make diversion of cases away from formal court procedures a central feature of the process;
- C establish an individual assessment of each child and a preliminary inquiry as compulsory procedures in the new process;
- C create special rules for a child justice court;
- C extend the sentencing options available to such children;
- C entrench the notion of restorative justice;
- C provide for legal representation of children in certain circumstances;
- C establish appeal and review procedure as well as an effective monitoring system for the legislation.

A summary of the provisions of the draft Bill is as follows:

## **CHAPTER 1: GENERAL**

### **Application of the draft Bill**

The draft Bill applies to any person legally resident in South Africa who is alleged to have committed an offence and who, at the time of the alleged commission of the offence, is or was under the age of 18 years. However, the Director of Public Prosecutions (DPP) may, in exceptional circumstances (which are set out in clause 2(3)), direct that proceedings in terms of the Bill must take place in respect of a person who is over 18 years but has not yet reached 21 years of age. The Bill applies to any person in respect of whom proceedings have been instituted, notwithstanding the fact that he or she may have turned 18 years of age during the course of such proceedings.

Where the Bill does not provide for any matter which is otherwise provided for in the Criminal Procedure Act 51 of 1977 (CPA), the CPA will apply, with such changes as may be required by the context.

## **Objectives and principles**

The objectives of the Bill, set out in clause 4, briefly stated, are to -

- C protect the rights of children subject to the Bill;
- C promote the concept of *ubuntu* in the child justice system; and
- C promote co-operation between the relevant government departments, other organisations and agencies involved in implementing an effective child justice system.

Any court or person exercising any power conferred by the Bill is to be guided by the set of 11 principles set out in clause 5 of the Bill.

## **CHAPTER 2: AGE, CRIMINAL CAPACITY AND AGE DETERMINATION**

### **Age and criminal capacity**

The Bill (in clause 6) repeals the common law with regard to children below the age of 14 years. The minimum age of criminal capacity is raised from seven to ten years. The rebuttable presumption of *doli incapax* with regard to children who are at least ten but not yet 14 years of age is codified. The Bill provides that -

- C a child who, at the time of the commission of an alleged offence is below the age of 10 years, cannot be prosecuted;
- C a child who, at the time of the commission of an alleged offence, is at least ten years, but not yet 14 years of age is presumed to not to have had the capacity to appreciate the difference between right and wrong and act accordingly, but this presumption may be rebutted if it is subsequently proved beyond a reasonable doubt that he or she did have capacity at that time.

A child who has reached 10 years, but is not yet 14 years of age may not be prosecuted unless the DPP issues a certificate confirming an intention to proceed with the prosecution of such child. This approach is intended to encourage the diversion of children in this age group in the majority of cases, whilst still preserving the discretion of the prosecutor with regard to the prosecution of such children.

### **Age determination**

Many children accused of crimes in South Africa do not know their exact ages. The draft Bill (in clauses 7, 8 and 9) proposes a solution to this problem by providing that where a child's age is uncertain or is in dispute -

- C the probation officer should gather available information and make an estimation of the age of the child and should record such information on a prescribed form. The legislation provides a list of documents or other forms of information relevant to the estimation of age;
- C the magistrate presiding at a preliminary inquiry should make a determination of age based on all available evidence, and the age so determined should be considered to be the child's age until contrary evidence is placed before a court;
- C the child may be taken to a medical practitioner for estimation of age by a police official of such official's own accord, or upon the request of a probation officer or a magistrate.

## **CHAPTER 3: POLICE POWERS AND DUTIES**

### **Methods of securing attendance of the child at preliminary inquiry**

The draft Bill (in clause 11) sets out three methods of securing a child's attendance at subsequent proceedings, namely, arrest, the use of an alternative to arrest, and summons. The Bill encourages the preferential use of alternatives to arrest. Such alternatives include requesting a child to accompany the police official to attend a preliminary inquiry, or issuing a written notice to attend any such procedure. The alternatives may be used with regard to any offence, but must be used with regard to minor offences (listed in Schedule 1 to the Bill) unless there are compelling reasons not to do so.

Where a child is arrested, the arrest must be made with due regard to the dignity and well-being of such child and only if it clear that a child cannot be arrested without the use of force, may such force as is reasonably necessary and proportional to the circumstances be used to overcome any resistance or to prevent the child from fleeing. Deadly force cannot be used except in certain limited circumstances which are detailed in clause 11(3).

### **Duties of police to notify parent and probation officer about an arrest**

When a police official has arrested a child he or she must notify a probation officer within 24 hours of such arrest. The police officer is further required to take the child to a probation officer as soon as possible but not later than 48 hours after the arrest, and if the 48 hours expires over a weekend or public holiday, the child must be taken on the first working day thereafter.

Where a child has been arrested the police have a duty to notify such child's parent (or if a parent cannot be found, an appropriate adult) about the arrest. The police official also has a duty to give a written warning to such parent or adult to attend a preliminary inquiry in respect of such child. The police may be required by the probation officer to notify specified persons to attend an assessment, or to obtain relevant documents.

The National Commissioner of the South African Police Service is empowered by the draft Bill (in clause 12) to issue a national instruction setting out the circumstances in which a police official may issue an informal warning instead of arresting a child, or using an alternative to arrest.

### **Pre-trial procedures**

The draft Bill provides protection for children who may be vulnerable during the investigation of the case by police. The Bill requires (in clause 17) the presence of a parent, an appropriate adult or a legal representative (or where none of these persons is available, an independent observer) at any confession, admission, pointing out or identity parade. If such adult is not present at any of these pre-trial procedures, then the evidence obtained at such procedures will not be admissible as evidence in subsequent court proceedings.

Fingerprinting of children should not be resorted to until after the preliminary inquiry in cases where it is clear that the child is going to be prosecuted. However, the Bill does allow for fingerprinting after arrest and prior to the preliminary inquiry if it is essential for the investigation of the case, to ascertain the age of the child or to establish prior convictions.

## **CHAPTER 4: DETENTION OF CHILD AND RELEASE FROM DETENTION**

### **Principles relating to release and detention**

In clause 19 the draft Bill provides for a number of principles which are to be considered by any person who makes a decision regarding the detention or release of a child. The principles are set out hierarchically, stating that preference should be given to releasing a child unconditionally to his or her parent, but that conditions linked to the release must be considered if the child would otherwise be detained. Bail should likewise be considered if detention is the only alternative, and finally, detention should be a measure of last resort, and the least restrictive form of detention appropriate to the child and the circumstances must be selected.

### **Treatment of children in detention in police custody**

The treatment of children in detention in police custody is specifically provided for in clause 20 of the draft Bill. The clause also includes a complaints procedure for children who wish to make complaints regarding injuries sustained during the arrest or whilst in detention. There is also a requirement that each police station must distinctively record details in the cell register regarding detention of children in police cells. Children may only be held in a police cell for 48 hours pending the appearance at a preliminary inquiry.

### **Powers to release child from detention in police custody prior to preliminary inquiry**

The police must release a child who is in police custody into the care of the child's parent or an appropriate adult if the child is charged with a minor offence listed in Schedule 1 to the Bill, and this rule can only be deviated from in exceptional circumstances which are described in clause 24(1). The police official may, in consultation with the prosecutor, release a child who is charged with an offence listed in Schedule 2 to the Bill, into the care of his or her parent or an appropriate adult on certain conditions. The Director of Public Prosecutions or a designated prosecutor has the power to authorise a release in either of the above-mentioned circumstances even if the police official has declined to release the child. In all of these instances, the child and the adult into whose care he or she is released must be warned in writing to appear at a preliminary inquiry.

Where a child who is entitled to be released from police custody cannot for any reason be released conditionally or otherwise into the care of his or her parent or an appropriate adult, the child must be held in a place of safety if there is such a place available within a reasonable distance from the venue where the preliminary inquiry will be held, and if such place of safety has a vacancy.

A police official may not release a child charged with an offence listed in Schedule 3 to the Bill (serious offences). However, where a place of safety or secure care facility is available within a reasonable distance from the place where the preliminary inquiry will be held and if there is a vacancy, the child must be detained there in preference to detention in a police cell.

The police also have the power to release children on bail with regard to Schedule 1 offences, and the Director of Public Prosecutions or an authorised prosecutor, in consultation with the police, may do so in the case of Schedule 2 offences.

### **Release of child at preliminary inquiry**

There is a general provision (in clause 30) which requires the magistrate to release any child who is still in detention at the time of first appearance at a preliminary inquiry into the care of the parent or an appropriate adult unless he or she considers such release not to be in the interests of justice. In making a decision whether or not to release the child, the inquiry magistrate must have regard to the recommendation of the probation officer in respect of release from detention. The draft Bill contains a comprehensive list of factors (in clause 31) which are to be considered at a preliminary inquiry or at a subsequent court hearing upon the making of a decision to detain further or to release. There is also a list of conditions (in clause 32) which may be used singly or in combination upon the release of a child into the care of a parent or an appropriate adult or on bail. The Bill provides for the release of a child on his

or her own recognisance if, in the opinion of the presiding officer, there are circumstances which warrant such release.

### **Detention of child after first appearance**

If, after a child's first appearance at a preliminary inquiry or a child justice court, the presiding officer has, after consideration of all the factors, decided not to release the child into the care of the parent or appropriate adult or on bail, the child may -

- C in the case of appearance at the preliminary inquiry, be remanded to a place of safety or secure care facility if there is such a facility available within a reasonable distance and there is a vacancy in such facility, or to a police cell pending conclusion of the preliminary inquiry;
- C in the case where the preliminary inquiry has been completed and the matter is set down for plea and trial, be remanded to a place of safety, secure care facility or, in certain specified circumstances, to a prison.

A child may only be held in police cells for 48 hours pending the finalisation of the preliminary inquiry, and then, if there are substantial reasons to believe that such remand will enhance the prospects of diversion of the child, for a further remand of 48 hours. If either of these 48-hour periods expires over a weekend or holiday, the period can be extended to the end of the first working day thereafter (clause 65), and no further.

A child can only be remanded to a prison to await trial if -

- C the child is 14 years of age or older;
- C the child is charged with an offence referred in Schedule 3 to the Bill;
- C referral of the child to a place of safety or secure care facility is not possible owing to certain specified circumstances (clause 36(4)(b)).

If a child is remanded to a prison, he or she must appear before court every 30 days, and every 60 days if remanded to a place of safety or secure care facility. The officer presiding in such court must be satisfied that the child is being treated appropriately, and the plea and trial must be finalised as speedily as possible. The presiding officer who decides to detain a child in a prison must record the reasons for such decision.

## **CHAPTER 5: ASSESSMENT AND REFERRAL**

### **The purpose and practice of assessment**

An assessment of every child is to be undertaken or authorised by a probation officer. The purposes of assessment (set out in clause 38) are to -

- C estimate the probable age of the child if uncertain;
- C establish the prospects for diversion of the case;
- C determine whether the child is in need of care;
- C formulate recommendations regarding the release of the child, or suitable placement;
- C in the case of children below the age of 10 years, establish what measures, if any, need to be taken.

The assessment must be attended by the child, his or her parent or an appropriate adult. Other persons who may attend the assessment are listed in clause 41. The assessment must take place as soon as possible and prior to the preliminary inquiry which means within 48 hours of the arrest, or if the 48 hours expires during a weekend or holiday, the child must be taken to the probation officer for assessment on the first working day thereafter.

The probation officer must make every effort to locate a parent or other appropriate adult for the purposes of concluding the assessment, but if all reasonable efforts to locate such person or persons fail the assessment can be concluded in the absence of that person or persons. The probation officer must encourage the participation of the child in the assessment process.

Where the child being assessed is ten years of age or older the probation officer must complete an assessment report containing recommendations regarding the purposes of assessment listed above. In the case of those children whose age is uncertain or is in dispute, a prescribed form should also be completed by the probation officer for consideration at the preliminary inquiry.

Although children under the age of ten years lack criminal capacity in terms of the draft Bill, children of this age group who are alleged to have committed offences may nevertheless be brought for assessment by the probation officer. The powers relating to such assessments are set out in clause 46. After assessment of a child younger than ten years of age the probation officer may -

- C refer the matter to the children's court;
- C refer the child or the family for counselling or therapy;
- C arrange for the provision of support services to the child or family;
- C arrange a family conference to come up with a written plan to assist the child and prevent him or her from getting into trouble again;
- C decide to take no action.

## **CHAPTER 6: DIVERSION**

### **Purposes of diversion, minimum standards and registration**

The draft Bill describes the purposes of diversion in clause 48. These include concepts such as -

- C encouraging the child to be accountable for the harm caused by him or her;
- C providing an opportunity for victims to express their views, encouraging restitution, and promoting reconciliation;
- C reintegrating the child into his or her family and community, preventing stigmatisation and preventing the child from acquiring a criminal record.

A set of minimum standards applicable to diversion and diversion options is listed in clause 49. The general principles aim to provide for equal access to diversion options. Any diversion options which are to be used must comply with minimum standards which are aimed at ensuring that children are not exploited or harmed; that the options are proportionate to the harm caused and to the circumstances of the child, and above all that diversion options should be positive in their outcomes, helping children to understand the impact of their behaviour on others and to heal relationships. Diversion options used on a regular basis, or used for groups of children, will need to be registered.

The Minister of Welfare and Population Development is charged with the responsibility of ensuring the development of suitable diversion options, although this does not derogate from the capacity of other government departments or non-governmental organisations to develop diversion options. The Minister of Welfare and Population Development must establish a system for keeping records regarding diversion (clause 50(3)).

### **Diversion to occur only in certain circumstances**

A child suspected of committing an offence may only be considered for diversion if -

- C he or she voluntarily acknowledges responsibility for the alleged offence;
- C he or she understands his or her rights;
- C there is sufficient evidence to prosecute;
- C the child and his or her parent or an appropriate adult consent to diversion and the diversion option.

If all of these circumstances exist, diversion has to be considered.

## **Diversion options**

The draft Bill sets out (in clause 52) a list of diversion options in three levels. Level one comprises the least onerous and level three the most onerous options.

- C Level one diversions include simple plans or agreements which can take the form of an order. These orders, many of which are to be set out on forms which will be included in regulations to the proposed legislation, include requirements such as supervision and guidance, compulsory school-attendance or refraining from frequenting a particular place. Apology and restitution of items to a victim are also options included in level one. The options in level one generally have a duration of no more than three months.
- C Level two diversions include the options in level one, but at this level the duration of the options may not exceed six months. This level also includes payment of compensation to victims or charities and community service. Restorative justice options, such as referral to a family group conference or a victim-offender mediation are also included in level two.
- C Level three diversion options may only be applied in respect of children who are 14 years of age or older, and only in cases where there are reasons to believe that if the child were to be convicted, he or she would be likely to receive a sentence involving deprivation of liberty for longer than six months. The options include referral to programmes which have a limited or periodic residential requirement (such as camps or a specialised centre) and community service for a period of up to 12 months. Where a child is no longer attending school, he or she may be referred to a full-time vocational or educational programme for a period of six months.

The draft Bill sets out special procedures for the holding of a family group conference, victim-offender mediation and other restorative justice processes (clauses 53 and 54).

## **Decisions regarding diversion**

The probation officer may make recommendations regarding diversion which are to be recorded on the assessment report. Such report is referred to the prosecutor. Upon consideration of the recommendations, the prosecutor may exercise his or her power to withdraw the charges, or must arrange for the opening of a preliminary inquiry to consider diversion.

## **CHAPTER 7: PRELIMINARY INQUIRY**

### **The objectives of the preliminary inquiry, and the manner of conduct of such inquiry**

A preliminary inquiry must be held in respect of every child subject to the draft Bill before such child is asked to plead to any charge. The objectives of the preliminary inquiry (clause 56) are, *inter alia*, to -

- C ascertain whether an assessment of the child has been effected by a probation officer and, if not, whether compelling reasons exist for dispensing with such assessment;
- C establish whether a child can be diverted, and if so, to which diversion option;
- C provide the prosecutor with an opportunity to assess whether there are sufficient ground for the case to proceed to trial;
- C determine the release or placement of a child.

The preliminary inquiry is presided over by a magistrate referred to in the draft Bill as the inquiry magistrate, and such person is to be designated by the chief magistrate of each district. The inquiry is an informal procedure and may be held at any place but may not be held in a court, unless no other suitable place is available. The preliminary inquiry must happen within 48 hours of an arrest (or if the 48 hours expire during a weekend or holiday on the first working day thereafter).

#### **Persons who must or may attend the preliminary inquiry**

The draft Bill sets out (in clause 57) a list of persons who must attend a preliminary inquiry. These are the inquiry magistrate, the prosecutor, the child, the child's parent or an appropriate adult, the probation officer or any person requested to attend the inquiry. In exceptional circumstances the inquiry can continue in the absence of the child's parent or the appropriate adult. The probation officer also may be absent in exceptional circumstances provided that the probation officer's report must be available. The people who may attend the inquiry are the child's legal representative if one has been appointed, a police official and any other person who is permitted to attend.

#### **Procedure relating to holding of a preliminary inquiry**

At the beginning of the preliminary inquiry the inquiry magistrate must explain the purposes and procedure of the preliminary inquiry, as well as the child's rights. The inquiry magistrate must be in possession of the assessment report and other relevant documents. A record must be kept of the inquiry. The inquiry is not subject to appeal save for a decision by the inquiry magistrate to remand a child in detention (clause 59).

#### **General powers and duties of the inquiry magistrate**

The inquiry magistrate has the power to obtain all the information required for the inquiry by requesting persons to attend the inquiry or requesting documents, and he or she may take such steps as are necessary to establish the truth of any statement or submission that may be in dispute. The inquiry magistrate may order that a child be assessed if this has not already occurred, or make a decision to dispense with assessment if it would be in the best interests of the child. It is the duty of the inquiry magistrate to ensure that all persons present are acquainted with the recommendations contained in the assessment report, and that they are aware of the diversion options available.

### **Decisions regarding diversion, prosecution or transfer to a children's court**

After consideration of the assessment report, the views of all persons present at the inquiry, the willingness of the child to accept responsibility for the offence and any other relevant information, the inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted. Where the prosecutor indicates that the matter can be diverted, the inquiry magistrate must make an order regarding a appropriate diversion option, or develop an individual diversion option for a particular child. Where the prosecutor decides to proceed with the prosecution he or she may set the matter down for plea and trial in an appropriate court (clause 62).

Where the magistrate has reason to believe that the child is need of care, he or she may decide to transfer the matter to the children's court. The factors indicating that a child may be in need of care are set out in clause 70. The child justice court may convert a matter to a children's court inquiry at any stage during the trial, even after conviction, in which case the finding of guilt must be considered not to have been made.

### **Evidentiary matters**

Where a child does not acknowledge responsibility for the offence, he or she may not be required to answer any questions regarding the alleged offence. Information regarding a previous diversion or conviction may be adduced at the preliminary inquiry. No information adduced at a preliminary inquiry is admissible in any subsequent court proceedings.

### **Separation and joinder of proceedings of the preliminary inquiry**

Where a child is co-accused with an adult, the case of the adult must be separated from the child (save where this would not be in the interests of justice) and the adult will not appear at the preliminary inquiry. Where a child is co-accused with one or more other children, a joint preliminary inquiry may be held and different decisions may be made with regard to each child.

### **Remanding of the preliminary inquiry**

The overall intention is that the preliminary inquiry should be concluded as soon as possible, preferably at the first hearing. Clause 65(1) sets out six specific circumstances in which the preliminary inquiry may be remanded for a period of 48 hours. The preliminary inquiry magistrate may grant one further remand of 48 hours if there are substantial reasons to believe that such remand will enhance the prospects of diversion. Clause 66 allows for a longer remand in instances where there are exceptional circumstances indicating that the child requires a detailed assessment. In such cases a preliminary inquiry may be remanded for 14 days.

### **Failure to comply with diversion conditions**

Where a child has been diverted at a preliminary inquiry and fails to comply with any order relating to diversion, the inquiry magistrate may issue a warrant of arrest or a written notice to appear in respect of such child. If the child then appears before an inquiry magistrate, he or she must inquire as to the circumstances surrounding such failure. The inquiry magistrate may decide to divert the matter to the same diversion option with altered conditions, apply any other diversion option or make an appropriate order. The clause contains a provision that the prosecutor may decide to proceed with the prosecution (clause 68).

### **Procedure upon referral of matter to child justice court or other court**

At the finalisation of the preliminary inquiry, if the matter has not been diverted or transferred to a children's court inquiry, the prosecutor must inform the inquiry magistrate of the place and time where the child is to appear for plea and trial. The magistrate must then inform the child about his or her right to legal representation and where the child is in custody and requires legal representation at state expense, he or she must assist such child as far as possible to make an application to the Legal Aid Officer. Where an inquiry magistrate has heard any information during the preliminary inquiry which is prejudicial to the impartial determination of the matter, he or she may not preside over any subsequent trial.

## **CHAPTER 8: CHILD JUSTICE COURT**

### **Designation and jurisdiction of the child justice court**

A child justice court is a court at district court level which has the jurisdiction to adjudicate in respect of

all offences except treason, murder and rape. Although cases involving child accused may be heard in Regional or High Courts, preference must always be given to referral of cases to the child justice court (clause 71(2)). The chief magistrate must designate a child justice court in his or her magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel. The court room, where practicable, should be located and designed in a way which is conducive to the dignity and well-being of children, the informality of the proceedings and the participation of all persons involved. The sentencing jurisdiction of a district magistrate's court applies to the child justice court.

### **Establishment and jurisdiction of One-Stop Child Justice Centres**

The Minister of Justice and Constitutional Development, in consultation with other relevant Ministers, is empowered by the draft Bill (in clause 72) to establish and maintain centralised services for child justice which may be situated at a place other than a court or police station. Such centres must provide for offices to be utilised by police and probation officers, facilities to accommodate children temporarily pending the finalisation of the preliminary inquiry and a child justice court. The centre may also include an office for persons providing legal representation for children, offices for persons providing diversion and prevention services, offices for persons authorised to trace families of children, a children's court to hear children's court inquiries and a Regional Court. Each government department is severally responsible for the provision of such resources and services as may be required to enable the functioning of a One-Stop Child Justice Centre.

The Minister of Justice and Constitutional Development is given the power (by clause 72(5)) to determine the boundaries of magistrates' courts in relation to One-Stop Child Justice Centres. This is to enable the centres to operate across the boundaries of existing magisterial districts.

### **Proceedings by a court other than a child justice court**

Any court which is not a child justice court and which hears the case of a child accused of an offence is required to apply the provisions of the Child Justice Bill in respect of such child. A Regional Court has jurisdiction to hear the case of a child accused of murder or rape. The Regional Court may also hear the case of a child charged with any other offence if -

- C in the opinion of the Director of Public Prosecutions or a designated prosecutor, the likely sentence will exceed the jurisdiction of the child justice court;
- C there are multiple charges against the child and the Regional Court has jurisdiction in respect of one or more of the charges;
- C a child is co-accused with an adult who is to be tried in the Regional Court and a decision has been made to join the trials.

A matter heard in the child justice court may be transferred to the Regional Court for sentence after conviction if the magistrate presiding in the child justice court is of the view that exceptional circumstances exist which indicate that the appropriate sentence may exceed the sentencing jurisdiction of the court.

A district court other than a child justice court has jurisdiction in matters where the child is co-accused with an adult and a decision has been made to join the trials.

### **Parental assistance**

The child's parent or an appropriate adult must attend the proceedings and assist the child unless he or she has been exempted in writing by the court from the obligation to attend, or if all efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child. Where a child is not assisted by a parent or an appropriate adult and if such child requests assistance, an independent observer may be nominated by a child justice committee (which is to be established in terms of Chapter 12) who may assist the child.

### **Conduct of proceedings in a child justice court**

At the commencement of the proceedings the presiding officer must inform the child of his or her rights, the nature of the allegation against him or her and the procedures which are to be followed. Lay assessors will not be used in the child justice court. The presiding officer may, if it would be in the best interests of the child, play an active role in eliciting evidence from any person involved in the proceedings. The proceedings must be conducted in an informal manner (whilst protecting the child's procedural rights) and should encourage the maximum participation of the child and his or her parent or an appropriate adult. The presiding officer also has the duty to protect the child from hostile cross-examination if it is prejudicial to the well-being of the child or the fairness of the proceedings.

### **Children in detention at court**

No child may be subjected to the wearing of leg-irons when appearing in any court and handcuffs may only be used if there are exceptional circumstances which warrant their use. Children must be held in conditions which take account of their age, and held separately from adults. Girls must be kept separately from boys. The National Commissioner of Police is required by the Bill (in clause 79(4)) to issue a national instruction relating to the treatment and conditions of children while in detention at court.

### **Establishment of criminal capacity**

Where an accused child is ten years but not yet 14 years of age at the time of commission of the alleged offence and is required to plead in a court, the prosecution must rebut the presumption that the child lacks criminal capacity beyond reasonable doubt. The prosecution or the defence may request an evaluation of the child by a suitably qualified person regarding the child's cognitive, emotional, psychological and social development. The person conducting the evaluation may be called to attend the court proceedings and to give evidence (clause 79). A child subject to these proceedings must be assisted by a legal representative (clause 98(1)(c)).

### **Separation and joinder of trials involving children and adults**

The draft Bill provides (in clause 80) that if a child is co-accused with an adult, such adult must be tried separately. The proviso to this general rule is that an application may, before commencement of the trial, be made to the court for a joinder of the trials concerned. If the court grants the application, the child will be tried together with the adult in the court where such adult is to be tried, and that court must ensure, as far as possible, that the child receives all benefits conferred upon him or her in terms of the Child Justice Bill.

### **Time limits relating to the finalisation of trials**

Any court must finalise all trials involving children as speedily as possible and ensure that remands are few in number and are of limited duration. A court other than a child justice court trying children must prioritise such cases. Where a child remains in detention pending trial and such trial is not concluded within six months from the date upon which the child has pleaded to the charge, such child must be released from custody unless he or she is charged with murder, rape, aggravated robbery or robbery involving the taking of a motor vehicle (clause 81).

### **Court may divert matter**

If, at any time before the end of the state's case, it comes to the attention of the presiding officer that the child acknowledges or intends to acknowledge responsibility for the offence the court may, with the consent of the prosecutor, refer the child to any diversion option and may postpone the matter to enable the child to comply with the diversion conditions. Upon receipt of a report from the probation officer that the child has successfully completed the diversion, the court must acquit such child. If the child fails to comply with the diversion conditions the prosecutor may have the matter placed on the roll and issue a summons in respect of the child in order to continue with the trial. If the diversion option selected by the court is a family group conference, victim-offender mediation or other restorative justice process, the probation officer must furnish the court with written recommendations arising from such process. The

court may confirm the recommendations, substitute or amend the recommendations or reject the recommendations and request the prosecutor to proceed with the trial (clause 82).

### **Privacy and confidentiality**

The draft Bill provides (in clause 83) that no person other than a person whose presence is necessary in connection with the proceedings may be present during the trial of a child. No person may publish any information which reveals or may reveal the identity of a child under the age of 18 years who is accused of an offence or of a witness under the age 18 years who may appear at proceedings referred to in the Bill. The Bill allows for access to information pertaining to the child if such access would be in the interests, safety or welfare of the child, and for publication of certain information in the form of a law report or any other report for research purposes.

## **CHAPTER 9: SENTENCING**

### **Sentence and pre-sentence reports**

The draft Bill requires (in clause 84) that any child, whether appearing in a child justice or any other court, must be sentenced in terms of the provision of this Chapter. Pre-sentence reports compiled by a probation officer are required in all matters, with a proviso that the report may be dispensed with in relation to less serious offences (specified in Schedule 1) or where requiring such a report would cause an undue delay which would be prejudicial to the best interests of the child. However, no court may impose a sentence with a residential requirement unless a pre-sentence report has been placed before such court, even if the residential requirement of the sentence is suspended. The Bill stipulates (in clause 85(6)) that pre-sentence reports must be completed no later than one calendar month following the date on which the report was requested.

### **Purposes of sentencing**

The draft Bill sets out (in clause 86) the purposes of sentencing, which are to -

- C encourage the child to be accountable for the harm caused by him or her;
- C promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;
- C promote the reintegration of the child into the family and community;
- C ensure that any necessary supervision, guidance, treatment or services which forms part of the sentence can assist the child in the process of reintegration.

### **Community-based sentences**

The draft Bill lists (in clause 87) a range of sentencing options which do not involve a residential requirement and which allow a child to remain in his or her community. The list includes some of the orders which can be used as diversion orders. Other options include placement under supervision and guidance, specialised intervention such as counselling or therapy, attendance at a centre for a vocational or educational purpose and community service. Clause 87(f) allows the presiding officer to use any other sentence appropriate to the circumstances of the child and in keeping with the principles of the Bill. The sentences contained in clause 87 are linked to specific maximum time periods, save for the specialised intervention in which case the court may set such time period as it deems fit.

### **Restorative justice sentences**

A court can refer a matter to a family group conference, victim-offender mediation or other restorative justice process. Upon receiving any decision, recommendation or plan arising from such process the court may confirm the recommendations and make them an order of court, or substitute or amend the recommendations and make an appropriate order (clause 88).

### **Correctional supervision**

The court can impose a sentence of correctional supervision for a maximum period of three years on any child who is 14 years or older. The whole or any part of such sentence can be postponed or suspended on condition that the child be placed under the supervision of a probation officer or correctional official and that the child performs a service for the benefit of the community (clause 89).

### **Sentences with a compulsory residential requirement**

No sentence involving a compulsory residential requirement may be imposed upon a child unless the presiding officer is satisfied that the sentence is justified by -

- C the seriousness of the offence;
- C the protection of the community;
- C the fact that the child has failed to respond previously to non-residential alternatives.

Clause 90(3) lists sentences involving a compulsory residential requirement as:

- C referral to a programme with a periodic residence requirement where the duration of the

programme does not exceed 12 months and no portion of the residence requirement exceeds 21 consecutive nights, with a maximum of 60 nights for the duration of the programme;

- C referral to a residential facility;
- C referral to a prison.

### **Referral to a residential facility**

A “residential facility” means a residential facility established by the Minister of Education or the Minister of Welfare and Population Development which is designated to receive sentenced children.

Clause 91(1) provides a general rule that a sentence to a residential facility may be imposed for a period not less than six months and not exceeding two years. Clause 91(2) provides an exception to this rule in cases where a child is below the age of 14 years, in that such child may not be required to reside in a residential facility beyond the age of 18 years.

### **Referral to a prison**

Clause 92 limits the use of imprisonment to situations where -

- C the child is 14 years of age or above at the time of the commission of the offence;
- C substantial and compelling reasons exist because the child has been convicted of an offence which is serious or violent or because the child has previously failed to respond to alternative sentences.

Furthermore, no sentence of imprisonment may be imposed on any child in respect of an offence listed in Schedule 1 (petty offences).

### **Postponement or suspension**

The passing of sentence may be postponed, with or without conditions, for a period of not less than three months but not exceeding three years. The whole or any part of any sentence may be suspended with or without conditions for a period not exceeding five years. The conditions relevant to postponement or suspension are set out in detail in clause 93(3). Where the court has postponed the passing of sentence with conditions and the court is satisfied, after expiry of the period, that the conditions have been complied with, the conviction is rescinded and must be expunged from the record.

### **Fines**

No fine payable to the state may be imposed as a sentence, but where there is a statutory penalty involving a fine and imprisonment as an alternative, a child may be required to make symbolic restitution or make a payment of compensation to the victim, or where there is no identifiable victim, the child may be required to provide a service or pay compensation to a community organisation, charity or welfare organisation identified by the child or by the court. The child may not be required to serve imprisonment as an alternative.

### **Prohibition on certain forms of punishment**

The draft Bill prohibits life imprisonment on a child who, at the time of the commission of the offence, was under the age of 18 years (clause 95(1)). The Bill also provides that a child who has been sentenced to attend a residential facility may not be detained in a prison or in police cells whilst awaiting designation of the place where the sentence will be served (clause 95(2)).

## **CHAPTER 10: LEGAL REPRESENTATION**

### **Requirements to be complied with by legal representatives**

Clause 96 of the draft Bill sets out a number of requirements regarding the appropriate representation of children. The clause also requires that a legal representative representing a child must be admitted as an attorney or an advocate, provided that an attorney may delegate the power to represent a child to any candidate attorney under his or her supervision who has 12 months experience as a candidate attorney.

### **Access to legal representation and legal representation at state expense**

A child is entitled to legal representation during any procedures under the legislation, and the child or his or her parent or an appropriate adult may appoint a legal representative of own choice (clause 97). In terms of clause 98 a child must be provided with legal representation at state expense upon the conclusion of the preliminary inquiry if -

- C the child is remanded in detention pending plea and trial;
- C the matter is remanded for plea and trial and a likelihood exists that a sentence involving a residential requirement may be imposed on conviction;
- C the child is at least ten but not yet 14 years of age and a certificate has been issued by the Director of Public Prosecutions indicating an intention to prosecute such child.

Clause 99 provides certain practical provisions to facilitate the process of the child securing legal representation at state expense.

### **Child may not waive legal representation in some circumstances**

A child who is entitled to legal representation at state expense in terms of clause 98, may not waive the right to legal representation. The child may be assisted to make a fresh application to the Legal Aid Board if he or she is not satisfied with the legal representative who has been appointed. If the child indicates that he or she does not want a legal representative, the court must appoint a legal representative to assist the child. The role of the legal representative who assists the child under these circumstances is explained in clause 100(5) and (6).

### **Accreditation of legal representatives**

A legal representative appointed at state expense must be accredited by the proposed National Office for Child Justice, and legal representatives must apply to this office to be registered in a specialised roster. The accreditation procedures will be detailed in regulations (clause 101).

## **CHAPTER 11: AUTOMATIC REVIEW OF CERTAIN CONVICTIONS AND SENTENCES**

### **Automatic review in certain cases decided by child justice courts or other courts**

The normal procedures relating to appeal and review apply to the proposed child justice system, but clause 102 of the draft Bill contains special provisions regarding automatic review. Any sentence which involves a residential requirement or correctional supervision must be subject to automatic review by the High Court. The automatic review procedure applies whether or not the child was legally represented at any stage of the proceedings.

## **CHAPTER 12: MONITORING OF CHILD JUSTICE**

Chapter 12 provides for a monitoring system at a number of levels. The draft Bill establishes -

- C Child Justice Committees at district level;
- C a Provincial Office for Child Justice;
- C a National Office for Child Justice;
- C a National Committee for Child Justice.

A Child Justice Committee will be established in each magisterial district and will be made up of representatives of a number of relevant departments as well as representatives from civil society. The committee must meet not less than four times annually. A Provincial Office for Child Justice must be established in each province. The MEC for Safety and Security and the MEC for Welfare and Population

Development must appoint an official from each of their departments to staff the Provincial Office for Child Justice. The National Office for Child Justice will consist of two members of staff from the Department of Justice, one from the Department of Welfare and Population Development and one from the Department of Safety and Security. Finally, the National Committee for Child Justice would be made up of the members of staff from the National Office for Child Justice, representatives from other relevant government departments, and six other persons not in the full-time or part-time employ of the state who have an interest in and expertise related to the development of child justice. The members of the committee will not receive remuneration, and the committee must meet not less than four times a year.

The Chapter contains detailed provisions setting out the powers, duties and functions of the various structures.

## **CHAPTER 13: RECORDS OF CONVICTION AND SENTENCE**

### **Expungement of records**

Clause 115 provides that any conviction and sentence imposed upon a child convicted of any offence listed in Schedule 3 may not be expunged. In respect of other offences, the presiding officer, at the time of sentencing the child, must also make an order regarding the expungement of the record of the child's conviction and sentence. The presiding officer must note reasons for the decision as to whether such record may be expunged, and if it is decided that the record should not be expunged, such decision is subject to review or appeal. In making a decision regarding expungement, the presiding officer must consider the nature and circumstances of the offence as well as the child's personal circumstances or any other relevant factor.

Where the presiding officer makes a decision that the record should be expunged, he or she must set a date upon which the expungement must take place, which date may not be less than three months and not exceed five years from the date of sentence. The presiding officer must also impose, as a condition of expungement, a requirement that the child must not be convicted of a similar or more serious offence between the date of imposition of the sentence and the date of expungement.

The order regarding expungement must be recorded on the record of conviction and sentence and must be submitted to the South African Criminal Bureau. The Bureau must, upon the date set for expungement, cause the record of conviction and sentence to be expunged, provided that no other conviction of a similar or more serious offence has been recorded since the date of sentence.

## **CHAPTER 14: GENERAL PROVISIONS**

### **Liability for patrimonial loss arising from the performance of community service**

Clause 116 provides that where a child commits a delict in the course of the performance of community service, the patrimonial loss arising therefrom may be recovered from the State. The State is not precluded from obtaining indemnification against its liability by means of insurance or otherwise.

### **Offences and penalties**

Clause 117 sets out the penalties for failure or non-compliance in terms of the legislation. It also creates (in clause 117(3)) a new offence relating to adults who use or involve children in the commission of crimes, namely that any adult who incites, persuades or encourages a child to commit an offence is, in addition to any other offence for which such adult may be charged, guilty of an offence and liable upon conviction to a fine or to imprisonment not exceeding two years.

### **Repeal and regulations**

Clause 118 sets out the sections of the Criminal Procedure Act which are repealed by this legislation, and clause 119 empowers the Minister of Justice and Constitutional Development, in consultation with the Ministers of Welfare and Population Development, Correctional Services and Safety and Security, to make regulations pertaining to this legislation.

### **Short title and commencement**

The short title of the legislation is set out in clause 120 as the Child Justice Act. The clause provides further that the legislation will take effect on a date fixed by the President by notice in the *Gazette*, and that different dates may be set in respect of different provisions of the Bill or in respect of different magisterial districts, thus allowing for a phased approach to implementation.

### **Schedules**

Schedule 1 contains a list of non-serious offences. The main purpose of this Schedule is to guide police in the optimal use of alternatives to arrest. The police are also empowered to release children charged with these offences prior to first appearance. Probation officers' reports may be dispensed with in cases where children are charged with these offences, and no sentence of imprisonment may be imposed on a child charged with an offence listed in Schedule 1.

Schedule 2 contains a list of offences of a slightly more serious nature. The sole purpose of this Schedule is to facilitate the release of children (with the authorisation of the Director of Public Prosecutions or a

designated prosecutor) prior to first appearance.

Schedule 3 contains a list of serious offences. The main purpose of this list is to regulate which children can be considered for detention in a prison, either pending trial or as a sentence. Only children who are at least 14 years of age, and charged with a Schedule 3 offence may be considered for detention in a prison. Children charged with offences contained in Schedule 3 may not be released prior to first appearance except by way of a formal bail application. Children convicted of these offences will not have the records of their convictions and sentences expunged. In one instance in the draft Bill specific mention is made to items 1, 2 and 3 of Schedule 3, namely, the most serious of offences: murder, rape and aggravated robbery or robbery involving the taking of a motor vehicle. Children charged with these offences will not be released after the expiry of six months in detention (clause 81(4)).

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## **CHAPTER 1: INTRODUCTION**

1.1 South Africa ratified the United Nations Convention on the Rights of the Child (1989) - hereafter "the CRC" - 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 child justice<sup>1</sup> 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

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<sup>1</sup> Although the title of the current investigation is "juvenile justice", the project committee, in view of the discussion in Chapter 6 regarding terminology, prefers to refer to "the child justice system".

constructive role in society”.

1.2 A steering committee was 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 identified the drafting of composite child 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 in December 1996.

1.3 An Issue Paper<sup>2</sup> was published for comment in May 1997 and distributed to a broad spectrum of interested persons, organisations and institutions - both governmental and non-governmental. The Issue Paper proposed, for the first time, a distinctive child justice system to be provided for by separate legislation, independent of the Criminal Procedure Act. This is in line with the CRC, and also reflects world trends.

## **Consultation**

1.4 Since the release of the Issue Paper the project committee has been involved in an intensive consultation process with interested parties. In a concerted effort to give effect to the Commission’s outreach policy, the project committee embarked on an innovative communications strategy. A video, conceptualising the topic of child justice and introducing the viewer to the various issues raised in the Issue Paper, was produced with the financial and technical support of UNICEF. A total of 13 workshops and briefings were held by members of the project committee throughout the country with the video forming a central part of the discussions. In order to intensify its community outreach endeavours, the project committee also simplified the issues canvassed in the Issue Paper in the form of a plain language questionnaire which was distributed at the workshops and completed by the participants. In November 1997 the Commission hosted a well attended and vibrant international

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<sup>2</sup> *Issue Paper 9.*

drafting conference in Gordon's Bay.<sup>3</sup> Ten international experts met with key South African role-players to engage in a comparative discourse regarding the drafting of legislation on child justice, and to debate in detail the content of the Issue Paper.

1.5 In December 1998 the Commission published a 450-page Discussion Paper which included a draft Bill. The project committee thereafter began its second consultation phase with the emphasis on specific focus group workshops rather than the general regionally based workshops that followed the Issue Paper. A total of 12 workshops were held with the following groups: the Department of Correctional Services, a variety of non-governmental organisations and representatives from various statutory Commissions, the Department of Safety and Security, the Department of Justice (both practitioners and policy-makers), NICRO, the Department of Education, inter-sectoral organisations and the Department of Welfare and Population Development. In addition, various briefings were held with the members of the Portfolio Committees of the Departments that would be responsible for implementation of the legislation, namely Justice, Welfare and Population Development, Safety and Security and Correctional Services.

1.6 The prosecutors and magistrates of the Durban Magistrate's Court as well as the Director-General of Welfare and Population Development were also briefed. In an attempt to consolidate the debates around the issue of age and criminal capacity, the project committee and the Centre for Child Law at the University of Pretoria co-hosted a two-day conference on the subject. The conference was attended by international and local experts on the subject who examined the social, political and anthropological factors influencing the determination of capacity.

1.7 The project committee also considered it to be of importance to ensure the participation of children in discussions about the proposed new child justice system. To this end a series of workshops was undertaken with a broad range of children, ranging from those who had had no contact with the formal criminal justice system to those who had been sentenced or were already serving residential

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<sup>3</sup> Financial assistance was provided through a UNDP preparatory assistance fund.

sentences. The opinions of the children interviewed are reflected throughout this Report.<sup>4</sup>

1.8 In addition to the large number of completed questionnaires, written comments on the proposals and options put forward in both the Issue Paper and the Discussion Paper were received from the persons and institutions listed in Annexure B to this Report. In compiling the Report, the Commission had due regard to the views expressed by and comment received from all respondents. The Commission wishes to express its gratitude to all who participated in the consultation process, and especially to the United Nations Crime Prevention and Criminal Justice Division, the United Nations Development Programme, UNICEF and the Swedish International Development Agency for their financial and technical support.

### **Factors influencing the process of law reform**

#### *Children's rights and responsibilities*

1.9 The journey towards an improved system for dealing with children accused of crimes in South Africa has been influenced by a number of factors. The first of these factors is children's rights. Those working for reform of juvenile justice in South Africa have always placed the issue firmly within the ambit of children rights. Calls for a new juvenile justice system in the early 1990s were couched in the rhetoric of children's rights.<sup>5</sup> This voice also found its way to the Constitutional Assembly, where it gave rise to a specific clause in the Constitution of the Republic of South Africa 108 of 1996 regarding children accused of crimes. Section 28(1)(g) states that every child has the right -

not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under section 12 and 35, the child may be detained only for the shortest possible

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<sup>4</sup> The workshops were conducted by NICRO, and were funded by the Swedish International Development Agency. See further NICRO *The Draft Child Justice Bill: "What the children said"* Community Law Centre, University of the Western Cape 1999.

<sup>5</sup> Juvenile Justice Drafting Consultancy *Juvenile Justice for South Africa: Proposals for policy and legislative change* Cape Town: Allies Printers 1994.

appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years, and (ii) treated in a manner, and kept in conditions, that take account of the child's age.

1.10 Apart from the CRC, a number of other international instruments relevant to juvenile justice have also influenced deliberations and policy making<sup>6</sup> regarding juvenile justice in South Africa.<sup>7</sup> The African Charter on the Rights and Welfare of the Child<sup>8</sup> has also been referred to in the ongoing debates. Although the African Charter does not differ significantly in content from the CRC on issues relating to juvenile justice, it is sometimes favoured by South Africans because of its emphasis on responsibilities corresponding with rights. The United Nations instruments promote a highly individualised approach to the rights of the child, whereas the African Charter takes a more collective approach, blending children's rights with respect for family and community. The inclusion of responsibilities in the Charter accords well with the notion of restorative justice, which can be identified as another major influence on the development of juvenile justice reform in South Africa.

### *Restorative justice*

1.11 Restorative justice<sup>9</sup> is a theory of justice which relies on reconciliation rather than on punishment. The offender must accept responsibility for the fact that his or her behaviour has caused harm to the victim, and the victim is encouraged to accept restitution or compensation for the offender's wrongdoing. Thus the purpose of restorative justice is to identify responsibilities, to meet needs and to

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<sup>6</sup> See generally National Institute for Public Interest Law and Research *Juvenile Justice Instruments* 1996, Inter-Ministerial Committee on Young People at Risk *In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* (1996) and A Skelton note 3.

<sup>7</sup> Notably the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), and the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDLs).

<sup>8</sup> Ratified by South Africa on 18 November 1999.

<sup>9</sup> See generally H Zehr *Changing Lenses: A New Focus for Criminal Justice* (1990).

promote healing.<sup>10</sup> Reconciliation, restoration and harmony lie at the heart of African adjudication.<sup>11</sup> The central purpose of a customary law court was to acknowledge that a wrong had been done and to determine what amends should be made.<sup>12</sup> Community-based justice of this restorative nature was not particular to Africa, and a trend has been developing in a number of former colonies where indigenous people are living, to return to restorative justice models.<sup>13</sup>

1.12 Interestingly, it is in the field of juvenile justice that many experiments with regard to restorative justice have been taking place. New Zealand has provided a striking example. Following a consultative process with Maori leaders, the government of New Zealand enacted the Children, Young Persons and their Families Act in 1989. This legislation involves families and communities in making decisions about children who are accused of crimes and aims to resolve matters through the mechanism of a ‘family group conference’, which is an alternative to taking children through the criminal justice system. The young person must acknowledge responsibility for his or her actions. The conference is attended by people who are significant in the child’s life, as well as the victim and persons supportive to him or her. The main goal of the conference is to formulate a plan about how best to put the wrong right. The eventual outcome is agreed to by all the parties.<sup>14</sup>

1.13 The New Zealand system has been hailed internationally and many countries are experimenting with conferencing. Australia, Canada, USA and the United Kingdom are all piloting some form of community conferencing as diversion or sentencing options. Academics and practitioners in South

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<sup>10</sup> A Skelton ‘Juvenile justice reform: Children’s rights and responsibilities versus crime control’ in CJ Davel (ed) *Children’s Rights in Transitional Society* 1999 93

<sup>11</sup> AN Allot ‘The people as law makers: Custom, practice and public opinion as sources of law in Africa and England’ (1977) 1 *Journal of African Law* 21. See also TW Bennet *A Sourcebook on African Customary Law in Southern Africa* (1991).

<sup>12</sup> C Dlamini *The role of chiefs in the Administration of Justice* (unpublished LLM thesis University of Pretoria 1988).

<sup>13</sup> A Skelton ‘International trends in the re-emergence of traditional systems’ in *Justice for Children: challenges for policy and practice in sub-Saharan Africa* (1998) 99.

<sup>14</sup> A Morris *Legislating for the effective involvement of young people, families, victims and the community in the juvenile justice system* Conference paper delivered at the International Conference on Drafting Juvenile Justice Legislation hosted by the SALC at Gordon’s Bay in November 1997.

Africa have, for a number of years, been following the development of restorative justice and of family group conferencing. In 1992 NICRO began to introduce the idea of diversion of children away from the criminal justice system, and they promoted this using the language of restorative justice.<sup>15</sup> In 1995 the Inter-Ministerial Committee on Young People at Risk<sup>16</sup> set up a pilot project on Family Group Conferences in Pretoria. The project ran 42 family group conferences, testing the setting-up of conferences, mediation, outcomes, community participation, and victim and offender satisfaction. The report<sup>17</sup> of the project provides a valuable resource indicating the practical implications of making family group conferences part of a future juvenile justice system.

1.14 The blending of these first two influences, namely children's rights and restorative justice, results in a healthy balance between rights and responsibilities, with victims' rights being considered alongside those of the child offender. The draft Bill annexed to this Report bears evidence of this balance. The Bill is imbued with the language of the international instruments, and whilst the Commission has not considered it necessary to restate the articles contained in the South African Constitution, the draft Bill gives effect to the constitutional guarantees for children accused of crimes. The objectives clause emphasises the procedural rights of children, and links the central theme of Article 40 of the CRC to the indigenous concept of *ubuntu*, thus Africanising the international principles by emphasising family and community. A further objective of the Bill is described as "supporting reconciliation by means of a restorative justice response". Emphasis is laid throughout the Bill on the desirability of children taking responsibility for their actions. Thus, before a child can be considered for diversion away from the formal courts, he or she must acknowledge responsibility for the offence. This requirement is however tempered by a provision which requires reasonable steps to have been taken to ensure that the child understands the right to remain silent and that he or she has not been unduly influenced to acknowledge responsibility for the offence.

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<sup>15</sup> L Muntingh and R Shapiro *Diversions: An Introduction to Diversion from the Criminal Justice System* (1994).

<sup>16</sup> The Inter-Ministerial Committee on Young People at Risk was set up in 1995 to develop policy for the transformation of the child and youth care system.

<sup>17</sup> Inter-Ministerial Committee on Young People at Risk *Report of the Family Group Conference Pilot Project* 1998.

1.15 The Commission did consider the possibility of making family group conferences a central feature of the system, as they are in the New Zealand system. However, the final draft of the Bill includes family group conferences, victim-offender mediations and other restorative justice processes as options which can be considered for diversion of the case away from the courts, or at the sentencing stage, rather than providing for their compulsory inclusion. The main reason for this is that the setting up and mediating of family group conferences is a highly skilled process, and that it would have necessitated the appointment of large numbers of highly trained personnel if it had been a compulsory process in every case. The preliminary inquiry proposed in this Report offers some of the advantages of a family group conference – a round-table conference of relevant people (who already exist in our current system) who will discuss the possible options, and thus make informed decisions at an early stage in the proceedings.

#### *Fiscal constraints*

1.16 This brings us to a third factor which has influenced the Bill, and that is the fact that systemic reform in South Africa has to be undertaken within the constraints of fiscal realities.<sup>18</sup> The Commission has not allowed this to be a bar to creative reform; indeed, if anything, the constraints have resulted in a high degree of imaginative conceptualisation. In essence, the Commission has steered clear of setting up or creating any new structures or categories of employees. This is evident from the fact that whilst the draft Bill requires the designation of certain district courts as “child justice courts”, this will not in fact involve the establishment of new courts, nor, for the most part, the employment of additional personnel. The increased specialisation of the child justice courts is linked not to such courts being housed in separate buildings, but rather to the personnel of such courts being properly selected and trained. Similarly, the probation officer is given a key role throughout the proposed new system, and although the increased workload may mean that additional probation officers will need to be appointed for the full implementation of the legislation, this is far less expensive than creating new categories of

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<sup>18</sup> J Sloth-Nielsen and B van Heerden ‘The political economy of child law reform: Pie in the sky?’ in CJ Davel (ed) *Children’s Rights in a Transitional Society* 1999 107; J Sloth-Nielsen ‘Charting the development of a new Youth Justice Statute in South Africa: An opportunity for innovation’ December (1999) *Youth Justice Matters* 15.

employees to undertake tasks such as assessment and the setting up of family group conferences.

1.17 The Applied Fiscal Research Centre (AFReC) of the University of Cape Town has published a research monograph detailing the costing implications of the implementation of the draft Child Justice Bill which accompanied the Discussion Paper. This research has played an important role in ensuring that the legislative proposals are workable within the existing resource allocation. An example of this relates to the preliminary inquiry. Because magistrates may hear evidence prejudicial to the child at a preliminary inquiry, it would be necessary for a different magistrate to preside at any subsequent trial. A criticism was raised during consultation on the Discussion Paper that this may be very expensive in magisterial districts where there is only one magistrate. The research by AFReC has shown that the magistrates in single magistrate districts are likely to have to recuse themselves in approximately six cases per year and that therefore the costs associated with this aspect of the proposals are not significant.<sup>19</sup>

*Public concern about crime*

1.18 Increasingly, however, during the three-year investigation into Juvenile Justice by the Commission, a further influence has been brought to bear, and that is the deep concern in South African society about the high levels of crime.<sup>20</sup> The public have expressed the need for a system of justice which deals effectively with serious violent criminals.

1.19 This factor, too has shaped the process of law reform, and this is evidenced by provisions in the draft Bill which allow for children charged with serious, violent offences to be tried in a criminal

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<sup>19</sup> C Barberton with J Stuart *Costing the Implementation of the Child Justice Bill: A Scenario Analysis* AFReC Research Monograph No 14 November 1999 57 (in this document referred to as the “AFReC report”).

<sup>20</sup> Research has shown that with regard to children under the age of 18 years, these concerns may be linked more to perceptions than reality. L Muntingh demonstrates a steady drop in the rate of convictions and imprisonment of offenders below 18 years of age over the past decade. See L Muntingh ‘Statistics: Youth convictions’ August (1999) *Article 40* 4.

court at a higher jurisdictional level,<sup>21</sup> to be imprisoned both during the awaiting trial period and as a sentence option. It is also recommended that criminal records for serious and violent offences should not be expunged. These features were not envisaged by the Commission in the early stages of the investigation. Indeed, the Issue Paper made the assumption that there would be no children in prison awaiting trial in the proposed new system. The realisation has grown, as the investigation has unfolded against a backdrop of rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labeled and treated as criminals, the Bill would need to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crimes.

1.20 Criminal law reformers have raised concerns about the fact that crime control approaches are gaining ground in South Africa over the protection of human rights, and therefore children's rights.<sup>22</sup> South African policy and law makers have in recent years begun to embrace a number of international trends relating to crime control. Concepts such as "zero tolerance" and the "broken window approach to policing"<sup>23</sup> have found their way into policy debates about crime prevention and management in South Africa.<sup>24</sup> Minimum sentences<sup>25</sup> are now (albeit temporarily) a part of our law, having been ushered in by the Criminal Law Amendment Act 105 of 1997.<sup>26</sup> This legislation has caused concern

<sup>21</sup> To be decided upon by the prosecutor.

<sup>22</sup> See D Van Zyl Smit 'Criminological Ideas and the South African Transition' (1999) *BJC*, J Sloth-Nielsen, 'The juvenile justice law reform process in South Africa: Can a children's rights approach carry the day?' (1999) *QLR*, A Skelton 'Juvenile Justice Reform: Children's rights and responsibilities versus crime control' in CJ Davel (ed) *Children's Rights in a Transitional Society* 1999 93.

<sup>23</sup> Many of these crime control concepts originate from the United States, but are also influencing law and policy in other countries, such as England. See further D Bedingfield 'Children and Crime' in *The child in need: children, the state and the law* 1998 at 479.

<sup>24</sup> GSimpson 'Youth Crime in South Africa' Conference paper presented at a conference entitled 'Appropriate Justice for young people: exploring alternatives to retribution' hosted in Cape Town by the Institute of Criminology (UCT) and NICRO, 5 and 6 February 1997.

<sup>25</sup> This idea also emanates from the United States, with over 60 statutes of the US Federal Code containing mandatory minimum sentences.

<sup>26</sup> South African Law Commission *Issue Paper 11: Mandatory Minimum Sentencing* (1997), published before the new Act was passed, had criticised minimum sentences and had indicated preference for sentencing guidelines or principles.

amongst criminal law reformists and the judiciary.<sup>27</sup> The Prevention of Organised Crime Act 121 of 1998<sup>28</sup> is a further example of the parliamentary endeavour to demonstrate to the public that the country has an armoury of legislation to deal with the country's crime problem.

### **The Commission's approach to a new child justice system**

1.21 The Commission is confident that although the draft Bill accompanying this Report is pragmatic and cognisant of the current realities of the crime problem in the country, the initial commitment to children's rights has not been sacrificed. The draft Bill is progressive because it creates new processes which enable a dynamic involvement of professionals and families in solving the problems of children who come into conflict with the law. It focuses on children being held accountable for their actions, setting limits on their behaviour in ways that have meaning for them. The aim is that a clash with the law which is not deeply serious or violent will bring children into contact with people and programmes who can really help them to change their lives. A great deal of emphasis is placed on the early phase, within the first 48 hours after the child has come into contact with the system. This is a purposeful attempt to focus energy on the crisis point as the child enters the system, using the crisis as an opportunity to change things in the child's life. The question which all personnel dealing with the child should be asking in the early phase is: What can be done to save this child from progressing into a life of crime? Thus, although the draft Bill does not contain any provisions for primary prevention, the envisaged system provides ample opportunity for effective secondary prevention of crime.

1.22 The system which has been devised can be described as a justice-oriented system. It cannot be typified as being welfarist in its approach, although there is a notable involvement of probation officers. This is based on the Commission's view that facing up to responsibility for crime is a stronger change agent than is the treatment of crime as a social ill. In addition, children's procedural rights are

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<sup>27</sup> The initial draft of Act 105 of 1997 had included children within its ambit. Following representations to the Justice Portfolio committee arguing that this could constitute a breach of South Africa's obligations in terms of the CRC, the Bill was altered. Children under 16 years are excluded from its ambit, and as regards children of 16 and 17, there is a reverse onus.

<sup>28</sup> The Act draws heavily on California legislation dealing with street gangs.

more likely to be protected in a justice-centred system than in a welfarist one.<sup>29</sup>

1.23 Although the draft Bill allows for the arrest, detention and trial of children charged with serious offences, these children will nevertheless be provided with legal representation (if there is a risk that a conviction will result in a sentence involving deprivation of liberty). The consideration of diversion, release into the care of a parent, or community-based sentencing options is not linked to the seriousness of the offence alone, but is based on the individual assessment of each child and the circumstances surrounding the offence. The decision whether to divert the case ultimately rests with the prosecutor,<sup>30</sup> who retains discretion in this regard. Decisions regarding placement of the child rest with the preliminary inquiry magistrate.

### General issues

1.24 There are a number of practical points which should be raised to facilitate the reading of this Report.

- Many comments were received regarding the draft Bill which accompanied the Discussion Paper, and in discussing these comments in order to motivate recommendations in the Report, it became necessary to distinguish clearly between the two draft Bills. Therefore this Report refers to the draft Bill which accompanied the Discussion Paper as Bill A, and the one annexed to the Report as Bill B.
- The forms which were attached to the Discussion Paper which set out *pro forma* court orders, assessment reports and the like do not appear in this Report. They are to be included in regulations to the final legislation.

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<sup>29</sup> *In re Gault* 387 US 1.

<sup>30</sup> In the Discussion Paper the decision-making power regarding diversion was given to the inquiry magistrate. Consultation on the Discussion Paper revealed a strong reluctance on the part of many practitioners to depart from the concept of **dominus litis**. Accordingly the Report gives the power to decide whether to divert to the prosecutor, whilst retaining a consultative procedure for the inquiry.

- Originally the Commission was inclined to avoid the use of schedules, as the practice of having lists of offences dictating a particular action seems contrary to an individualised response to each case. Schedules do, however, provide certainty for practitioners working in the field, and have been used frequently by the legislature in recent years. The three Schedules to Bill B are not an exhaustive listing of offences for which children may be charged. Schedules 1 and 2 are enabling, giving clear guidance as to when police officials should use alternatives to arrest, and indicating the specific instances in which such officials or, with regard to the offences listed in Schedule 2, the Director of Public Prosecutions, may release children prior to the first appearance at the preliminary inquiry. Schedule 3 is aimed at providing protection from arbitrary imprisonment, as it is only in cases where children have committed offences that are listed in Schedule 3 that they can be held in prison to await trial, or be sentenced to imprisonment.
- The draft Bill does not include provisions relating to the care and protection of children in residential facilities or in prison. In the case of prisons, such provisions are included in the Correctional Services Act 111 of 1998. With regard to residential care facilities, it has been decided that the provisions should be included in the new Children's Statute.<sup>31</sup>
- The adoption of Bill B in its present form will necessitate amendments to the Criminal Procedure Act 51 of 1977. As it is not clear to what extent the recommendations embodied in the Bill will eventually be supported and accepted by Parliament during its deliberations, a draft Bill amending the affected provisions of the Criminal Procedure Act is not included in this Report. The nature and content of such a Bill will depend upon the content of the Child Justice Act ultimately adopted by Parliament.

## Conclusion

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<sup>31</sup> The Law Commission's Project Committee on the Review of the Child Care (Project 110) Act have embarked on the drafting of a comprehensive children's statute, and the care and protection of children in residential facilities is to be included in the statute.

1.25 This Report frames a cohesive system which at all times strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions. It is proposed that the assessment of each individual child should become a key determinant in deciding how the matter should proceed. Much emphasis is placed on a proposed new procedure called “the preliminary inquiry”, which aims to ensure that the case of each child is carefully considered and that each child will have the maximum opportunity of being diverted out of the system. Those proceeding to trial will be better protected from the risk of pre-trial detention.

1.26 The court system proposed is not an entirely separate structure, but rests instead on the notion of specialisation and training of personnel.

1.27 It is proposed that legal representation should be compulsory in matters where children are remanded in custody awaiting trial, where they are at risk of being given a sentence involving deprivation of liberty or where they are between the ages of ten and 14 years and the matter proceeds to trial. The sentencing provisions echo earlier efforts in the system to prevent children’s loss of liberty, and a range of innovative sentencing options is set out with imprisonment to be considered only as a measure of last resort.

1.28 The envisaged system is balanced in such a way that the majority of children will be afforded the opportunity to be held accountable outside the formal court system. It is recognised, however, that when children are accused of serious violent crimes and are assessed to be a danger to others, provision must be made for their secure containment.

1.29 Finally, the proposed child justice system will replace isolated provisions in the Criminal Procedure Act 51 of 1977 that have afforded limited protection to children in the past. It will, in the Commission’s view, constitute a comprehensive legislative framework for the future development of institutions, practice and programmes specifically applicable to persons under the age of 18 years. Importantly, the system gives effect to the Constitutional Court’s remarks in *S v Williams*<sup>32</sup> that “there

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<sup>32</sup> 1995 (3) SA 632 (CC) at 654 par 75.

is indeed much room for new creative methods to deal with the problem of juvenile justice ... [d]oubtless these processes, still in their infancy, can be developed through involvement by State and non-governmental agencies ...”.

## **CHAPTER 2: PRINCIPLES AND FRAMEWORK FOR THE LEGISLATION**

### **Overview of the proposals in Discussion Paper 79**

2.1 The proposed objectives and principles set out in the Discussion Paper aimed to give effect to international instruments which enshrine various principles in regard to young people in conflict with the law. Recent law reform in the children's rights area shows an increasing trend towards adapting international principles to local circumstances.<sup>33</sup>

2.2 There are a number of international instruments which can be drawn upon to crystallise the relevant principles. The United Nations Convention on the Rights of the Child is a binding instrument and provides a backdrop to relevant sections in the Constitution, such as sections 28 and 35.<sup>34</sup> Other international instruments<sup>35</sup> 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),<sup>36</sup> the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules),<sup>37</sup> and the 1990 United Nations Rules for the Protection

33 For example in New Zealand, Uganda and more recently, Ghana. The Model Law on Juvenile Justice (dated July 1998) was drawn up by the United Nations Centre for International Crime Prevention, Vienna, as a legislative guide to states considering the adoption of juvenile justice legislation which embodies the principles of the Beijing Rules, Riyadh Guidelines and Standard Minimum Rules for Juvenile Deprived of their Liberty. Chapter 1 of the Model law contains a preamble which sets out both the aims of the juvenile justice system, as well as principles. The relevant principles include: separation of juvenile courts from adult courts; equitable and humane treatment of young people in conflict with the law, with recourse to diversion where applicable; detention and deprivation of liberty to be used as a matter of last resort; the child must be enabled to participate in proceedings and express him or herself freely; all persons in charge of cases dealing with young people (judges, prosecutors, investigation authorities, police officers, prison personnel and social workers) must receive continuous specialised training; the reactions of the authorities must be proportionate to both the circumstances of the young person and the offence.

34 Section 39(1) of the Constitution provides that regard must be had to international law when interpreting the Bill of Rights. In *S v Makwanye & Mchunu*, Chaskalson P stated that "international agreements and customary international law provide a framework within which Chapter 3 (of the Constitution) can be evaluated and understood". For further discussion of the legal implications of ratification of an international treaty, see Discussion Paper 79 at 79 - 81.

35 Underlining the importance of the international instruments is the recent endorsement in government policy documents of many of the principles enshrined therein. The *National Crime Prevention Strategy* and the IMC's *Interim Policy Recommendations* also emphasise the need to introduce restorative justice values for child justice. Restorative justice has the added significance that it draws on community-based and indigenous models of dispute resolution. Consequently, the restorative justice approach formed part of the principles and objectives included in the Discussion Paper.

36 The main body of these Rules are summarised in the Discussion Paper at 84.

37 These Rules are summarised in the Discussion Paper at 82 - 83.

of Juveniles Deprived of their Liberty (known as the JDLs).<sup>38</sup> The African Charter on the Rights and Welfare of the Child (1990) was ratified by the South African Parliament on 18 November 1999, and entered into force shortly thereafter. It, too, is a useful document for the purposes of defining relevant principles.<sup>39</sup>

2.3 Responses received to the questions put in Issue Paper 9 suggested that it was necessary to enact in domestic law those principles from the international instruments upon which a new system of child justice should be based. Discussion Paper 79 therefore followed the approach recommended by respondents and provided for certain general principles, as well as for a set of objectives to guide all role-players in the administration and interpretation of the proposed legislation.

2.4 The Discussion Paper proposed a vision for a new system of child justice.<sup>40</sup> This vision comprised a comprehensive system for children in conflict with the law, striving at all times to prevent children from being drawn further into criminal justice processes. The emphasis was on assessment, diversion, and a new procedure called the “preliminary inquiry,” which would ensure that proper consideration to the possibility of diversion, as well as an appropriate release or detention option, was given. Protection of children’s rights was given concrete definition at all stages of the envisaged procedures, and special sentencing provisions were contemplated. No new court structure was proposed, but attempts to entrench specialisation were made throughout.

## **Evaluation of comment and recommendations**

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38 The JDL's are summarised in the Discussion Paper at 85.

39 The African Charter on the Rights and Welfare of the Child, 1990, differs from the CRC in that the former includes a section on the responsibilities of children which is absent from the latter. The African ethos places “rights” within the context of collective and individual “responsibilities”. In the African Charter “responsibility” refers to the explicit duties to which every child is automatically subject, such as the duty to ‘work for the cohesion of the family... and to assist them in case of need’. Further, the Charter emphasises the responsibilities of parents and communities for the well-being, growth and development of the child. This moved the Commission to include principles in the draft Bill reflecting the importance of parental responsibility, as well as the child’s right to maintain family contact (clause 5(j) and (k)).

40 See Discussion Paper at 4 - 5.

*General responses to the framework proposed in Discussion Paper 79*

2.5 Most respondents lauded the Commission for the comprehensive approach followed in establishing a new framework for children accused of offences. NICRO, in a submission prepared by LM Muntingh, argued that "... the establishment of such a system is a sound investment in the future of the country and its people. In view of this we want to commend the SA Law Commission Project Committee on Juvenile Justice on the mammoth task they undertook and the progress that has been made." The Law Society of the Cape of Good Hope noted as a preface to their specific comments that the Discussion Paper was "a monumental work of in-depth research, foresight and insight". On a point of general concern about the scope of the Discussion Paper, the Inkatha Freedom Party raised the issue of the future of the child after he or she has successfully passed through the child justice system, but has not yet attained the age of 18 years. The IFP proposes that legislation should provide for a system of post-justice care, or alternatively, such a system of care or guidance should be adequately provided for in other welfare legislation.

2.6 The Commission is gratified by the general acceptance of the overall framework contained in Discussion Paper 79, and has consequently retained the proposed model to a large degree. This emerges more clearly from ensuing chapters of this Report.

*Responses to the inclusion of objectives*

2.7 Dr L Glanz, from the Directorate Crime in the Department of Justice, supported the inclusion of objectives in the legislation. She commented: "By keeping children and young people away from all the negative effects of the adult justice system, and providing a more appropriate way of dealing with them, you are ultimately aiming to prevent re-offending and the development of a 'criminal career'. Perhaps this does not come out sufficiently in the objectives, and something to this effect could be added." A commentator who completed a questionnaire provided at one of the consultative workshops, also expressed agreement with the overall objectives contained in the Discussion Paper. The Inkatha Freedom Party voiced support for the inclusion of the objective of promoting the spirit of *ubuntu* in

the child justice system, but was of the view that the Discussion Paper did not provide sufficient clarity or guidance on the various aspects of this concept. The IFP therefore recommended the insertion of an appropriate definition, or, in the alternative, the inclusion of a description of *ubuntu* in the section dealing with the objectives of the legislation.

2.8 In accordance with the positive responses received on this matter, the Commission proposes retention of the objectives in Bill B,<sup>41</sup> as the setting of objectives facilitates understanding amongst all role-players of the primary goals of the legislation. Further, since it has been pointed out that some of the objectives specified in the Discussion Paper clearly relate closely to the concept of *ubuntu*, which is an African philosophy of humanity and humanitarian co-existence, it is proposed that the objectives clause be reformulated to reflect the specific elements of *ubuntu* that the legislation seeks to promote.

2.9 The Commission is also of the view that the principles of sentencing are properly reflected in the Chapter dealing with sentencing, and that no reference to the objective of providing for appropriate sentencing of convicted children needs to be incorporated in the objectives clause.

#### *Responses to the inclusion of principles*

2.10 Respondents generally agreed with the recommendations on the principles and framework. Ms F Cassim from the Department of Criminal and Procedural Law at UNISA commented favourably upon them, as did participants at all of the consultative workshops held by the Commission. As a general comment, the Office of the Director of Public Prosecutions (KwaZulu- Natal) endorsed the attempt to keep the child out of the criminal justice system, whilst making the child accept responsibility for his or her actions. The safeguarding of victims' interests, an explicit objective in accordance with the principles of restorative justice, was also welcomed. The International Law Division of the Department of Foreign Affairs found the Discussion Paper to enshrine the relevant international law principles derived from the CRC and related international instruments, and to be acceptable from an international law point of view. Superintendent Hickman, SAPS, Kimberley, commented that the "whole direction

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<sup>41</sup> See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

that this Bill takes is long overdue in South African Law" and that he "fully supports the endeavour to bring responsibility for a child's action back to the parent/guardian." The Inkatha Freedom Party strongly supported the protection of the constitutional rights of children and the "stated aim of providing individual responses to offences while holding the child accountable."

2.11 Respondents at the consultative workshop held in George, Western Cape, argued that a fundamental principle of proposed legislation should be the extraordinary liability of adults who use children to commit crimes, a view articulated in many other workshops. In addition, and as a matter of principle, it was suggested by many that parents who are directly liable - through neglect or abuse - for their children's offending, should be held accountable, either through mechanisms in this legislation, or in other legislation (such as the Child Care Act 74 of 1983).

2.12 After consideration of these submissions, the Commission recommends that the proposed clause dealing with the principles underpinning the Act be rephrased to reflect the elimination of certain proposed principles contained in the Discussion paper, and simplification of others. In accordance with suggestions made at some of the workshops, some of the principles are now incorporated in Chapters where specific issues are dealt with, such as police powers or sentencing. Principles which restate constitutional provisions, some of which were included in the Discussion Paper, have not been repeated in the proposed legislation.

2.13 The Commission is of the view that parental accountability is - through a variety of mechanisms - indeed a central theme in the envisaged system. Although parents are not directly subject to this legislation, save where this is expressly required in order that they may assist their child in legal proceedings, there are nevertheless opportunities for parental involvement, and support to parents, which opportunities do not exist at present. Particularly insofar as diversion orders can contribute to more effective parenting, the Commission is of the view that the envisaged system will contribute to the betterment of family life. Moreover, as has been pointed out in Discussion Paper 79, the Commission's project committee on the Review of the Child Care Act is currently examining legislative measures for early intervention aimed at strengthening families.

2.14 The proposal that a new criminal offence be included in the legislation to enable the state to punish those who use children to commit offences on their behalf has been accepted, and a provision to that effect included in the penalties clause.<sup>42</sup> The necessity of such a provision has been underscored by the fact that the implementation of section 29 of the Correctional Services Act allegedly led to the increased use of children to convey and sell drugs, in the expectation that children would be dealt with more leniently by the criminal justice system. This could hamper efforts to counter organised crime.

2.15 The principles that have been included in the proposed legislation are therefore derived from the international documents, as well as from cultural, socio-economic and other practical concerns which the Commission feels are especially relevant to South Africa. Restorative justice principles<sup>43</sup> and the interests of victims are provided for explicitly.

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<sup>42</sup> Clause 117(3) of the draft Bill.

<sup>43</sup> Restorative justice and its relevance to child justice statutes is explained more fully in Chapter 7.

## CHAPTER 3: AGE AND CRIMINAL CAPACITY

### Overview of the proposals in Discussion Paper 79

#### (i) Age and terminology

3.1 In the Discussion Paper the Commission analysed the various responses contained in the questionnaires as well as the written submissions on the terminology that should be used in the proposed legislation. The terms “juvenile”, “youth” and “child” were discussed and the merits of each debated. The Discussion Paper proposed the use of the word “child” to describe persons under the age of 18 years, and further proposed that Bill A<sup>44</sup> be named the “Child Justice Bill”.

#### (ii) Criminal responsibility

3.2 One of the most challenging issues facing the Commission was that of establishing a revised minimum age of criminal capacity. In the Discussion Paper three approaches to the question of the minimum age of criminal capacity were presented:

- \* The retention of the current common-law rule that a child who is seven years (or ten years) old but has not yet turned 14 years, is presumed to be *doli incapax*, with additional measures, such as the requirement of expert testimony for rebuttal of the presumption, to ensure enhanced protection of such children.
- \* The second option was to depart entirely from the *doli incapax* presumption, and to set a minimum age of prosecution at 12 (or 14) years. The establishment of a minimum age of prosecution would therefore not link directly to the actual criminal capacity of the child.
- \* The third option was to set the minimum age of prosecution at 12 (or 14) years, but with the

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<sup>44</sup> See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

proviso that where a child is charged with a serious offence, specified in clause 4 of Bill A, such child may be prosecuted.

**(iii) Age determination**

3.3 With regard to the assessment of age, the Commission proposed that -

- \* where a child's age is uncertain or in dispute, the probation officer should gather available information and make an assessment of the age of the child and should record such information on a form which was set out as an annexure to Bill A;
- \* the legislation should contain a list of possible evidence relevant to proof of age (such as birth certificates, estimation of age by a district surgeon, and school records) to be considered by the probation officer in a specified order of cogency;
- \* legislative provisions should enable a police officer or a probation officer to refer a child to the district surgeon for estimation of age;
- \* where the age of a child or person is uncertain or in dispute, the magistrate presiding in the preliminary inquiry should make an age determination based on the assessment of age put before him or her by the probation officer. The age determined by the magistrate should be deemed to be the age of the child until contrary evidence becomes available;
- \* a person appearing in a court other than a child justice court, who at any stage during the proceedings claims to be below the age of 18 years, should also be taken to a probation officer for the gathering of information relating to the assessment of his or her age, after which the assessment form should be submitted to the presiding officer of that court for determination of age;
- \* if the age of such person is found to be below 18 years after the trial has commenced, the proceedings should continue in the court concerned, but the remainder of the trial should be conducted as if the court is a child justice court, and subject to the provisions of the proposed legislation.

**Evaluation of comment and recommendations**

(i) **Terminology and applicability of the legislation**

3.4 There was very little comment on the proposed use of the term “child justice” as opposed to the more familiar “juvenile justice”. Of the four responses on the use of the word “child”, only Ms Cassim of UNISA expressed a preference for “juvenile” which, she stated, should describe any person under 21 years as it is in keeping with the Correctional Services Act 8 of 1959. As was pointed out in the Discussion Paper, the new Correctional Services Act 111 of 1998 (not yet fully in operation) includes a definition of child and the age limit of 18 is used. The proposals in the Discussion Paper are therefore consistent with the new approach in the Correctional Services Act.

3.5 The Gauteng Department of Welfare and Population Development, the Free State Department of Social Welfare and the Department of Legal Services of the SAPS supported the use of the word “child” in the title of the proposed Bill and argued that it is consistent with the Child Care Act 74 of 1983, the South African Constitution and the Convention on the Rights of the Child. The Commission was concerned that “child justice” might be somewhat wide and all- embracing for legislation that purports to deal primarily with the establishment of a criminal justice system for accused children. It could, for instance, be interpreted to include child victims in the justice system. However, it was realised that in recent years, and especially since the publication of the Discussion Paper, the term “child justice” has become synonymous with “juvenile justice” and that over time, the public will become ever more familiar with the term and its meaning. In addition, the argument put forward in the Discussion Paper that the use of the word “child” will promote the future integration of this legislation with other legislation<sup>45</sup> currently being drafted in connection with children, is still valid. The Commission consequently retains the recommendation that Bill B should be titled the Child Justice Bill.

3.6 The general consensus of opinion was that the proposed legislation should apply to children below the age of 18 years, as proposed in the Discussion Paper. This upper age limit accords with the constitutional provisions concerning protection of children, as well as the age of childhood established

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<sup>45</sup> The Project Committee on the Review of the Child Care Act, Project 109, is drafting comprehensive child care and protection legislation, and the Project Committee on Sexual Offences, Project 107, has proposed measures to combat sexual exploitation of children (*Discussion Paper 85* released on 12 August 1999).

by both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>46</sup> The Commission accordingly retains the proposal that the legislation should be applicable to those who, at the time of commission of the alleged offence, are below the age of 18 years (hereafter called the general rule). Further, Bill B proposes that the legislation should apply until the conclusion of criminal proceedings commenced under this legislation, notwithstanding the fact that the child attains the age of 18 years during the course of the criminal process.

3.7 The Commission proposes limited exceptions to the general rule, and details three instances in Bill B. The most significant of these are instances where, in the discretion of the Director of Public Prosecutions, a person's individual circumstances are such that such person would benefit from the protections contained in this Bill, and where several persons are co-accused of the same offence while the majority of them are below the age of 18 years. The exceptions apply only if the accused person in respect of whom the extended jurisdiction is sought is below the age of 21 years. The provisions have been included in order to provide more flexibility to the prosecution. There may well be occasions where a person who has just attained the age of 18 years, is still attending school, and could benefit from the diversionary procedures spelt out in the Bill.<sup>47</sup> Similarly, where a group of children is alleged to have committed the same offence, it may be artificial to separate the cases of one or two who are slightly older from those of their contemporaries.

## **(ii) Criminal responsibility**

3.8 Public opinion and comment on the issue of the age of criminal responsibility of children were varied and influenced by a wide range of social and political considerations, as well as differing perspectives and beliefs about child development. In an effort to reach an understanding as to how to approach the issue of the minimum age of criminal capacity in our very diverse, plural society where the life experience of one ten-year-old is very different from that of another ten-year-old, the Commission,

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<sup>46</sup> Ratified by South Africa on 18 November 1999.

<sup>47</sup> At present, there is no rule that prevents those of 18 or 19 from benefiting from diversion, and indeed significant numbers of those referred to NICRO programmes are of this age.

together with the Centre for Child Law of the University of Pretoria, hosted a two-day seminar in May 1999. The seminar was attended by legal academics, prosecutors, advocates from various Offices of the Director of Public Prosecutions, staff from Justice Training College, magistrates, probation officers, anthropologists, educationalists, child psychologists and child development experts.<sup>48</sup> International papers on approaches to minimum age were also presented. Extensive debate took place and concrete proposals were developed by conference participants.

3.9 As its final proposal, the Commission recommends the retention of the option which was referred to as option one in Discussion Paper 79, in amended form.<sup>49</sup> This conclusion has been reached after extensive deliberation, consideration of public opinion and the views of conference participants at the above-mentioned seminar, and due regard being had to the merits and difficulties inherent in each of the approaches. The Commission has therefore rejected options two and three as presented in the Discussion Paper,<sup>50</sup> both of which are premised on a fixed minimum age below which prosecution cannot take place, rather than on any individualised inquiry into the actual capacity of a child. The various arguments supporting the final conclusion of the Commission are set out in the paragraphs below, but a primary reason underlying the rejection of the fixed age approach is the very plural nature of South African society, and significant differences in upbringing, maturity and development of children in differing circumstances. Culture, rural or urban environment, and socio-economic and educational factors all play a role in shaping children's development, and, consequently, the age at which they attain criminal capacity.<sup>51</sup> Ms Leclerc-Mdlala, an anthropologist, presented a paper at the seminar referred to above, where she argued convincingly, on the basis of extensive local and international research, that it is the process of socialisation itself that results in the development of rational thought about issues such as the meaning of childhood, deviance, criminal capacity and notions of right and wrong. She further

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<sup>48</sup> For a summary of the proceedings of the seminar, see vol 1 no 2 (1999) *ARTICLE 40* Community Law Centre, University of the Western Cape.

<sup>49</sup> See clause 6 of the draft Bill.

<sup>50</sup> See Discussion Paper 79 at 104 - 108.

<sup>51</sup> K Muller 'Children's Perceptions of the Legal Process' *A Basic introduction to the Preparation of Child Witnesses* 1999 at 95. See, too, T Leggat 'Finding an age of reason for the young' *Mail and Guardian* 14 to 20 May 1999.

submitted that this socialisation is by and large *not* the result of acts explicitly aimed at shaping a child's world view. It happens mostly in an unstructured, haphazard and unplanned way as people feed, care for, discipline and play with a child.<sup>52</sup>

*Retention of the doli capax /doli incapax presumptions*

3.10 Many of the respondents expressed an opinion on the issue of age and criminal capacity. The retention of the *doli capax/ doli incapax* doctrine received much support.<sup>53</sup> The greatest advantage of retention of the *doli capax/ doli incapax* presumptions is that the protection they offer comes into operation automatically. It is activated by the simple fact of a child being a specified age. This is important from a practical point of view, as the moment a child is alleged to be between the relevant ages, the “protective mantle” (namely, the presumption that the child lacks capacity) is immediately thrown over such child. Another central feature is that once the presumption is triggered, the onus shifts to the State to present evidence to overturn the “protective mantle”.

3.11 A further benefit is the considerable flexibility within this approach. The younger the child, the greater the protective cloak of the presumption, because more evidence would be required to rebut the presumption. In addition, while the actual age of the child is an important factor to be taken into consideration, this alone is not conclusive. Equally important are the features of the case and the individual child's background. This flexibility is especially beneficial in a country such as South Africa,<sup>54</sup> with its culturally and ethnically diverse population. Courts in other countries have in fact cautioned

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<sup>52</sup> S Leclerc-Mdlala ‘An Anthropological Perspective on Childhood’ Age and Criminal Capacity Seminar May 1999

<sup>53</sup> The Department of Welfare and Social Development of the Gauteng Province (Benoni) recommended the retention of option one, as did the Law Society of the Cape of Good Hope, SAPS Legal Services, and numerous other respondents and workshop participants.

<sup>54</sup> In the UK, where the presumption has been abandoned in the 1998 Crime and Disorder Act, it was found that the *doli capax/doli incapax* rule tended to regard children from respectable families or with superior upbringing as more capable of appreciating the wrongfulness of their acts, thus rendering these children more likely to be classified as being *doli capax* than those from “humble origins”. It is for this very flexibility that the Commission favours this approach, as it recognises the individual development of each child and is the only option that would recognise that the life experience of one ten year old would be vastly different from that of another ten year old in South Africa.

against a presumption of normality (ie any 11-year-old would know that such behaviour is wrong). Implicit in this approach are two forms of flexibility: leeway between children of different ages (ten versus 13), and leeway between children with differing levels of maturity where they are the same age (between one 11-year-old and another).

3.12 The Department of Social Services, Western Cape supported option one. The argument was raised that many of the children in South Africa, especially those who come into conflict with the law, may have developed slowly owing to their socio-economic circumstances and that their progress at school is sometimes well below the expected norm as a result of limited early childhood development opportunities. NICRO, too, supported the retention of the principle of the rebuttable presumption as set out in option one, claiming that it is well established and widely accepted.

3.13 The Commission considered the effects of the removal of the presumption. If upon removal the minimum age is set too low, there is a risk of indiscriminate prosecution of young children without any form of screening linked to proof of maturity. Even if the age is set quite high, for example at 12 years, a handful of children of that age and above will be less mature than the ordinary child of equal age, and will be prejudiced by the removal of the presumption. This then creates substantive inequality between the mature and the immature 12-year-old, who are treated in exactly the same manner by the criminal justice system.

#### *Establishing the minimum age of criminal capacity*

3.14 One of the strongest arguments supporting the retention of the presumption of incapacity for younger children is that, because of the cloak of protection, one can relatively safely retain a comparatively low minimum age of criminal capacity, knowing full well that only the most developed and mature children will survive the screening process implicit in the presumption. The Convention on the Rights of the Child states that States Parties should establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.<sup>55</sup> The monitoring body responsible

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In Article 40.

for receiving reports from States Parties with regard to the Convention, namely, the Committee on the Rights of the Child, has consistently criticised countries who have established a minimum age of ten years or younger. As regards the establishment of a minimum age, the Beijing Rules require that “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”.

3.15 The Law Society of the Cape of Good Hope suggested that the present minimum age of criminal capacity of children at seven years be retained. However, the vast preponderance of other respondents preferred a higher minimum age. The age of no less than ten years as a minimum age for criminal liability was also the consensus of opinion<sup>56</sup> expressed by the participants at the expert seminar held by the Commission on this issue.

3.16 The Department of Legal Services of the SAPS favoured an increased minimum age for prosecution fixed at ten years. The Department strongly expressed the view that children under this age who find themselves in trouble with the law are actually in need of care, and recommended that, in order to address the care needs of these children, provisions should be included in the legislation to enable the SAPS to arrest children over the age of seven, but below the age of ten years, so that they can be brought to a probation officer for assessment and referral to a children’s court inquiry. The SAPS did not favour the minimum age being set at 12 (as proposed in options two and three) because, it was argued, younger children are getting involved in serious crimes, eg. murder, rape and robbery. They also pointed out that children between the ages of ten and 12 are involved in gang activity and sometimes have to commit crimes to prove their loyalty to a gang.

3.17 At the seminar referred to above, participants also expressed substantial support for raising the minimum age of criminal responsibility, alongside the retention of the presumption of incapacity for younger children. One group formulated its proposal in the following manner: “Children under the age of ten shall be irrebuttably presumed to be *doli incapax*, whilst there shall exist a rebuttable presumption that a child between ten and 14 has criminal capacity.” The group premised its

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<sup>56</sup> Although there was also significant support for a minimum age of 12 years.

recommendation on the anthropological and psychological arguments presented at the conference. Option two was rejected by that group because it does not allow for the assessment of individual circumstances, which, they argued, is necessary in our society. The group also rejected option three, which provided for exceptions, based on a schedule of serious offences, in respect of which children below the proposed minimum age could be prosecuted. The conference participants argued that it often happens that the children charged with those very offences listed in the schedule are the ones who have the greatest need for the protection of an inquiry into their criminal capacity. Many supported the notion that children below the minimum age fixed in legislation should continue to be subject to the jurisdiction of the Children's Court, in order to determine whether they are children in need of care.

3.18 In a paper presented at the seminar, Dr Karen Muller highlighted the third stage of a child's development (between approximately seven to 11 years) as the one in which the child begins to evaluate and think in the abstract.<sup>57</sup> She pointed out that it is only at approximately the age of ten that the left and right halves of the brain join, thus enabling a child to think about an event and evaluate it. As far as moral development is concerned, research has shown that children move from a stage of moral realism to moral relativism at about the age of ten.<sup>58</sup>

3.19 The Commission was sufficiently convinced by the scientific and developmental arguments set out above, the public support received for this proposal, and the guidance provided by international law, to propose that the lower age of criminal capacity be set at ten years, and that children younger than this age should be irrebuttably presumed to lack such capacity.

*Establishing the upper age limit in respect of the rebuttable presumption of incapacity*

3.20 The upper age limit for the operation of the presumption was more difficult to establish. The question whether there are constitutional implications inherent in removing the current presumption,

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<sup>57</sup> K Muller 'The Mental Capacity of a Child', Paper presented at the Seminar on Age and Criminal Capacity, May 1999, in which she discusses the different stages of a child's development according to Piaget.

<sup>58</sup> See Muller *op cit* n 13 and Bukatko and Daehler *Child Development: A Topical Approach* 1992.

which protects children below the age of 14 years, and fixing an age lower than this, must be raised. Such a step would result in less protection for younger children than exists at present. Measured against the provisions of section 30 of the Constitution, this could be seen as a retrogressive step; one that diminishes rather than advances the protection and best interests of the child. Such a retrogressive step could conceivably be challenged at some point, and, in order to survive constitutional scrutiny, would have to be shown to comply with the section 36 requirements, including the requirement that less restrictive means to achieve the same purpose were not available.

3.21 However, it is possible to raise the minimum age of criminal capacity without sacrificing some protection in law for the children above the minimum age but below 14, and it may be difficult to justify removing existing protections for children of, say, 12 or 13 years.

3.22 Ms P Jana, MP, who was responsible for the defence of many children arrested for political crimes during the apartheid regime, observed during the seminar that the capacity of children to participate in legal proceedings against them was often limited as a result of the system of Bantu education.<sup>59</sup> Ms Jana was of the opinion that children under the age of 14 years could not instruct legal representatives effectively as:

- \* lawyers would often make decisions on behalf of a child that the child could not challenge;
- \* the power imbalance between the adult lawyer and the child often inhibited the child;
- \* the concentration level of younger children was limited;
- \* the capacity of a child to understand court proceedings was often inhibited by the intimidating environment, and further exacerbated by the failure of the child to understand the language in which court proceedings were conducted.

3.23 The arguments put forward above would support the retention of the age of 14 years as the upper limit relevant to the presumption of criminal incapacity, and the Commission consequently

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<sup>59</sup> She argued, simultaneously, that their criminal capacity was enhanced by a deep and noble commitment to freedom and justice.

recommends that the rebuttable presumption should apply to children of ten years and older, but below the age of 14 years.

*Rebuttal of the presumption*

3.24 The proposals put forward in paragraphs 3.19 and 3.23 above would not be complete without reference to the fact that whilst, in theory, the retention of the presumption has merit, in practice it is incorrectly applied and ineptly and incompetently rebutted. In reality, then, children fail to benefit from the “protective cloak”. This assertion requires that attention be paid to the question as to how the proposed legislation can improve the way in which the presumption is to be rebutted in practice. At present, expert evidence is not required, and usually the mother of a child is asked whether she has taught the child the difference between right and wrong. A positive answer, which most mothers provide, serves to confirm criminal capacity.

3.25 The argument that the present operation of the presumption of *doli incapax* fails to protect children between seven and 14 years may be more illusory than real. First, from available arrest and conviction statistics in the country, it is quite clear that very few children of tender years are in fact prosecuted. And, although this fact was challenged at the seminar referred to above, official statistics from the Department of Correctional Services indicate that there are indeed very few children under 13 who are in prison for criminal offences. The following table reflects statistics that were provided by the Department of Correctional Services of children between seven and 13 who were serving a sentence in prison at 31 April 1999:

CRIME CATEGORY	FREE STATE	MPUMALANGA	KWAZULU NATAL	EASTERN CAPE	WESTERN CAPE	NORTH WEST	NORTHERN CAPE	NORTHERN PROVINCE	GAUTENG	RSA
ECONOMIC	0	1	1	1	1	0	0	0	0	4

AGGRESSIVE	2	0	1	0	0	0	0	0	1	4
SEXUAL	0	0	1	0	0	0	0	1	0	2
NARCOTICS	0	0	0	0	0	0	0	0	0	0
OTHER	0	0	0	0	0	0	0	0	0	0
TOTAL	2	1	3	1	1	0	0	1	1	10

3.26 It was mentioned in the Discussion Paper that few, if any, children below the age of 14 were serving sentences in reform schools at the time at which the Paper was released. The Commission has ascertained that this is still the case. Therefore, it would appear that very few children under the age of 14 are convicted and sentenced to residential sentences at present in South Africa.

3.27 Further, the Discussion Paper mooted that a new statute could set out specific steps to be undertaken in preparation for rebuttal, for example, a requirement that expert evidence of the child's development be led. Addressing difficulties in rebutting the presumption in practice could also be achieved through a variety of mechanisms such as training of probation officers, the preparation of guidelines for dealing with children over the age of ten but below 14 years, and setting up a database of experts to conduct evaluations, where expert assessment of capacity may be required.

3.28 In addition, proposals were put forward at the seminar that in lieu of requiring expert evidence to be presented in order to rebut the presumption, the Director of Public Prosecutions should play a role in ensuring that only cases where prosecution is warranted should proceed to plea and trial in court. The advantage of this suggestion is, first, that it obviates the need to obtain expert evidence in respect of every child alleged to be over the age of ten years but under the age of 14, in order to proceed in terms of the draft Bill. The Commission is aware of the difficulties and expense involved in requiring expert evidence in a large number of cases. Thus, the Commission proposes that children subject to the rebuttable presumption who acknowledge responsibility may still be diverted at a preliminary inquiry and provided that the prosecution agrees to diversion.<sup>60</sup> Such children would still be held accountable

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<sup>60</sup> See Chapter 8 in this regard.

through diversion options, but would not be subject to formal prosecution and the rigours of the criminal justice system, unless the Director of Public Prosecutions issues a certificate. Finally, where such certificate is produced, the presumption will still have to be rebutted by the State during the trial, and then the choice of which evidence will be necessary and sufficient for rebuttal will rest with the prosecuting authority.

3.29 The Commission has been persuaded that this approach indeed serves the best interests of this younger group of children and gives effect to the intentions behind the presumption of incapacity, yet allows the flexibility to take the matter to court in serious cases, or where other factors suggest that formal court proceedings are warranted. The prosecution will continue to bear the evidentiary burden of rebuttal, and in most cases it is unlikely that prosecutors will pursue cases where there is substantial doubt about the capacity of the child. Further, the requirement of expert evidence in all cases of children under the age of 14 years, which was proposed in the Discussion Paper, may well be unaffordable and impractical in this country, especially in rural areas and smaller towns, where such expertise is not readily available. Therefore, the Commission recommends that in cases where prosecutions of children under the “protective mantle” of the presumption are conducted, the Director of Public Prosecutions would be required to have issued a certificate confirming an intention to prosecute the child prior to the trial. It is further recommended that such children’s presumed criminal incapacity should be disproved by the State beyond reasonable doubt, and that both the prosecution and the defence may call for an evaluation of a child by a suitably qualified person to assess the child’s cognitive, emotional, psychological and social development.<sup>61</sup>

*Children below the minimum age of criminal capacity*

3.30 An important question raised earlier is what should happen to children below the minimum age of prosecution who may be accused of offences. As has been pointed out by an international commentator on juvenile justice, Mr Nigel Cantwell, the level at which a country sets its minimum age

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<sup>61</sup> See clause 79 of the draft Bill.

is not an automatic indication of the way a child is dealt with after commission of an offence.<sup>62</sup> Countries that set too high a minimum age frequently allow repressive welfare or educational placement without the procedural guarantees implicit in criminal procedure. The Commission is always cognisant of the fact that the proposed system would be failing to protect both children and the broader public if due consideration were not given to those children who, despite being below the minimum age of prosecution, find themselves in trouble with the law. The Commission therefore proposes that children who are irrebuttably presumed to lack criminal capacity may still be subject to some procedures in terms of this legislation, albeit not through the mechanism of the criminal law.<sup>63</sup>

3.31 The Commission's intention is that the legislation should provide that certain specified steps may still be taken to address a child's behavioural problems, links with organised crime or exploitation by others in the commission of offences, where such steps are appropriate or warranted. It is proposed that children under the age of ten years be assessed and that a children's court inquiry may be opened, or a family group conference convened, or a probation officer may ascertain whether support to the child and his or her family is required. Where children are below the age of ten, they will therefore still have access to social services, counselling and reintegration services, when this is indicated.<sup>64</sup>

3.32 As the Commission's project committee on the Review of the Child Care Act is destined to propose a complete restructuring of the child care and protection system in South Africa, the proposed steps to deal with children below the minimum age of prosecution are feasible in practice, and will be supplemented by the increased protective measures that a new Child Care Act will offer. Finally, by

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<sup>62</sup> *Innocenti Digest: Juvenile Justice* UNICEF (1998)

<sup>63</sup> It has been argued that the proposed child justice system might lose credibility if a public perception were to take root that children below a certain age may commit crimes with impunity. Similarly, the point has been raised that organised criminals may seize the opportunity presented by the irrebuttable presumption to use children below the age of ten to commit offences.

<sup>64</sup> Isabeth Mijnaerends, Officer of Justice at the Hague, observed during the seminar on Age and Criminal Capacity referred to in this Chapter, that in the Netherlands, great emphasis is currently being placed on early intervention, even where young children cannot be prosecuted in the formal criminal justice system. To this end, information in respect of those children below the age of prosecution is fed into the system and kept by the Child Protection Board. Ms Mijnaerends argued that the benefit is that early intervention can minimise the further progress of young people into delinquency by offering family programmes and educational support to families with a high concentration of risk factors.

spelling out measures that can be taken when children who are below the minimum age of prosecution come into conflict with the law, the public unease at the prospect that “nothing will be done” can be addressed.

3.33 The Commission recommends the retention of the *doli capax/doli incapax* presumptions in the following form:

- \* children under the age of ten years should irrebuttably be presumed to be *doli incapax*;
- \* children between the ages of ten and 14 years should rebuttably be presumed to be *doli incapax*;<sup>65</sup>
- \* the minimum age of prosecution should be 14 years, provided that a child under 14 years may be prosecuted upon production by the prosecutor of a certificate from the Director of Public Prosecutions setting out reasons for the prosecution;
- \* children under the age of ten years who are alleged to have committed a crime may be taken to a probation officer for assessment and referred to the care system or provided with social support services.<sup>66</sup>

**(iii) Age determination**

3.34 Although there were no comments that addressed the substantive recommendations of the Commission in respect of the procedure to be followed in conducting an estimation of age, the SAPS

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<sup>65</sup> This recommendation incidentally corresponds with recent recommendations of the Hong Kong Law Reform Commission as are evident from its *Report on the age of criminal responsibility in Hong Kong* May 2000. That Commission also recommended that the minimum age of criminal responsibility should be increased from seven to ten years. The report can be found on the Internet at: <http://www.info.gov.hk/hkreform>.

<sup>66</sup> Clauses 7(2) and 46 of the draft Bill.

submitted very valuable comment on the terminology of the sections dealing with age estimation and determination, and much positive comment was received at the workshops on the proposals contained in Bill A attached to the Discussion Paper. In particular, respondents welcomed the inclusion in legislation of formal procedures designed to address the problem of ascertaining age in this country, as well as the clear allocation of responsibility for collecting the necessary documentation to assist in establishing age, where this is available. Probation officers and staff from the provincial Departments of Welfare expressed approval that the inclusion of provisions on age determination will give certainty at the earliest possible stage as to which children fall within the jurisdiction of this legislation, and which persons are to be dealt with in adult courts.

3.35 A suggestion was received from SAPS that the word “evidence”<sup>67</sup> be replaced with the word “information”, to indicate clearly that sources of information<sup>68</sup> about age which may not be considered as evidence for the purposes of a trial, but which would nevertheless assist probation officers and magistrates to estimate and determine probable age, are contemplated by the drafters. This proposal has been accepted. However, in view of the fact that no comment was received on the substance of the section on age determination, the Commission has largely retained the recommendations set out in the Discussion Paper, save for minor refinements in wording and structure.<sup>69</sup>

3.36 The sections that dealt with age assessment by what was formerly known as a district surgeon, which were set out in Bill A, do not appear in Bill B. It has now been clarified that age estimation and collection of necessary information (which may include a medical practitioner’s report) is, in the first instance, the duty of the probation officer. The final determination of age is the responsibility of the inquiry magistrate or other judicial officer, who may also request a report from a medical practitioner if this has not yet occurred.

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<sup>67</sup> Concerning possible age of the child or person.

<sup>68</sup> For example, uncertified copies of documents such as school admission records.

<sup>69</sup> See clauses 7 to 10 of the draft Bill.

## **CHAPTER 4 : PRE-TRIAL PROCEDURES PERTAINING TO POLICE POWERS AND INVESTIGATION**

### **Overview of the proposals in Discussion Paper 79**

4.1 The proposals regarding police powers and duties, embodied mainly in clauses 10 to 24 of Bill A<sup>70</sup> contained in Discussion Paper 79, were aimed at modifying and enhancing those powers already assigned to the police in terms of the Criminal Procedure Act 51 of 1977 in order that the police may become more effective participants and protectors of the rights of children in the new child justice system.

4.2 In general it was felt that specialisation within the police can greatly improve the way in which the child justice system deals with children. Mindful of the fact, however, that especially in rural areas it is unlikely that there would be enough child justice cases to warrant full-time specialisation by police officials, it was recommended that all police officials undertaking arrests should be trained to deal appropriately with the arrest of children and in the deployment of the proposed alternatives to arrest.

4.3 In order to enhance the present infrequent use of alternatives to arrest, despite the availability of such alternatives, the Commission deemed it a viable option to draw distinctions between minor and serious offences for purposes of providing statutory guidance in deciding whether alternatives to arrest would be more appropriate, and recommended the enactment of a number of such alternatives.<sup>71</sup>

4.5 To increase the protection of children's procedural rights, it was recommended that children

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<sup>70</sup> See the explanation regarding the distinction between Bill A and Bill B in paragraph 1.24.

<sup>71</sup> *Discussion Paper 79* at 125 - 126.

should be informed of their rights upon arrest; not only of the rights which are immediately applicable, but also of rights which will be important later in the process, such as the right to legal representation. Moreover, the Commission recommended that the principle embodying the use of minimum force in effecting the arrest of a child should be enacted, with a prohibition on the use of deadly force except where such force is used to protect the person effecting the arrest or some other person from imminent death or serious bodily harm, and only where the offence for which the arrest is sought is serious and violent.

4.6 Along with the view that the primary responsibility for finding and informing parents or guardians of children should remain with the arresting police official, it was proposed that the current legal obligation to inform the probation officer of the arrest of a person under the age of 18 years should also rest with this official.<sup>72</sup>

4.7 The Commission made a number of recommendations regarding the detention of children in police custody prior to appearance at an assessment, and the release of a child from detention. The proposals included a requirement that children be held in appropriate conditions; an obligation on the station commander of each police station to cause a separate cell register to be kept, in which details regarding the detention of children in police cells should be recorded; a requirement that children should appear before an inquiry magistrate within 48 hours of detention and that they may only be remanded to detention in a police cell for one further period of 48 hours; the possibility of release of a child, with or without conditions, if he or she has committed a less serious offence (listed in Schedule 1 to the proposed draft Bill), into the care of his or her parents or an appropriate adult, or on his or her own recognisance; and the possibility of release from police detention by a police officer after consultation with the relevant Director of Public Prosecutions.

4.8 Since diversion by the police, and police cautioning in particular, is widely recognised in foreign jurisdictions (Canada, Germany, Australia, New Zealand and the United Kingdom), and has been found

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<sup>72</sup> Defined in the proposed legislation as a member of the child's family, a guardian who is not a parent, a social worker, a person appointed by the proposed child justice committee, or failing any of these persons, another responsible person aged 18 years or above who is not a police official or employed by the police.

to be an appropriate and suitable option for children in conflict with the law, it was recommended that the possibility of both informal and formal police cautioning should be provided for.<sup>73</sup> The Commission did not deem it desirable to prescribe the way in which informal cautioning should occur, leaving it to the police to develop regulations in this regard. Concerning formal cautioning, it was recommended that such caution should be administered by a police officer of senior rank, with or without conditions, a record of which should be kept for a period of two years.

4.9 In view of the trend already evident in our recent case law<sup>74</sup> towards recognising the need for additional protections for children in the pre-trial phase, it was recommended that the legislation should provide that a child is entitled, during the noting of an admission or confession or during a pointing out or identity parade, to have his or her parent, guardian, family member, legal representative or an appropriate adult present. Where no such person is available, it was envisaged that the proposed child justice committee would maintain a roster of other appropriate adults who could stand in. Moreover, it was recommended that evidence obtained during these procedures without the assistance of any of the persons referred to should be inadmissible as evidence at any subsequent trial.<sup>75</sup>

4.10 The Commission recommended that fingerprinting of children should be regarded as a measure which should not be resorted to before the holding of a preliminary inquiry, where a decision will be taken on the manner in which the matter should proceed. It was further recommended that the fingerprints of children should only be taken after arrest and before the preliminary inquiry if it is essential for the investigation of the case; if it is required for the purposes of establishing the age of the person in question; or if it is necessary to establish the prior convictions of the child for the purposes of making a decision on diversion, release from custody or placement in a particular residential care facility.

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<sup>73</sup> S Uglow *Criminal Justice* London: Sweet & Maxwell 1996 at 317 points out, in respect of the United Kingdom, that the expansion of the use of cautioning as opposed to prosecution is remarkable.

<sup>74</sup> *S v Kondile* 1995 (1) SACR 394, *S v N* 1997 (1) SACR 8

<sup>75</sup> Juvenile Justice *Drafting Consultancy Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* Cape Town: Allies Printers 1994 at 27. These proposals included the possibility of evidence which is obtained in the absence of a parent or guardian being rendered inadmissible.

## Evaluation of comment and recommendations

### *Arrest*

4.11 Senior Superintendent Hickman, SAPS Kimberley, pointing out that a distinction can be drawn between the initial arrest and further detention, suggested that the draft Bill should include a definition of “arrest” as well as of “detain”. The respondent also called for a definition of “police officer”. In this regard valuable comment was received from the Division: Legal Services at Police Headquarters (hereafter “Police Legal Services”). It was submitted that the phrase “police officer”, wherever used in the draft Bill, should be replaced by the phrase “police official”, since “official” would include both “officers” and members of lower rank. The respondent suggested that “police official” should be defined in the draft Bill as follows: “A member of the South African Police Service or of a municipal police service established in the South African Police Service Act, 1995 (Act No. 68 of 1995).” These suggestions have been accepted by the Commission, and Bill B makes reference to “police official” throughout.

4.12 Police Legal Services further submitted that clause 10 of Bill A, reflecting the meaning and purpose of arrest, should be deleted *in toto*. This suggestion has also been accepted by the Commission, and the clause does not appear in Bill B.

4.13 Police Legal Services also queried the purpose of clause 11(1) (powers of arrest and arrest by police officer without warrant) and suggested that it should be deleted. Superintendent Hickman drew attention to the same clause and offered the view that it would be better to retain the provisions of the Criminal Procedure Act in this regard. Following upon these criticisms, the powers described in clause 11 of Bill A are not included in Bill B.

4.14 During a workshop attended by officials of the Department of Safety and Security, it was

mentioned that the purpose of arrest is not always to bring a person before a court; arrest might be undertaken in order to establish a bodily feature, or an entire family may be arrested as illegal immigrants. In their comment Police Legal Services further submitted that the police official will need the power to arrest the child in order to take him or her to the probation officer. The police official will need this power irrespective of whether the child will be prosecuted, as very few children will voluntarily accompany the police official to the probation officer.

4.15 Ms F Cassim, lecturer in the Department of Criminal and Procedural Law at UNISA, holding that minimum force should be used in effecting an arrest, considered the use of deadly force to be acceptable in exceptional circumstances to protect the person effecting the arrest or innocent third parties. The Inkatha Freedom Party supported the use of minimum force in effecting an arrest, but argued that “minimum force” needs to be defined in the draft Bill.

4.16 A comment that emerged during a workshop attended by a variety of NGOs and commissions, was that the clause on minimum force is too subjective, and that the draft Bill should spell out what is meant by minimum force. A workshop with officials from the Department of Safety and Security elicited a comment that the South African Police Services Act 68 of 1995 prohibits the use of force, and that there is no need to restate this.

4.17 As far as the use of deadly force in effecting an arrest is concerned, Superintendent Nilsson of the SAPS Child and Youth Desk in the Western Cape asserted that the criteria for using deadly force must be same as that in section 49(2) of the Criminal Procedure Act. Pointing out that it happens frequently that the police official has to make the arrest at night and under poor conditions of light, the respondent remarked that the official cannot distinguish whether the perpetrator is an adult or a child. The criticism expressed by Superintendent Nilsson was echoed by Superintendent Hickman. The Commission has given due regard to these comments and although the practical difficulties raised by Superintendents Nilsson and Hickman may well be valid, any *bona fide* error on the part of a police officer using deadly force will not open that officer to criminal or civil liability. The fact remains that children do require special protection and that section 49(2) of the current Criminal Procedure Act does not provide sufficient protection. The Commission has thus decided to retain the wording of clause

10(6) of Bill A, with minor editorial adjustments.

4.18 In the light of the above comments the Commission recommends that the purpose of arrest and the power to arrest should not be described in the proposed legislation, as they are adequately catered for in the Criminal Procedure Act 51 of 1977.

4.19 With regard to minimum force, Bill B now requires (in clause 11(2)) that “the arrest of a child must be made with due regard to the dignity and well-being of such child and, only if it is clear that a child cannot be arrested without the use of force, may the person effecting the arrest use such force as may be reasonably necessary and proportional in the circumstances to overcome any resistance or to prevent the child from fleeing.”<sup>76</sup> This provision applies to all arrests of children, whether made by police officials or private citizens. The Bill retains special provisions for the use of deadly force, set out in clause 11(3).

#### *Alternatives to arrest*

4.20 Regarding the proposed alternatives to arrest (clause 12 of Bill A), Superintendent Hickman suggested that the granting of a recognisance by the police official should be scrapped and that the written notification to appear at an assessment be used. During the workshop with officials from the Department of Safety and Security it was submitted that the granting of a recognisance is “too wishy-washy”. The NICRO report indicates that 55.2% of the children interviewed preferred the alternative of the police official accompanying the child to his or her home and giving a written notification to the child, the parents or an appropriate adult. The second most preferred alternative (chosen by 15.5% of the children) is the written notification to the child to appear at an assessment. It is evident from the responses given that children depend to a large extent on the involvement of their parents when they are in conflict with the law. The Commission has accordingly decided to remove the release of a child

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<sup>76</sup> Beijing Rule 10 requires contacts between law enforcement agencies and a child offender to be managed in such a way as to respect the legal status of the child, promote the well-being of the child and avoid harm to him or her with due regard to the circumstances of the case.

on his or her own recognisance as one of the alternatives to arrest.<sup>77</sup>

4.21 The Benoni Office of the Department of Welfare and Population Development in the Gauteng Provincial Government (hereafter the Department of Welfare, Benoni) supported the requirement in clause 11(3) of Bill A that police officials should consider alternative methods of securing the appearance of the child at assessment, including the use of informal cautions. Ms F Cassim was also in favour of police officials using alternative methods of arrest or informal cautions. She remarked that this would take into consideration the fact that the police are dealing with children and not with adults. The Provincial Inter-Sectoral Committee on Youth in Conflict with the Law (Gauteng Province) (hereafter “the Provincial Inter-Sectoral Committee, Gauteng”) fully supported the recommendation that an arrest should not be effected in all cases.

4.22 Police Legal Services, on the other hand, contended that the provisions of clause 15(3) of Bill A, requiring the arresting official to complete a written report reflecting the reasons why alternatives to arrest could not be used, will cause police officials to avoid arrest in order to avoid completing the required form. The respondent suggested that the regulations to the final legislation should contain clear instructions concerning the circumstances in which an arrest should be effected and where it should not be effected. The comments of Police Legal Services in respect of clause 15(3) of Bill A are noted, but the Commission remains committed to the idea of the use of alternatives to arrest being promoted by creating a paperwork exercise should the alternatives not be used.<sup>78</sup> This is a positive way of encouraging police to use alternatives, and it is believed that proper training of police officials will promote understanding about why the alternatives are preferable to arrest. The Commission agrees with the view that more details to guide police officials should be included in the regulations to the legislation, or in Police National Instructions.

4.23 The Directorate: Secondary Legislation in the Department of Justice, also referring to the

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<sup>77</sup> The Commission has decided, however, to retain release on own recognisance as release option to be exercised by the inquiry magistrate or court. See Chapter 5.

<sup>78</sup> Clause 15(2) of Bill B.

requirement in clause 15(3) of Bill A that the arresting officer must provide the inquiry magistrate with a report giving reasons why alternatives to arrest could not be employed, posed the question what the magistrate is to do if he or she is not satisfied with the report, and what the magistrate must do after considering the report. Although there is no sanction for failure to employ an alternative to arrest, it is nevertheless useful for the ongoing maintenance and development of the system to know whether this provision is useful in protecting the rights of children. For this reason the chapter on monitoring in Bill B requires the proposed Child Justice Committee at district level to monitor the extent to which alternatives to arrest are used; the Provincial Office for Child Justice will collect statistics regarding the use of alternatives to arrest and, at a national level, the Department of Safety and Security is to monitor and assess the policies and practices in relation to the arrest procedure for children.<sup>79</sup> This monitoring approach has been opted for, rather than the more punitive approach of sanctions for failure to fulfil legislative requirements, because the Commission is of the view that it will encourage the development and improvement of the system on an ongoing basis.

4.24 It was contended by Police Legal Services that, as far as alternatives to arrest are concerned, the feasibility of the police official requesting the child to accompany him or her to the place of assessment should be reconsidered, as the child may allege that he or she was not informed of the reason and the consequence of such accompaniment and such conduct may amount to an unlawful arrest. The respondent, referring to section 35(2) of the Constitution, pointed out that such a child will be regarded as being in detention. This point is considered to be an important one by the Commission, and Bill B now provides, in clause 14(3)(b), that where an alternative to arrest has been used the arresting official must explain to the child his or her rights in the prescribed manner (which will be spelt out in the regulations).

4.25 The general recommendations regarding alternatives to arrest are that the alternatives set out in Bill A should remain, with the exception of the release of a child upon his or own recognisance, which has been removed.<sup>80</sup> The police are required to use the alternatives in all cases where children are

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<sup>79</sup> Clauses 105(a), 109(2) and 110(4).

<sup>80</sup> See clause 11(6) in Bill B.

charged with offences listed in Schedule 1 to the proposed Bill (less serious offences). If they fail to do so they are required to report this failure in writing, giving reasons, to the preliminary inquiry magistrate within 48 hours of such failure.

*Duties of police official upon arrest or use of alternatives to arrest*

4.26 The proposal that there should be a duty upon the police official effecting the arrest of a child to take such child to a probation officer within 12 hours generally met with support. The input from the Stepping Stones One Stop Youth Justice Centre indicated that this procedure is already followed in the area that the Stepping Stones Centre serves, and that it has been very effective. Superintendent Nilsson raised the concern that a probation officer may not be available within 12 hours. A workshop held with the police elicited the same comment. The Commission has accordingly extended the 12 hours to “as soon as possible and in any event not later than 48 hours”, and has made provision for the situation where the 48 hours may expire over a weekend or holiday.

4.27 There was broad support for the requirement that children be informed of their rights in language that they understand. By using the phrase “in language that he or she understands” the Commission had intended to convey both the idea of the vernacular language of the child as well as language of a level which is understandable to children. Consultations about the draft Bill revealed that this concept was not readily understood, and for that reason the phrase “in language that he or she understands” has been replaced by “in a manner appropriate to the age and intellectual development of the child”. This right, together with the right of the child to speak and be spoken to in vernacular language is, however, provided for in a new principle which has been included in clause 5(b) of Bill B, as this language right should be applicable at every stage of the process.

4.28 The report on consultation with children compiled by NICRO on behalf of the Law Commission (hereafter the “NICRO report”) revealed that 27.6% of the consulted children claimed to have been physically assaulted during the arrest procedure. A notable suggestion made by the children is that they should have access to a doctor, nurse or psychologist following an arrest in order to ensure that, should a child be assaulted during the arrest process, he or she can be treated and evidence of any

injury can be formally noted. Other suggestions were that the police should be held accountable if an assault occurs during or after an arrest, that police officials should identify themselves through the use of uniforms and name tags, that the police should produce a warrant before arresting children, and that parents should be more visible during the arrest procedure. The suggestion by children regarding access to medical examination and treatment is catered for by the fact that if a child is to be detained in police custody, he or she has the right to be examined or treated by a medical officer.

4.29 Superintendent Nilsson contended that when arresting a child, the police official must explain to the child what is going to happen to him or her and what procedure is going to be followed. This was considered by the Commission to be a valuable suggestion, and provision has been made in the draft Bill that the police are required, in addition to informing the child about his or her rights, to explain to the child the nature of the allegations against him or her and the immediate procedures to be undertaken.<sup>81</sup>

4.30 The NICRO report indicated that whereas 29.3% of children who were arrested stated that they were informed of their rights upon arrest, 53.4% submitted that they were not informed of their rights. When asked whether they were aware of the rights of an arrested person, the majority (70.7%) averred that they were not aware. Responses from the participating children indicated that they felt that had they been more aware of their rights, their cases might have had a different outcome. When asked to specify which rights in particular would have been useful to be aware about, the children responded as follows:

* Right to remain silent	13.8%
* Right to have parent or appropriate adult contacted	31%
* Right to have a parent or legal representative present during the noting of confessions, admissions or identity	
parades	13.8%
* Right to legal representation	15.5%
* All of the above	8.8%

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<sup>81</sup> See clause 14(1)(c).

4.31 In the light of the above the Commission has determined to retain the explanation of rights to children. On reflection, it has been decided that those rights which are included in the Constitution in chapter 35 need not be restated in the Child Justice Bill, and Bill B now states (at clause 14 (1)) that the police official effecting the arrest must inform the child of the nature of the allegations against him or her<sup>82</sup> and his or her rights, as well as the immediate procedures to be followed. The details about which rights should be included and the precise manner and type of wording to be used will be included in regulations or in police national instructions.

*Locating parents or another appropriate adult, and involving them in pre-trial stages*

4.32 Regarding the Commission's recommendation that the category of persons who should be notified of a child's arrest be extended to include an appropriate adult, Ms SL Kloppers, Public Prosecutor in Richmond, remarked that she foresees a problem where the children involved do not come from stable homes, since many young offenders are either street children or have domestic problems. She pointed out that the appropriate adult has a large, time-consuming role to play in the proposed process, requiring a measure of commitment and the knowledge to make informed decisions regarding the child and his or her rights.

4.33 The Gauteng Inter-Sectoral Committee, supported by the Welfare Department: Crime Prevention, on the other hand, submitted that it is an important consideration that appropriate adults be involved where parents are not available. The respondent submitted that many cases are delayed inordinately because of the previous rigidity of having only parents involved.

4.34 Referring to clause 17(2) of Bill A, Police Legal Services posed the question what the police are to do if the child identifies an adult who cannot be regarded as responsible or is not available, or if no adult is designated by the child. Probation officers, at a consultative workshop held in George, Western Cape, expressed concern that children might identify gang members, and raised the question whether the police or the probation officer would have the power to exclude certain persons or deem

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<sup>82</sup> Article 40(2)(b)(ii) of the Convention on the Rights of the Child provides that upon arrest a child must be informed promptly and directly of the charges against him or her.

them unsuitable. The Commission considered giving discretion to the police official to make a decision not to notify a person if he or she believes such person not to be suitable for that purpose. The Commission, however, concluded that this discretionary power might result in fewer children being able to access adult help. Two clauses have however been added to Bill B which deal with the concerns raised by respondents. First, the probation officer has the power to exclude any “appropriate adult” if the presence of such person is obstructing the completion of the assessment, and second, the inquiry magistrate may exclude such person from the preliminary inquiry.<sup>83</sup>

4.35 The Gauteng Inter-Sectoral Committee, supported by the Welfare Department: Crime Prevention, pointed out that in many instances the police do not do their work properly - they often neglect their duty to contact parents, and frequently reflect insufficient or incorrect details and home addresses on the docket, resulting in the probation officer having to spend many hours in tracing the child’s parents. The respondents conclude that legislation clearly spelling out police responsibilities will assist efforts in practice to locate a parent or appropriate adult.

4.36 Police Legal Services proposed that upon arrest, the child should be taken to the Community Service Centre where the Commander of that Service should be made responsible to ensure that reasonable steps are taken to locate the child’s next-of-kin. This respondent commented that this need not be done in legislation, as the Police National Instructions will develop guidelines to deal with the discharge of this responsibility. The responsibility could therefore simply be placed on “the police”.<sup>84</sup>

4.37 Superintendent Nilsson averred that to place the duty of informing the parents or appropriate adult of a child’s arrest on the arresting officer, is not always feasible in practice. The respondent explained that an arresting officer (mostly a uniformed branch member) who is not the investigating officer is bound to a police district and is responsible for responding to crime reported in that police district. If he or she leaves that district, any reported crime will be left unattended. In urban areas,

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<sup>83</sup> Clauses 41(2) and 57(4).

<sup>84</sup> See also M Chaskalson *et al Constitutional Law of South Africa* Cape Town: Juta 1996 at 33-11 *et seq* where it is argued that South African legislation should place the onus on the police to locate the parents.

children who commit crimes often stay in townships far away from the arresting officer's police district. The respondent agreed that the arresting officer should attempt to locate the parents and serve the required notice on them if they are in that officer's police district, and suggested that where they are not residing in such district, they must be requested to report at the place of the child's detention where the officials can release the child into their care and serve on them the notice to report at the assessment centre. Only if the arresting officer was unsuccessful in locating or notifying the child's parents, should the duty be placed on the investigating officer. This has been provided for in clause 16(2) of Bill B.

4.38 Superintendent Nilsson also pointed out that children feel threatened by police officials, often resulting in their giving false particulars. He called for extended use of the services of family finders, stating that their appointments are in the best interests of the child and can save the other departments both time and money. The Commission agrees that family finders are of great assistance in those areas where they exist. However, as the family finder is currently not recognised by the Public Service Commission as being an official category of worker, the decision to include them by name in the draft Bill would entail the creation of a new category of state employee, a step which cannot be taken without substantial consultation with the Public Service Commission and various professional bodies. It has thus been decided to allow probation officers to "authorise" other suitable persons to carry out certain functions on their behalf, and the work of family finders can thus be done in terms of this power to "authorise". A related difficulty is the fact that the draft Bill leaves the responsibility of locating and informing parents or appropriate adults with the police (as is the position under the current law), whilst the activities of family finders are likely to be developed under the auspices of probation services.<sup>85</sup> However, as the new system depends on closer inter-sectoral co-operation, it is believed that the joint efforts of police, probation officers and, where they exist, family finders, will result in more parents being located and informed about the arrest of their children in a shorter period of time.

*Duties of police upon the request of the probation officer*

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<sup>85</sup> The Welfare Department: Crime Prevention commented that although the police have the legal responsibility of finding parents and appropriate adults under the current system, family finders (where they exist) are being paid by the Department of Welfare.

4.39 The provision entitling probation officers to require police officials to notify persons of the appearance of a child at assessment, to obtain documents relevant to proof of age and to transport specified persons to assessment (clause 18 of Bill A) was criticised by Superintendent Hickman. The respondent contended that the responsibilities identified are those of the probation officer and should remain so. The Commission is of the view, however, that when the probation officer is in the process of assessing the child, trying to gather all information together to undertake an effective assessment, it is not unreasonable for him or her to request assistance from the police.

4.40 Regarding the provisions requiring the police to transport the parents or guardians, the Directorate: Secondary Legislation pointed out that the police are not allowed to transport private persons in SAPS vehicles. These provisions were also not supported by Police Legal Services. It was submitted that the provisions, as they stand, will have a significant financial impact on the police and that this should be brought to the attention of the Department of Finance once the Bill is referred to Cabinet. The respondent proposed that the police should be required “to render such assistance as may reasonably be practicable” to make arrangements for the transportation of the persons referred to and to obtain documents. A workshop attended by officials from the Department of Safety and Security elicited a comment that the duty to inform the child’s parents or an appropriate adult must centre on ‘reasonableness’, as such persons may be in a province different from the one where the crime took place. The Commission has noted these views and has adjusted the clause accordingly. Clause 44(1)(d) of Bill B thus empowers the probation officer to require the police officer to “ensure, as far as is reasonably practicable, the provision of transport in order to secure the attendance at the assessment of a parent of the child or an appropriate adult.”.

*Arrest by private persons without a warrant*

4.41 The only comment received on this aspect, provided for in clause 13 of Bill A, was from the Police Legal Services who expressed the view that this clause may be deleted *in toto* as the provisions of the Criminal Procedure Act are sufficient. This suggestion has been followed.

*Diversion by the police and police caution*

4.42 With regard to the system of formal cautions, Dr L Glanz from the Crime Directorate in the Department of Justice expressed a concern that until the proposed Integrated Justice System<sup>86</sup> is fully functional, in the sense that every police officer and probation worker will have access to a computerised central database, there will be no way in which a particular police official or probation worker would know whether a child has had previous warnings, or how many. In Dr Glanz's opinion the Integrated Justice System will only be functional in five to eight years' time. She cautioned that until the system is automated and supported by a database, it is going to be virtually impossible for service providers to have access to historical information.

4.43 Superintendent Nilsson did not support the formal cautioning system at all, stating that the police should not be required to perform a judicial function. In his view, the keeping of records of formal cautions would be unconstitutional in that the Constitution guarantees each person the right to a fair trial and to be presumed not guilty unless found guilty in a court of law. To use records of previous cautions against a child will, in his view, be a breach of the Constitution. Moreover, he was critical of the resulting increased administrative burden for the police that will ensue.

4.44 Superintendent Hickman asserted that according to administrative procedure a person can only give a cautioning after having applied his or her mind to the facts and having decided that a cautioning is appropriate. It was suggested that the Station Commissioner or Superintendent should either be on the panel making the decision or should hold his or her own inquiry.

4.45 The Gauteng Inter-Sectoral Committee, supported by the Welfare Department: Crime Prevention, suggested that a schedule should be developed for cases that can be considered for formal cautioning. The respondent also proposed that the SAPS should develop a monitoring mechanism to prevent the same child from being cautioned over and over again.

4.46 In similar vein, Police Legal Services called for the development of a schedule containing the specific offences for which a police official may issue an informal caution. The respondent also pointed

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<sup>86</sup> The Integrated Justice System is a planned inter-sectoral information system linked to the criminal justice system.

out that a number of practical problems will arise in respect of informal cautions, such as the accessibility of records of such cautions. Police Legal Services furthermore did not support the proposed system of formal cautioning, averring that apart from the fact that it would bestow upon the police a judicial function, it places an additional administrative burden upon them which would be extremely difficult to accommodate. It was submitted that the purpose of keeping registers at provincial level is unclear as it would not help members of the Police Service at local level. Police Legal Services suggested that the function of cautioning a child should be that of the inquiry magistrate.

4.47 The Law Society of the Cape of Good Hope was of the view that the provisions in the draft Bill relating to formal cautioning would be burdensome in the absence of regulations, but noted, with approval, the provisions in the draft Bill relating to informal cautioning and expressed hopes for a meaningful implementation of these provisions.

4.48 Having considered all of the above comments, the recommendations of the Commission with regard to informal and formal cautions are as follows: The possibility of informal cautions by police are retained. No specific list of cases is identified, as Bill B indicates that the detail with regard to police cautions will be included in the Police National Instructions. Formal cautioning has been removed as an action to be taken by police, following upon the fact that the police themselves expressed many possible problems ranging from the possibility of corruption to the difficulties relating to keeping records of such cautions. The formal caution is nevertheless still seen by the Commission as a useful diversion option, and therefore remains included in the list of diversion options in the chapter in Bill B on diversion, to be administered at the preliminary inquiry by the inquiry magistrate.

*Duty to inform the probation officer about the arrest of the child*

4.49 Superintendent Nilsson, referring to the requirement in clause 16 of Bill A that the arresting officer must inform the probation officer of the arrest of a child within 12 hours and within 72 hours if an alternative to arrest has been deployed, using different forms for this purpose, urged the Commission to combine the various forms into one, providing sections for different scenarios. Cautioning that the draft Bill will cause a substantial amount of paperwork to be done by the police, and pointing out that

at this time of high levels of crime, South Africa needs police officials to be on the street and not stuck or strangled in administrative procedure, the respondent suggested that the same form can be adapted to inform both the probation officer and the magistrate (with the notice to the magistrate being channelled through the probation officer).

4.50 The Welfare Department: Crime Prevention, while agreeing that detention in any form should be kept to a minimum and that a child should be assessed by a probation officer, submitted that provision should be made for weekends and long weekends. Bearing in mind that the proposed 12-hour period could expire before the next working day, the fact that staff from the various departments will have to be on call or work overtime will have serious financial implications. The respondent further contended that in many instances the parents of the child concerned do not want to accept responsibility for the child, and actually want him or her to spend a night in the cells to teach the child a lesson. The respondent suggested that these attitudes need to be addressed by the probation officer during the assessment of the child, and by the investigating officer once the parents have been contacted.

4.51 In the light of the above comments the Commission has decided to simplify the time frames relating to the notification of a probation officer by the police, and Bill B now requires that the police official who effected the arrest (or the alternative to arrest) must notify the probation officer within 24 hours of the arrest or the use of an alternative to arrest.

#### *Sanctions for police officials*

4.52 Superintendent Hickman criticised the offences created in clauses 21(7) and (9) of Bill A, asking why criminal offences are not also created in respect of probation officers, prosecutors and magistrates who fail to perform their duties. It was also pointed out, during a workshop held with officials from the Department of Safety and Security, that the creation of offences will only serve to alienate police officials and that if there is a sanction, the police merely would avoid matters where children are involved. It was suggested that other monitoring mechanisms, such as the Independent Complaints Directorate, be used. Police Legal Services echo these reservations and assure the Commission that the police will treat the custody of children with the required circumspection and that

failures by their members to comply with the Bill will be regarded in a very serious light. These concerns and comments regarding the sanctions for police officials have been accepted by the Commission and the sanctions have been removed.

*Conduct of the initial investigation by the police*

4.53 The Gauteng Inter-Sectoral Committee found it commendable that fingerprinting of children should be regarded as a measure which should not be resorted to before the holding of the proposed preliminary inquiry. Ms F Cassim also expressed support for fingerprinting not to be resorted to until the preliminary inquiry is held.

4.54 The Welfare Department: Crime Prevention cautioned that not being able to take fingerprints of children might delay the whole justice process. The respondent averred that the availability of SAP 69 forms<sup>87</sup> are often delayed and if one has to wait until the trial starts to request the criminal record, cases will be remanded more often. It would also be problematic to track children through the system without their being positively identified. The respondent contended that every person is subjected to fingerprinting at some stage of their lives. It was submitted that fingerprinting will assist in keeping track of repeat offenders.

4.55 The Commission is of the view that the provisions in Bill A are sufficiently balanced to ensure the protection of children, whilst at the same time not jeopardising the investigation of the offence.<sup>88</sup> Thus the provisions included in Bill B are the same as those which appeared in the Discussion Paper. This will ensure that whilst children are to be protected from the stigmatising experience of having their prints taken in instances where their cases are likely to be diverted away from the courts, the possibility is still available of the prints being taken if it is essential for the investigation of the case, is required for

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<sup>87</sup> Reflecting previous convictions of the accused.

<sup>88</sup> Cf FW Miller *et al* *The Juvenile Justice Process* 3<sup>rd</sup> edition United States of America: The Foundation Press 1985 at 210 which sets out circumstances under which fingerprints of children may be taken.

the establishment of the child's age, or is necessary to establish whether or not the child has previous convictions.<sup>89</sup>

4.56 Ms F Cassim was in favour of precautions being taken during the child's questioning, concurring that the child's legal representative, parent or an appropriate adult should be present. Police Legal Services were of the view that if the child has the right to have certain persons present at the noting of a confession, admission or pointing out, they should also have the right not to have such persons present. The implication, the respondent averred, is that a child who does not wish to embarrass a parent or guardian with the details of his or her misdeed, cannot confess privately. The respondent further contended that the draft Bill did not make it clear whether, if an alternative method of securing the attendance of a child at assessment has been used, the police official may take the necessary steps to ascertain whether the child has any mark, characteristic or feature as contemplated by section 37 of the Criminal Procedure Act. It was submitted that this will be necessary in order to provide the probation officer with information regarding previous convictions of the child.

4.57 The Commission is of the view that children are in need of special protection during the investigation, and the requirement should be retained that the taking of a confession, admission, a pointing out or an identity parade should occur in the presence of a parent, appropriate person or a legal representative. The question as to whether the child should be able to refuse this protection is now catered for in a proviso to the relevant clause, giving the child the right to refuse. Where the child does refuse, however, the draft Bill makes provision for the presence of an independent observer (to be selected from a roster compiled by the local child justice committee). As the child will not know this observer personally, the objection raised that the child may feel embarrassed to reveal what he or she has done is not an issue in such instances.<sup>90</sup>

4.58 With regard to the ascertaining of marks and the taking of blood samples raised by Police Legal Services, the provisions of the Criminal Procedure Act 51 of 1977 will apply, as no different

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<sup>89</sup> Clause 18 of Bill B.

<sup>90</sup> Clause 17 of Bill B.

procedures applicable to children are contemplated.

## **CHAPTER 5: DETENTION OF CHILD AND RELEASE FROM DETENTION**

### **Overview of the proposals in Discussion Paper 79**

#### *Introduction*

5.1 The arguments relating to the issue of release and detention were not dealt with in a separate chapter in Discussion Paper 79. The relevant discussion appeared in a variety of places in the chapters on pre-trial procedures pertaining to police powers and the preliminary inquiry. In view of the prominence of recent debates about the matter of pre-trial detention of children, especially the question of detention in prison, the Commission was of the view that a separate chapter on this issue was warranted. In addition, the fact that the Discussion Paper addressed decision-making about pre-trial detention in police cells and prison in several different sections tended to create some confusion. The Commission therefore decided, in the interests of clarification of this important area, to address all matters pertaining to detention as well as its counterpart, release, in one chapter.<sup>91</sup>

5.2 A discussion of the history of legislative interventions concerning the pre-trial detention of children was provided in the situational analysis in the Discussion Paper.<sup>92</sup> There have, however, been

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<sup>91</sup> Release and detention are therefore also dealt with in a dedicated Chapter in Bill B. See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

<sup>92</sup> At 15 - 16. In particular, this historical overview focuses on the 1994 legislative amendments to section 29 of the Correctional Services Act 8 of 1959, which prohibited the pre-trial detention of children under the age

developments since the publication of the Discussion Paper, which can usefully be dealt with in this introduction.

5.3 The amendments to section 29 of the Correctional Service Act 8 of 1959 were supposed to be of temporary duration. This was made clear by the insertion of a clause to the effect that the legislation would cease to be of effect after the expiry of a period of a year, which could be extended by one further year. The intention was to provide the Department of Welfare with a time limit within which to set up secure care facilities, which would serve as alternative placements for children who would otherwise be detained in prisons awaiting trial. However, owing to a drafting error in the section of the amendments which provided exactly which sections would cease to be of effect after the expiry of two years, the incorrect subsections were referred to. The consensus of legal opinion obtained from the State Law Advisers was that consequently, for the most part, section 29 (as amended) would not cease operation by virtue of the savings clause. Thus, section 29 continues to regulate the matter of juvenile detention.

5.4 During 1998, a new Correctional Services Act 111 of 1998 was enacted by Parliament. This Act, *inter alia*, regulates conditions of detention for awaiting-trial and sentenced prisoners. It does not provide for circumstances under which a person (adult or child) may be referred to a prison to await trial. In respect of adults, this falls generally in the domain of the Criminal Procedure Act 51 of 1977. It was predicted that in respect of judicial decisions to detain or release children, the applicable legislation would be the Child Justice Bill, which was still in the process of preparation by the

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of 18 years. Upon promulgation of this amendment in 1995, many detained children were released from prisons and police cells. However, a crisis in the administration of justice ensued, as places of safety, which were the alternative accommodation, were either unavailable, or ill-equipped to keep children charged with offences. The situation was resolved temporarily by the enactment of further amending legislation to once again allow pre-trial detention, but with stricter criteria. The amendments brought about by Act 14 of 1996 in essence limited detention in police cells to the first period following arrest, and distinguished between a limit of 24 hours for children below the age of 14, and a maximum of 48 hours for children over the age of 14 but younger than 18 years. In addition, Act 14 of 1996 prohibited the detention in prison of children younger than 14 years whilst awaiting trial. Children over this age, but younger than 18 years, could only be detained if charged with a serious offence specified in a schedule developed for this purpose, or if charged for an offence committed "in circumstances so serious as to warrant such detention" where the offence did not appear on the schedule. See, for a discussion of the above legislative amendments, J Sloth-Nielsen 'No Child Should Be Caged: Closing the Door on the Detention of Children' (1995) *SACJ* 47 and J Sloth-Nielsen 'Amending section 29 of the Correctional Services Act' (1996) *SACJ* 61.

Commission. There was, however, a concern that upon promulgation of the new Correctional Services Act, section 29 with its various amendments, being part and parcel of the old Correctional Services Act 8 of 1959, would be repealed along with that Act. This would, it was feared, leave a legislative vacuum regarding the detention of children awaiting trial.

5.5 At a more practical level, the numbers of children awaiting trial in prisons have continued to show a steady rise since the implementation of the amending legislation in 1996. From a low of 600 children in September 1996,<sup>93</sup> the numbers have grown to the extent that the daily average number of children awaiting trial in prisons around the country now exceeds 2 500.<sup>94</sup> This growth has continued unabated, despite the initiative called “Project Go”,<sup>95</sup> which had as one of its aims the assessment of all children awaiting trial with the aim of establishing which children could be transferred to places of safety, or could be released. Project Go failed to make any significant impact on the numbers of children awaiting trial in prisons, for reasons that could not be established with any clarity.

5.6 Progress in the development of secure care facilities<sup>96</sup> by the Provincial Departments of Welfare has not been as rapid as had been hoped. In a report<sup>97</sup> by the National Department of Welfare and Population Development submitted to the Parliamentary Portfolio Committee on Welfare and Population Development during February 2000, information was provided to the effect that only one facility is operational at this point, although several places of safety have improved features and security to the extent that they are functioning as secure care facilities. It is also now clear that even when the

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<sup>93</sup> This figure also provided the framework for early plans that were made within the Department of Welfare for the provision of secure care facilities. It was expected that accommodation for approximately this number of children would be required.

<sup>94</sup> See J Sloth-Nielsen and LM Muntingh ‘1999 Annual Juvenile Justice Review’ (2000) *SACJ* (forthcoming). The increase in numbers of children awaiting trial mirrors a similar increase in the numbers of adult prisoners awaiting trial. At the end December of 1999, there were 58 231 unsentenced prisoners in South African prisons, which represented a 139.98% growth over the number of unsentenced prisoners at the end of January 1995 (source: Department of Correctional Services).

<sup>95</sup> Launched and funded by the Department of Welfare and Population Development.

<sup>96</sup> The secure care programme aimed to ensure one such facility in each province, ranging from a 30 bed facility in the Northern Province, to 70 bed facilities in other provinces.

<sup>97</sup> A summary of the report is available at [www.pmg.org.za](http://www.pmg.org.za).

secure care programme is fully functional, the facilities will not be able to accommodate all children awaiting trial and requiring such an environment at the present time.<sup>98</sup>

5.7 Both as a result of the possibility that the new Correctional Services Act would be promulgated, leaving a legislative vacuum concerning the question when children may be detained awaiting trial, and owing to some concerns that magistrates were using the discretion granted under section 29 to detain children in circumstances where detention was not justified, the Department of Justice in consultation with the Department of Welfare, during the course of 1998, developed a possible amendment to the Criminal Procedure Act to regulate the detention of children. Introduced to the Portfolio Committee on Justice as Bill 59 of 1998, the Bill was subjected to intensive scrutiny by members of the Portfolio Committee, who then produced a further Bill on the issue, Bill 132 of 1998. Bill 132 of 1998 has not been finalised by Parliament at this stage.

5.8 The Commission has, however, studied Bill 132 of 1998 carefully, and regarded the contents as a useful addition to the available literature on detention. Since the Commission's recommendations in this area bear some evidence of the approach adopted in Bill 132 of 1998, examination of certain aspects of the Bill is regarded as being necessary.

5.9 Because the intention was to effect limited amendments to the Criminal Procedure Act pending the development of a comprehensive child justice law by the Commission, the Bill had to mesh with the existing structure of that Act. The Bill commences with the circumstances under which a child may, after arrest, be held in police custody. Very stringent<sup>99</sup> criteria for holding children in police cells were proposed.<sup>100</sup> A distinction was drawn between children charged with offences referred to in a proposed new Schedule 8, and those charged with other offences. In respect of those charged with less serious offences, the police official had to be satisfied that (amongst other things) the child could not be placed

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<sup>98</sup> See, however, the predictions contained in the AFReC report, *infra*.

<sup>99</sup> See the Memorandum on the Objects of the Criminal Procedure Amendment Bill 1998, which uses these words.

<sup>100</sup> See note 25 below.

in the care of parents or other appropriate adults, or in a place of safety. In respect of those charged with Schedule 8 offences,<sup>101</sup> the police official was required to satisfy himself or herself, *inter alia*, that the child concerned could not be placed, pending first appearance in court, in a secure place of safety<sup>102</sup> or in a prison. The overall thrust of the provision was that, where release could not be effected, detention facilities other than police cells had to be the first resort, even if this meant detention in a prison pending first appearance in court. Finally, in regard to police detention, the Bill required a police official who found it necessary to detain a child to provide the court with a report explaining why detention in police custody was necessary prior to first court appearance.<sup>103</sup>

5.10 Currently, Chapter 9 of the Criminal Procedure Act is set out in such a way that bail is in effect the primary mechanism for achieving the release of a person from detention. The wording of the heading<sup>104</sup> to section 72(1)(b) confirms that release of a juvenile on warning is an alternative to bail, but that bail constitutes the main instrument for securing the release of a detained person. Thus, Bill 132 of 1998 had of necessity to fit in with this framework, and the provisions on both detention in police custody and detention after first appearance in court were expressly subject to Chapter 9 of the Criminal Procedure Act, which regulates bail.

5.11 Proceeding from the premise that detention in prison was only possible in respect of a child charged with an offence listed in Schedule 8,<sup>105</sup> Bill 132 envisaged that detention in a prison after first

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<sup>101</sup> Or those already awaiting trial in respect of an offence referred to in Schedule 8, or those children with a previous conviction for an offence referred to in item 1 or 2 of that Schedule (to wit murder or rape) irrespective of the nature of the present charge on which they must appear.

<sup>102</sup> The Child Care Act 74 of 1983, at that stage, did not provide for secure care facilities, and referred only to places of safety. The Act was amended by Act 13 of 1999. The amending legislation provides for the establishment (by the Minister of Welfare) of secure care centres, which are defined as places for the reception and secure care of children awaiting trial or sentence.

<sup>103</sup> This provision was a feature of the 1996 amendments to section 29 of the Correctional Services Act, and it is notable that the provisions were retained in Bill 132 of 1998 despite police arguments that this reporting created unnecessary paper work for them.

<sup>104</sup> “Accused may be released on warning in lieu of bail.”

<sup>105</sup> Or where a child is already awaiting trial in respect of an offence referred to in that Schedule, or where a child (on any charge) has a previous conviction for item 1 or 2 of that Schedule (ie murder or rape). The other offences specified in Schedule 8 were: Robbery when there are aggravating circumstances or robbery

appearance in court would be contemplated only where an application for bail had been postponed, or bail had been refused. After this, consideration could be given to the further (more detailed) criteria enabling detention in prison.

5.12 By contrast, the starting point in Discussion Paper 79 was that because the vast majority of arrested children cannot pay monetary bail,<sup>106</sup> release into the care of a parent, or appropriate adult should be the first option for consideration. Only if there was some doubt as to whether the child would appear to stand trial, and if the child would otherwise remain in detention, would the setting of bail as an inducement to attend the trial be considered.<sup>107</sup> Despite some debate about the appropriateness of bail for children raised in Issue Paper 9, the Commission was of the view that denying children the opportunity to secure their release from detention by paying bail would place them in a worse position than adults, who have this right. Failing to provide for a limited form of bail could also be seen as a retrogressive step from a constitutional point of view. However, the Commission's view was that bail should be an alternative in the last resort to detention, rather than the primary mechanism for release.

5.13 Further to the above, the recent amendments to the Criminal Procedure Act regarding bail<sup>108</sup>

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involving the taking of a motor vehicle; assault involving the infliction of grievous bodily harm; indecent assault involving the infliction of grievous bodily harm; indecent assault involving a child under the age of 16 years; kidnapping; public violence; any offence referred to in section 1 or 1A of the Intimidation Act 72 or 1982; certain specified contraventions of the Drugs and Drug Trafficking Act 140 of 1992; certain specified offences relating to dealing in or possession of certain arms or ammunition; certain specified offences relating to corruption, extortion, fraud, forgery or theft, where large sums of money are involved or where the offence was committed by a person, group of persons, syndicate or enterprise in the furtherance of a common purpose or conspiracy; any other offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or enterprise acting to further a common purpose or conspiracy; and attempt to commit murder, rape or robbery as set out in items 1, 2, and 3 of the Schedule.

<sup>106</sup> See *Issue Paper 9* in this regard.

<sup>107</sup> In *Issue Paper 9* comment was invited as to whether bail (the payment of a sum of money) should not be excluded as a condition of release for children accused offences. In Discussion Paper 79, following the support received for this proposition, the conditions upon which a child could be released did not include the payment of money as bail (see p 320 and 344 in this regard), and bail was therefore not a feature of the proposals in Bill A. An exception was proposed in that prior to a decision to detain a child, the magistrate concerned was empowered to consider the granting of bail in order to ensure that detention was used as a measure of last resort (see *Discussion Paper 79* at 345.)

<sup>108</sup> In particular, the provisions of section 60(11)(a), which place the onus on the accused person, in respect of offences set out in Schedule 6, to adduce evidence which satisfies the court that exceptional

were made applicable to detained children by virtue of the wording of various subsections of Bill 132 of 1998. In this respect, too, the philosophy of the Commission in Discussion Paper 79 was that individual assessment would play a greater role in the child justice system, and only in respect of certain specified serious offences could detention in a prison even be considered. The emphasis was therefore different. Further, Discussion Paper 79 did not place restrictions on the possible release of children, even those charged with serious offences, into the care of parents or appropriate adults, whereas an onus on an accused child to provide compelling grounds for release on bail may be seen to constitute such a restriction.

5.14 Bill 132 of 1998 sought to abolish the rule in section 29 of the Correctional Services Act which provided that only children aged 14 years and older could be detained in a prison after first appearance in court. But, although no prohibition on pre-trial detention of children below the age of 14 was included, the wording of clause 71A(6)(b)(i) suggested that children below this age were to be treated differently. It was provided that a child under the age of 14 years could only be detained in a prison if the Director of Public Prosecutions or a person authorised by him or her issued a written confirmation that he or she intended to charge the child concerned with a schedule 8 offence, and stating that there was sufficient evidence to institute a prosecution.

5.15 As has been described in para 5.9, the approach in Bill 132 of 1998 was to provide for detention in a prison only if the child concerned<sup>109</sup> could not be placed in a secure place of safety. This approach differed from the approach in Discussion Paper 79 in two respects. First, Discussion Paper 79 did not allow for children charged with serious offences to be held in “ordinary” places of safety, if this was recommended at assessment and ordered by a judicial officer. By contrast, Bill 132 of 1998 does not appear to view the “usual” places of safety as alternatives to prison for the children governed by the Bill. Second, the wording indicates that if secure care facilities are available, detention in prison

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circumstances exist which, in the interests of justice, permit his or her release; and the provisions of section 60(11)(b), referring to an accused charged with an offence listed in Schedule 5, in respect of which the accused must satisfy the court that the interests of justice permit his or her release.

<sup>109</sup> That is, a child charged with a Schedule 8 offence, or awaiting trial on a Schedule 8 offence, or with a previous conviction for murder or rape.

pending trial is excluded. Discussion Paper 79, on the other hand, proceeded from the premise that detention in either places of safety and secure care can be recommended by a probation officer based on individual assessment (for any accused child who cannot be released), whilst the option of last resort is imprisonment, and then only for children charged with specified serious offences.

5.16 In addition to the limitations based on the fact that only children charged with an offence referred to in Schedule 8<sup>110</sup> could be considered for detention in a prison, Bill 132 of 1998 provided extremely detailed criteria to assist judicial officers to decide whether detention in prison was warranted. It has been suggested that the development of these criteria<sup>111</sup> was a response to criticisms of the way in which the 1996 amendments to section 29 were interpreted by magistrates. It has been argued<sup>112</sup> that the discretion to detain a child in prison for an offence committed in “circumstances so serious as to warrant such detention” allowed the offence to be over-emphasised at the expense of other considerations, such as the best interests of the child and the likelihood of an eventual prison sentence being imposed.

### **Evaluation of comment and recommendations**

5.17. The NICRO report presented children’s views on their experiences in custody. An overwhelming number of those consulted felt that children should not be held in police cells, for the following reasons:

- cells are unhygienic and dirty

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<sup>110</sup> Or children referred to in note 19, *supra*.

<sup>111</sup> The criteria are spelt out in clause 71A(7)(a) -(n) of Bill 132, and include such matters as the risk the child may pose to other children in a secure care facility, the period that the child has already been in custody, the probable period of detention until the conclusion of the trial, the state of health of the child, the risk of absconding from a secure care facility, and the seriousness of the offence in question.

<sup>112</sup> See A Skelton ‘Children, young persons and the Criminal Procedure’ in JA Robinson (ed) *The Law of Children and Young Persons in South Africa* Durban: Butterworths 1997 at 63. The Department of Correctional Services’ statistics have consistently demonstrated that over 50% of children in pre-trial detention are not charged with scheduled offences but have been detained through a broad interpretation of this clause by magistrates.

- there are not enough beds, blankets, toilets, showers and not enough light or food
- there is no privacy, and no space or recreational facilities
- there is no-one to assist when help is needed, and no contact with family
- cells are unsafe as children of different ages are held together, leading to sodomy and assault
- children became suicidal when alone and depressed.

5.18 The AFReC report makes some important findings as regards detention of children awaiting trial. The report estimates<sup>113</sup> that children spend some 1 275 000 days each year, or, put differently, 3 490 person-years in police cells or prisons without having been sentenced. Moreover, 20% of this time is spent in custody prior to first appearance in court. Assuming that the average detention period in a police cell is one week, then over 86 000 children are held in police cells during the course of each year. This is only slightly less than the total number of children arrested each year. And, assuming<sup>114</sup> that the average period of detention in prison is six weeks, then some 16 000 children are held in prison during the course of a year. The report continues: “In other words, it is estimated that children spend about 1 400 person-years in prison prior to the court making any ruling on their guilt, and a further 420 person-years prior to sentencing. The social and economic implications of these extended detention periods are enormous.”<sup>115</sup> However, the report predicts that substantial cost saving can be brought about by the introduction of the preliminary inquiry and the increased use of diversion. The time periods associated with trials of children will be reduced as a result of the smaller number of cases being brought to trial, which will also ultimately diminish detention costs.<sup>116</sup> Most importantly, a dramatic decrease will be brought about in respect of detention in police custody, as a direct result of the police taking most children they arrest directly to assessment.<sup>117</sup>

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<sup>113</sup> At 17.

<sup>114</sup> This was corroborated by data from the Department of Correctional Services, which showed that some 15 900 unsentenced children were admitted to prisons during 1998.

<sup>115</sup> AFReC report at 18.

<sup>116</sup> A further surprising cost saving is predicted in respect of police transport for children from places of detention to courts, a saving calculated to be in the region of R30 million per annum (See AFReC report at 23).

<sup>117</sup> AFReC report at 25.

5.19 A further important finding in the report is that although “it is generally thought that to reduce the number of children detained in police custody and prison many more place of safety and secure care facilities will need to be built”,<sup>118</sup> the analysis does not bear this out. Rather, implementation of the new system is expected to cause the demand for accommodation in places of safety and secure facilities to drop substantially, which can be ascribed to the increased use of diversion as well as greater operational efficiency in the trial stage, with faster processing of cases likely to result.

*General framework pertaining to release*

5.20 Most respondents supported the provisions in the Discussion Paper which sought to give effect to the constitutional principle that detention should be a matter of last resort. So, for instance, Magistrate Louwrens supported the starting point that the whole object of the Child Justice Bill should be for children to be treated differently from adults as far as incarceration is concerned.<sup>119</sup> The magistrate, Nqutu, agreed with the stance in Discussion Paper 79 that provided that release into the care of a parent or an appropriate adult must be considered as a matter of first resort. The magistrate, Vulindlela, was of the view that the proviso in the Discussion Paper to the effect that bail could be granted if a decision to detain a child had been made could not be supported. In his view, “juveniles have no source of income ... the granting of bail, albeit as a last resort, would therefore be a hollow, meaningless gesture.” Magistrate Laue of Durban expressed similar views. Ms Cassim of the Faculty of Law, Unisa, expressed the view that pre-trial detention should not be an option for children committing minor offences, and that pre-trial detention for those charged with serious offences should be determined by reference to a schedule of offences for this purpose.

5.21 The Commission has, with due regard to the provisions drafted in Bill 132 of 1998, concluded that release into the care of parents, guardians or other suitable adults should be considered as a matter of first resort in all matters where children are in detention. Where possible, release (with or without

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<sup>118</sup> *Ibid* at 19.

<sup>119</sup> He suggested, however, that, further to the provisions in the Discussion Paper, it should be provided that children of the same age must be detained together and that probation officers should have free access to the various places of lock-up or detention to ensure the children’s safety.

conditions) should be effected without a requirement that the child or his or her parents pay monetary bail. However, if detention in police custody would otherwise continue, or if a judicial officer is of the opinion that release into the care of parents or guardians is not possible, bail may be set in order to avoid the child being detained in police custody or in prison. The structure of the Chapter on detention and release in Bill B shows that the emphasis falls on considering release, with detention only to be considered if release is for some reason not possible. Since it is intended that the provisions in this Bill will constitute a “stand alone” legal framework governing detention and release, the provisions in Chapter 9 of the Criminal Procedure Act have not been made fully applicable to children subject to this legislation.

5.22 As a general principle, the Commission has sought to distinguish between children charged with serious offences and those charged with less serious offences, both with regard to detention in police custody and with regard to detention after first appearance before a preliminary inquiry. However, no prohibition on the possibility of a child charged with a more serious offence being released has been provided for, nor has any added burden of proof regarding release been contemplated.<sup>120</sup> The restriction on the detention in prison of children below the age of 14 years has been retained,<sup>121</sup> and only children charged with offences specified in Schedule 3 to Bill B may be remanded to a prison to await trial, and then only if referral to a place of safety or secure care facility is not possible.<sup>122</sup> Further details pertaining to the provisions on detention and release appear in the paragraphs below.

#### *Pre-trial detention in police cells*

5.23 Police Legal Services were of the view that detention in police custody for the first 48 hours, or for the extended further period of 48 hours, should only be permitted “if there is no other detention

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<sup>120</sup> Such as the burden of adducing substantial and compelling reasons why, in the interests of justice, a child should be released, as provided for in section 60(11) of the Criminal Procedure Act, 51 of 1977.

<sup>121</sup> The current position under section 29 of the Correctional Services Act, 8 of 1959.

<sup>122</sup> Three situations are contemplated in clause 36(4) of Bill B: that there is no such facility within a reasonable distance from the court at which the child is appearing; that there is such facility but there is no vacancy; or that there is evidence which shows that there is a substantial risk that the child will cause harm to other children in such place of safety or secure care facility.

facility available within a reasonable distance from the court and provided that the detention facilities at the police station are suitable for the detention of children and provide for the child to be detained separately from adults.” The submission explained further that in practice a magistrate can refer a child to a police cell for further detention regardless of the fact that there are insufficient facilities to detain a child separately from adults, or regardless of the fact that the cell facilities are inadequate for the detention of children. In their view, this places an intolerable burden on the official in charge of the cells, who cannot refuse to admit a child so referred, and who is bound by the court order. In the view of Police Legal Services, the addition of the proposed words would require the magistrate to think creatively of alternative solutions before remanding a child in police custody.

5.24 Although the Commission has some sympathy for the arguments expressed above, the burden of ensuring the provision of detention facilities, or the upgrading of police cells so as to provide for the humane confinement of arrested children, cannot be shifted to the bench. The correct approach, in the Commission’s opinion, is to provide in the legislation that conditions of detention of children in police custody must comply with internationally acceptable standards,<sup>123</sup> as well as with the rights accorded detained persons in the Constitution. This has therefore been provided for in Bill B. However, two aspects of the proposed legislation mitigate the apparent harshness of this stance. First, there are detailed and improved provisions enabling the release of children from detention in police custody that have been included in Bill B.<sup>124</sup> Second, the legislation incorporates a provision to the effect that where a child who is entitled to be released from detention in police custody for some reason cannot be released into the care of a parent or appropriate adult and cannot be released on bail, such child must be held in a place of safety if such facility is available within a reasonable distance from the place where the child will be assessed or where the preliminary inquiry will take place.<sup>125</sup> The referral to a place of

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<sup>123</sup> The requirement that children must be held separately from adults whilst in detention dates from the 1955 Standard Minimum Rules on the Treatment of Prisoners, an instrument to which South Africa is a party.

<sup>124</sup> Discussed in para 5.29 below.

<sup>125</sup> This provision draws to some extent on the relevant provisions of Bill 132 of 1998. This latter Bill was, however, more restrictive as regards detention in police custody within the first 48 hours, as it spelt out further criteria which had to be satisfied before a child could be placed in the cells. These were, *inter alia*, that exceptional circumstances demanded the holding of a child in police custody; that such detention was necessary in the interests of the administration of justice or the safety or protection of the public or such person; that the person has not been released on bail; that no care-giver was available, and that no place

safety is, however, conditional upon a vacancy existing. The Commission does not support the notion that children should be held in prisons,<sup>126</sup> in lieu of police cells, in the first 48-hour period. It has been established that the completion of assessments would be hampered; children would be less accessible to family and legal representatives, and prisons conditions are not necessarily any more ideal for the detention of children than are police cells.<sup>127</sup> In the view of the Commission, detention in prison (the most restrictive form of deprivation of liberty) should be a measure of last resort, to be ordered only by a judicial officer after consideration of all of the circumstances of a case, and should therefore not constitute an alternative to detention in police custody during the first 48-hour period.

*Time limits for detention in police custody prior to first appearance*

5.25 Ms F Cassim of the Faculty of Law, Unisa, expressed support for the provisions allowing the release of a child from police detention, although she suggested that a distinction be drawn between minor and serious offenders.<sup>128</sup> She argued further that detention in police custody should not exceed 48 hours prior to appearance at the preliminary inquiry, and that facilities should be appropriate for the detention of children.<sup>129</sup> The submission from the Stepping Stones Youth Justice Centre addressed the interpretation of the phrases dealing with “appearance before a court within 48 hours”, and assumed that the expiry of the 48-hour period would only occur on a court day, as provided for in section 50

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of safety was available within a reasonable distance from the court. Only once all these were met could a child be placed in the police cells. In the view of the Commission, commendable though this approach is with regard to limiting the placement of children in police cells, it is rather onerous for the police, especially in rural areas, where access to places of safety is very limited, and where placement in such facility virtually immediately after arrest would simply not be possible. Similarly, the police often require a few hours in order to trace parents of guardians, which is not self-evident in Bill 132 of 1998. This time taken in tracing parents or other adults may be required even where no exceptional circumstances exist.

<sup>126</sup> See the proposal to this effect in clause 71A(3)(c) of Bill 132 of 1998, which suggested that detention in prison was preferred to detention in a police cell.

<sup>127</sup> Due the large increase in children awaiting trial in prisons, severe overcrowding is presently being experienced by the Department of Correctional Services, with very negative consequences for children’s safety, health, access to adequate sanitation, and so forth.

<sup>128</sup> This has been effected in Bill B, clause 28 of which provides that a police official may not release a child charged with a Schedule 3 offence.

<sup>129</sup> She referred in particular to access to proper food, adequate clothing, medical treatment, access to family and legal representatives, access to educational materials and sufficient exercise.

of the Criminal Procedure Act.

5.26 The Commission has included a provision<sup>130</sup> which spells out the rights of children whilst in police custody, taking account of the suggestions made by respondents. In addition, the legislative provision stipulating that no child may be held in detention in police custody for longer than 48 hours before appearing before an inquiry magistrate, details (in clause 22) that if the period of 48 hours expires outside of ordinary court hours, or on a day which is not a court day, the child must appear before the preliminary inquiry no later than the end of the next court day.<sup>131</sup>

5.28 The Commission has provided that a child may be remanded in police custody pending the finalisation of the preliminary inquiry. In effect, this may mean that a child could be detained in police cells for a period exceeding the first 48 hours if, after appearing before the preliminary inquiry, such remand is effected. The provision is premised on the belief that remanding the preliminary inquiry will be necessary from time to time to locate parents or guardians, or to find a suitable diversion option, and that the probation officer may need to have access to the child during this period in order to further the process of diversion. The intention is not, however, that extended periods of detention in police cells be routinely ordered, and therefore a provision has been included to the effect that such remand may only be ordered where there are substantial reasons to believe that such remand will enhance the prospects of diversion of the child concerned.<sup>132</sup>

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<sup>130</sup> Clause 20 of Bill B.

<sup>131</sup> Numerous respondents at both workshops, consultations, Parliamentary briefings and written submissions raised queries about the provision in the Discussion Paper that compelled children in detention in police custody to be brought for assessment within 12 hours, or, if they had already been released from police custody after arrest, to appear within 24 hours at assessment. Whilst all role-players recognised the extreme vulnerability of children in detention in police cells, and the concomitant necessity of ensuring early intervention (in the form of assessment) to see whether release into the care of parents, guardians or other suitable adults could not be effected, concerns were expressed about whether probation officers would be sufficiently available to ensure compliance with the proposed time frames. It was almost universally suggested that 12 hours was too short a period to enable the police to find a probation officer, especially where full-time officers were not available. The Commission has thus provided that no child may be held in police custody for longer than 48 hours before appearing at a preliminary inquiry. Further discussion of this is to be found in Chapter 4 (Police Powers) and Chapter 6 (Assessment).

<sup>132</sup> Clause 65(3).

*Release from police custody*

5.29 Police Legal Services submitted that the proposals in Discussion Paper 79 did not adequately deal with the manner in which a child can be released from police custody. It was suggested that the question of pre-trial release be removed completely from the restraints of the provisions of the Criminal Procedure Act, and that a procedure exclusively for the release of children from police custody be drafted in the proposed legislation. In particular, it was pointed out that existing legislation<sup>133</sup> does not allow the police official to attach conditions to the release of any person, apart from warning the person of the place, date and time of the first court appearance. The power to attach further conditions would, in the view of the author(s) of that submission, be a welcome development. The submission continued to suggest that the release of a child on his or her own recognisance, as provided for in Discussion Paper 79, was not supported by the SAPS. They cited statistics which showed that in one magisterial district, 81% of bench warrants issued in respect of children who failed to appear concerned children who had been released on their own recognisances from courts. They were therefore of the view that a parent, next of kin or appropriate adult should be involved in the release procedure in order to ensure that the child takes responsibility for his or her actions. Superintendent Hickman of the SAPS, Northern Cape, also did not support the release of a child on own recognisance.

5.30 In accordance with the philosophy that detention, even in police custody, should be a matter of last resort, the Commission has included extensive provisions aimed at encouraging the police to release children prior to assessment or to appearance at a preliminary inquiry, where this is feasible. Thus, the rather restrictive provisions pertaining to release by the police currently in the Criminal Procedure Act have been replaced. There is now a duty upon the police to consider release of a child charged with a Schedule 1 offence, unless the child's parent or an appropriate adult cannot be located, or there are exceptional circumstances which warrant such child's detention.<sup>134</sup> This provision is designed to limit detention in police custody where a child is charged with a minor offence to a situation where such detention takes place only as a matter of last resort.

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<sup>133</sup> Specified in the submission as the Criminal Procedure Act and the Child Care Act.

<sup>134</sup> See clause 24(1) of Bill B.

5.31 Further, the relatively new provisions inserted in the Criminal Procedure Act<sup>135</sup> which allow release by the police for certain other offences, where this takes place in consultation with the Director of Public Prosecutions, are echoed in Bill B, providing yet further scope for pre-trial release. In this respect, the possibility of release in consultation with the Director of Public Prosecutions is determined by reference to those offences specified in Schedule 2 of Bill B. At the same time, though, it is manifest<sup>136</sup> that children charged with serious offences, which do not appear on Schedule 1 or Schedule 2, may not be released prior to appearance before a preliminary inquiry. Finally, as suggested by Police Legal Services, provisions have been drafted that enable the police to attach conditions where children are released from police custody, and these are to be found in clause 24(2). The specified conditions do not, however, include the payment of monetary bail, in accordance with the principle that as a general rule, bail should not be considered suitable for children unless there are no other options and the child is likely to remain in detention.

5.32 However, as the Commission views the possibility of setting bail as a useful way of ensuring that detention can be limited, a provision has been drafted enabling the police to set an amount of bail<sup>137</sup> in respect of children charged with Schedule 1 offences, where they cannot otherwise be released. The Bill provides further that in order to determine the amounts that may be set for such bail, the National Commissioner of the South African Police Service may issue a national instruction. Where a child is charged with a Schedule 2 offence, and his or her release may be effected in consultation with the Director of Public Prosecutions, bail may also be set if release into the care of parents or guardians is not possible, and the amounts may be determined by the National Director of Public Prosecutions<sup>138</sup> after consultation with the Minister of Justice and Constitutional Development.

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<sup>135</sup> Section 59A inserted by section 3 of Act 85 of 1997.

<sup>136</sup> See in this regard clause 28 of Bill B, which prohibits release from police custody where a child is charged with an offence referred to in Schedule 3. In accordance with the thinking evident in Bill 132 of 1998, however, such children may, if there is a vacancy, be held prior to first appearance in a place of safety or a secure care centre in lieu of detention in police custody.

<sup>137</sup> Commonly known as “police bail”.

<sup>138</sup> The National Director of Public Prosecutions is required to issue directives in this regard.

5.33 In accordance with the views expressed by respondents to the Discussion Paper, provisions enabling the release of children on their own recognisance by the police have not been included in Bill B. This means that children will have to be released into the care of a parent, guardian or other appropriate adult who can then take responsibility for ensuring that the child returns to attend further proceedings under this legislation.<sup>139</sup>

*Detention after the first appearance*

5.34 Superintendent Nilsson<sup>140</sup> was of the opinion that detention in police cells after the finalisation of the preliminary inquiry should be expressly forbidden.<sup>141</sup> A contrary view was expressed by some magistrates, including the magistrate, Pietermaritzburg, who stated that “... the blanket exclusion of police cells as holding places<sup>142</sup> cannot be supported. Appropriately designated police cells can offer far better conditions than most prisons, and children in police cells are certainly more accessible to lawyers, social workers and parents.” The Gauteng Department of Welfare and Population Development suggested that consideration be given to the establishment of pre-trial detention centres for each locality for children who have no guardians.

5.35 The Commission has endeavoured to ensure that the maximum use of diversion will be a feature of the new legislation, which will reduce the numbers of children requiring detention after the finalisation of the preliminary inquiry. However, where a matter cannot be diverted, and the case is referred to the child justice court for trial, the Commission is firmly of the view that further detention in police cells pending trial should not be permitted. This is the existing legal position under section 29 of the Correctional Services Act, and despite arguments that detention in police cells is more convenient (especially in rural areas), there is a broad consensus amongst non- governmental organisations, human

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<sup>139</sup> However, a judicial officer is empowered to release a child on his or her own recognisances, in accordance with present practice at some courts, as some magistrates argued for the retention of this power. See, further, clause 34 of Bill B.

<sup>140</sup> The magistrate, Hopetown, strongly supported the proposed prohibition on keeping children in police cells.

<sup>141</sup> This view was also implicit in the submission from Police Legal Services.

<sup>142</sup> After the finalisation of the preliminary inquiry.

rights bodies, many members of the SAPS, and the policies of the Inter-Ministerial Committee on Young people at Risk that long periods of pre-trial detention in police cells should not be allowed by law. Therefore, the Commission has provided that if a child is remanded in detention after the conclusion of the preliminary inquiry, such detention may not be in a police cell.

*Consideration of release of children at first appearance*

5.36 The issue of when children may be detained in prison pending trial is, surprisingly, one on which few comments were received. The Commission has, however, had regard to Bill 132 of 1998 in revising the detention provisions that were included in Discussion Paper 79. In particular, many of the criteria for the guidance of judicial officers that were suggested in Bill 132 of 1998, have been included in Bill B.<sup>143</sup>

5.37 As with the provisions pertaining to children in detention in police custody, Bill B provides that if a child has not yet been released at the preliminary inquiry, there is a duty upon the presiding officer to consider release of such child into the care of an appropriate adult. The magistrate concerned must have regard to the recommendations contained in the assessment report when making a decision whether or not to release a child. Further, the Bill sets out a number of conditions<sup>144</sup> that may be imposed when a child is released. Only if release into the care of parents or an appropriate adult is for some reason not possible, and the child would otherwise be liable to remain in detention, can the setting of bail be considered by the presiding officer.

5.38 As a general rule, where a child cannot be released into the care of a suitable adult, or on bail,

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<sup>143</sup> See clause 31, which refers to factors such as the best interests of the child, the availability of the child's parent or an appropriate adult, the likelihood of the child returning to the preliminary inquiry or court, as the case may be, the period for which the child has already been in detention, and the probable period of detention until the conclusion of the trial, the risk that the child may cause harm to himself, herself or others, and the likelihood that, if the child were convicted, a substantial period of imprisonment will be imposed.

<sup>144</sup> See clause 32. As with the section dealing with release by the police, the elaboration of these conditions is intended to ensure that monetary bail for children is an option only of last resort.

such child will be held in a place of safety or secure care facility.<sup>145</sup> This framework accords with the policies developed by the Inter-Ministerial Committee on Young People at Risk, and was supported by respondents at the workshops. Further to this, only when the conditions spelt out in clause 36(4) of Bill B are met may such child be detained in prison. In determining whether the child should be remanded to a place of safety or a secure care facility, the presiding officer is obliged to have regard to the recommendations contained in the assessment report, as it is through this screening process that it will be established whether the child's needs include secure containment.

*Limitations on children being detained in prison*

5.39 The Law Society of the Cape of Good Hope expressed the view that the minimum age at which children should be allowed to be detained in prison should be 14 rather than 16 years. Magistrate Collins, Pietermaritzburg, submitted that the list of offences that provided for which children may be remanded in custody in a prison, should be expanded to include housebreaking with intent to commit an offence, as well as theft of a motor vehicle. Police Legal Services commented that the offences for which a child could be detained in prison awaiting trial should be expanded to include the illegal possession of ammunition, firearms and explosives, and assault with intent to do grievous bodily harm.<sup>146</sup>

5.40 The Commission has, after careful consideration, decided that the minimum age at which children can be detained awaiting trial in prison should be set at 14 years. The Commission is of the view that detention in prison is not appropriate for children below this age, and is supported in this regard by the response to the Discussion Paper from the Department of Correctional Services, which maintained that the Department does not have the infrastructure, staff or facilities necessary for the humane treatment of children below the age of 14 years. As regards the proposal in Discussion Paper 79 that the minimum age could be set at either 14 or 16, the Commission has not opted for 16 years as a minimum age. There

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<sup>145</sup> See clause 36(1).

<sup>146</sup> They reasoned that children are used to transport illegal firearms and ammunition, which are intended to be used in serious violent crimes.

are several reasons for this, including the fact that secure care facilities have not developed as rapidly as had been hoped, and that alternative secure facilities for the detention of 14- and 15-year-old children may, therefore, not be readily available. Public submissions also preferred the possibility of detention in prison for children of 14 and older, as there is concern about some children of this age who are charged with serious offences. However, the Commission is hopeful that over time it may be possible to raise this minimum age, and for South Africa to progress towards a situation where fewer or no children are detained in prisons awaiting trial.

5.41 The Commission has provided, further, that only children charged with the offences specified in Schedule 3 in Bill B may be detained in prison awaiting trial. This approach accords with that in Bill 132 of 1998, which also permitted detention in prison only in respect of children charged with certain serious offences. The offences set out in Schedule 3 are based largely on the serious offences suggested in Schedule 8 to Bill 132 of 1998.<sup>147</sup> This Schedule did not include housebreaking or theft (save robbery where there are aggravating circumstances or where the taking of a car is involved, or theft involving amounts of more than R50 000, or, if a syndicate is involved, more than R10 000). The Commission is of the view that this is the correct approach, and accordingly does not propose to include theft or housebreaking in Schedule 3 either, other than in the exceptional cases specified above.

5.42 Finally, the legislative provisions clarify that a child may only be remanded to a prison where, in addition to the above circumstances, referral to a place of safety or secure care facility is not possible because there is no such facility within a reasonable distance from the court at which the child must appear, or there is such facility but there is no vacancy, or where there is a facility and a vacancy, but the judicial officer is satisfied, based on evidence placed before him or her, that there is a substantial risk

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<sup>147</sup> The offences included in Schedule 8 which have not been included in the Schedule to Bill B are: assault involving the infliction of grievous bodily harm; kidnapping; public violence; the offences referred to in section 1 or 1A of the Intimidation Act 1982, and “any other offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise, acting in the execution or furtherance of a common purpose or conspiracy.” The latter was not included as the Commission was of the opinion that this category could open the way to detention for virtually any offence where there are co-accused involved, in much the same way the intent behind the setting of a fixed schedule of offences attached to section 29 of the Correctional Services Act was subverted in practice with more than 60% of children being detained in prison for “offences committed in circumstances so serious as to warrant such detention”. Assault involving the infliction of grievous bodily harm can be similarly widely interpreted, and kidnapping charges where children are accused are extremely rare.

that the child concerned may cause harm to other children in such place of safety or secure care facility.

*Appearance in court after 14 days where child is in detention*

5.43 The Sub-directorate Crime Prevention through Development and Restorative Justice, Gauteng Province, questioned the provisions that required that children remanded after the finalisation of the preliminary inquiry in detention to places of safety, secure care or prisons be returned to court every 14 days for an investigation as to whether continued detention was necessary. It was argued that this was not practical due to the fact that SAPS experience transport problems and problems pertaining to staff capacity. They argued that staff capacity posed a problem for the Department of Justice, too, which was exacerbated by the provisions concerning remands of children in detention.

5.44 However, the Commission is of the view that judicial monitoring where children are in detention is necessary, and that it is indeed an integral part of ensuring the regular review of detention required by international instruments. Also, the findings of the AFReC report suggest that, owing to the emphasis in the legislation on diversion, fewer children will be remanded in detention. The consequent benefits for child justice courts would be that trials would be able to be processed more speedily, which would be occasioned by lower case loads. This, too, would mean that those children who are in detention will have their trials finalised more quickly, and fewer returns will then be necessary. In sum, the Commission is of the opinion that these factors, together with a relaxation of the 14-day period to a return period of 30 days (in the case of detention in a prison) and 60 days (in the case of detention in a place of safety or secure care facility), will ensure that the burden of transporting children and reviewing their continued detention is not as onerous as may at first appear.

5.45 The Commission is mindful of the fact that the above proposals, permitting the detention of children in prison in limited circumstances, could be said to represent a conservative stance, given the expectations of the 1994/1995 era that it would be possible to eliminate altogether the pre-trial detention of children in prisons in South Africa. Therefore, the Commission has resolved to place a time limit on

detention where children have been remanded to await trial in prison. Thus Bill B provides<sup>148</sup> that, save where a child is charged with murder, rape or robbery,<sup>149</sup> if the trial has not been concluded within six months and the child is in detention, such child must be released. The Commission believes that this will ensure that priority attention is paid to finalising those cases where children are in detention awaiting trial.

## **CHAPTER 6: ASSESSMENT AND REFERRAL**

### **Overview of the proposals in Discussion Paper 79**

#### *Assessment*

6.1 Assessment is a process of evaluation of a child, the child's development and competencies, and the child's home and family circumstances. With regard to a child accused of having committed a crime, an assessment would include an understanding of the circumstances surrounding the offence, its impact on the victim and the child's intention to acknowledge responsibility for the offence. Such pre-trial assessments of children accused of offences are generally conducted by probation officers<sup>150</sup> in the employ of Provincial Departments of Welfare. The main purposes of assessment are to determine whether diversion should be recommended and to recommend suitable placement if children cannot be released.

6.2 Discussion Paper 79 recorded that most of the respondents to the Issue Paper were of the view that assessment of each child should be mandatory, and should occur prior to any decision being made regarding the progress of the case. It was accordingly recommended that the proposed legislation should

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<sup>148</sup> In clause 81(4).

<sup>149</sup> As specified in item 1, 2, or 3 of Schedule 3.

<sup>150</sup> Subsequent to the publication of the Discussion Paper, amendments were made to the Probation Services Act (Act No. 116 of 1991) which included new provisions pertaining to the assessment function of probation officers. Bill 15A of 1999 made reference to *inter alia* assessment, diversion, and various other matters associated with the performance of this pre-trial function. The Bill was debated in the Portfolio Committee on Welfare and Population Development during 1999, but was not enacted. It may be enacted during 2000.

include the compulsory assessment of each child to take place as soon as possible after the child has been accused of committing an offence. Specific time limits within which this had to occur were spelt out in Bill A. The set limits were 12 hours where a child was in detention in police custody; 48 hours, where a child had been arrested, but had already been released from police custody; and 72 hours where an alternative to arrest had been used and there was less need for urgency. It was further provided that, where a child appeared before a preliminary inquiry and it appeared that, for some reason, an assessment had not yet been effected, this procedure could be dispensed with, but only in very limited circumstances and where this was in the best interests of the particular child.

*Assessment and the role of probation officer*

6.3 The Discussion Paper reviewed the role of the probation officer at some length, pointing out that the development of probation services was a key goal of the planned transformation of the child and youth care system.<sup>151</sup> It was explained that the functions of probation officers and social workers performing probation work on a sessional basis have expanded beyond the preparation and presentation of pre-sentence reports in the period since 1994, and more specialisation has occurred.<sup>152</sup> Various assessment centres<sup>153</sup> have been established in South Africa, and these initiatives have mainly centred upon expanding access to the services of probation officers in the preliminary stages of the proceedings, after arrest and before a child appears in court. They have also focused on practical ways to assist in locating families, on investigating and increasing the use of diversion, and on making the availability of

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<sup>151</sup> See in general IMC *Interim Policy Recommendations* (Department of Welfare and Population Development, 1996).

<sup>152</sup> J Sloth-Nielsen '1994 - 1995 Juvenile Justice Review' (1995) *SACJ* at 331. See too IMC *Report on the Pilot Projects* 1997 and 1998.

<sup>153</sup> Assessment centres have been set up in various urban areas and are providing a variety of services for children, including assessment. The "Stepping Stones One Stop Youth Justice Centre" described in Chapter 9 of this Report is one such example. The Stepping Stones initiative is more fully described in vol 1 no 3 ARTICLE 40 (Community Law Centre, 1999). The Probation Services Amendment Bill (note 1 above) provides for the establishment of "reception, assessment and referral services for the provision of early intervention with regard to children", and for the establishment of centres for that purpose. The enactment of this legislation will bring about a broadening of the functions of those assessment centres that are already operating in some areas of the country. The Bill focuses particularly on the services provided by probation officers in relation to reception, assessment and referral services and centres

social background histories of arrested children routine. The results are then supplied to the justice functionaries,<sup>154</sup> mainly prosecutors, to enable more effective and individualised decisions to be made. This initiative has set a precedent nationally, and many provinces are now establishing processes and procedures akin to assessment centres. In addition, many provinces have appointed additional staff to undertake assessments, and to ensure the extension of the service in smaller towns and the more rural areas.

6.4 In Discussion Paper 79, the Commission was of the view that effective diversion decisions would depend on the availability of reliable information about the child and his or her circumstances, and that the intervention of probation services before the first appearance in court would therefore be essential. Accordingly, it was recommended that there should be statutory provision for this in the proposed child justice legislation. It was also proposed that further duties and functions would be undertaken by probation officers in relation to the implementation of diverse aspects of the legislation. These included organising family group conferences,<sup>155</sup> keeping diversion records, and reporting back to the magistrate should diversion not be completed by the child concerned. It was thus envisaged that probation officers would play a central role, not just in relation to assessment, but as regards the whole system of diversion.<sup>156</sup>

#### *Referral and role of probation officer*

6.5 It was recommended by the Commission that probation officers should be given certain limited powers to decide on diversion where the offence is of a non-serious nature, and where there are no

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<sup>154</sup> In the Mitchell's Plain Pre-Trial Service Project, launched by the Bureau of Justice in 1997, similar functions are performed by bail officers, rather than social workers. See *Sunday Independent Newspaper* 15 March 1998.

<sup>155</sup> See Chapter 7 in this regard.

<sup>156</sup> For an analysis of the significance of probation in the overall philosophy of the Discussion Paper, see Julia Sloth-Nielsen 'The Juvenile Justice Law Reform Process in South Africa: Can a children's rights approach carry the day?' (1999) *Quinnipiac Law Review*.

other factors militating against such a decision.<sup>157</sup> The Commission gave the saving of time and costs as one reason for enabling diversion decisions in petty cases to be finalised by probation officers at assessment.<sup>158</sup> At times, the period between assessment and acceptance of a diversion recommendation may even be spent in detention, which is prejudicial to the best interests of the child. For these reasons, Bill A proposed that a probation officer should, in minor cases,<sup>159</sup> be able to effect a diversion immediately after assessment without the necessity of a preliminary inquiry. The intention was to enable, but not compel, diversion decisions in non-serious matters at the earliest possible opportunity.

6.6 The Commission proposed further that if the probation officer was of the opinion that the matter could be diverted at assessment stage, this diversion procedure should be explained to the child (and family members if present), after having established whether or not the child acknowledges responsibility for the offence. This would need to be done in a manner which fully protects the child's rights, as the child would be entitled to plead not guilty and protest his or her innocence at a trial.<sup>160</sup>

6.7 The Commission emphasised that although it was envisaged that the probation officer would have limited powers to divert in non-serious matters on a day-to-day basis, the probation officer would be guided and supported by the proposed child justice committee,<sup>161</sup> a legislated inter-sectoral committee which would exist in every district and meet regularly. The probation officer was required in Bill A to submit reports concerning these particular diversion decisions to the child justice committee,

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<sup>157</sup> Other such factors could be: the child does not accept guilt, the needs or wishes of the community require that the prosecution decide on whether diversion is appropriate, and so forth. The child should be assessed in terms of a pre-determined and approved method. The assessment should view the child holistically focusing on strengths. The seriousness of the offence and its impact on the victim should be factors taken into consideration when deciding whether or not to divert the child and to what type of programme, but should not be the sole or the most important factor.

<sup>158</sup> Where children appear for assessment after ordinary court hours, for example, they often have to wait for a juvenile court sitting during conventional court time for ratification of the recommendation on diversion (IMC *Report of the Durban Pilot Assessment, Reception and Referral Centre* 1997).

<sup>159</sup> Determined by reference to Schedule 1 of Bill A.

<sup>160</sup> Section 35(3)(c) of the Constitution. See too, A Skelton 'Diversion and due process' in L Munting (ed) *Perspectives on Diversion* NICRO 1995.

<sup>161</sup> See Chapter 12.

who could then examine them. However, this would be in the nature of an *ex post facto* evaluation, though, once made, decisions would not be able to be reversed.

6.8 The Commission concluded that in all other cases, where diversion was not effected at assessment, the probation officer must, after assessment, make recommendations regarding diversion on a prescribed form, which recommendations would be furnished to the prosecutor.

#### *Role of the prosecutor*

6.9 In the Discussion Paper the concepts of assessment and referral mechanisms, as well as the details pertaining to diversion, were linked together in one Chapter.<sup>162</sup> The Discussion Paper envisaged that prosecutors would continue to play a key “gate-keeping” role in regard to referrals for diversion. It was proposed that prosecutors could support the recommendation of probation officers and finalise diversion decisions where they agreed with the proposals contained in the assessment form. When the prosecutor was of the opinion that diversion was appropriate, even if it had not been recommended by the probation officer, he or she would still be able to divert, as is current practice. Only where the prosecutor was of the opinion that the matter was not suitable for diversion, would it proceed to the preliminary inquiry. The prosecutor could, of course, in any event decide to withdraw the case.

### **Evaluation of comment and recommendations**

#### *Assessment*

6.10 There was widespread agreement amongst respondents to the Discussion Paper that an individual assessment by the probation officer should be required for every arrested child.<sup>163</sup>

6.11 The report on consultation with children undertaken by NICRO indicated that of the children

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<sup>162</sup> See Chapter 8 of Discussion Paper 79..

<sup>163</sup> In addition to the more detailed submissions regarding assessment which are recorded in the text of the report, support for assessment was also indicated in the responses of Mr S Collins (Magistrate, Pietermaritzburg), the RP Clinic in Pretoria and the Inkatha Freedom Party.

who participated in the study, 55.2% stated that they were assessed by a probation officer. Of those, 60% were assessed within 48 hours of arrest, one was assessed 70 days after arrest and the rest were attended to by a probation officer between one and two weeks after arrest. The report showed that the majority of the assessments took place either at court, at a police station, at a prison or at a place of safety. The children felt that alternatives to these venues could include the office of the social worker or assessment in their own home.

6.12 The Legal Services Department of the South African Police Service (SAPS) welcomed the “much needed emphasis which ... [is placed] on the increased role of the probation officer”, and remarked that “this enhanced role ‘softens’ the criminal justice system and in doing so makes it more ‘child friendly’”. They supported individual assessment of all arrested children, and recommended that further provision should be made to enable the investigating official or any other police official to attend the assessment. The National Department of Welfare has indicated support for the provision that every child must be assessed by a probation officer in every case.<sup>164</sup> The Free State Department of Social Welfare supported the proposals regarding assessment, describing the provisions in the Discussion Paper as “very clear and precise”. The Department also supported the increased role of the probation officer. Whilst this increased role is seen as a positive development, the Department also pointed out that this has major human and other resource implications<sup>165</sup> for the Department of Social Welfare, particularly in rural areas.

6.13 The AFReC report<sup>166</sup> considered the financial implications of mandatory assessment and the concomitant expansion of probation services. The report concluded that costs for the provincial

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<sup>164</sup> The Probation Services Amendment Bill 15A of 1999 requires that there should be “mandatory assessment of arrested children.” It goes on to provide that every child who is alleged to have committed an offence shall within 48 hours of arrest be assessed by a probation officer who may, upon such assessment, make certain recommendations to the court.

<sup>165</sup> For example, the provision of transport.

<sup>166</sup> See para 1.17.

Departments of Welfare<sup>167</sup> will necessarily increase with the implementation of assessment, and greater spending on diversion by Welfare. However, whilst personnel costs will rise from approximately R2 million to R6 million upon implementation of the legislation, this being directly related to the increased demand for assessment services of probation officers, other costs currently borne by provincial welfare departments are expected to fall.<sup>168</sup> More pertinently, in order to realise savings at later stages of the proceedings (for example costs associated with trials, the detention of children pending trial and transport costs occasioned by repeated remanding of cases), the AFReC report argued that “greater expenditure is needed at the front end of the child justice system, most notably stages 2<sup>169</sup> and 4. The estimated increase of R28 million<sup>170</sup> across stages 2, 3 and 4 is relatively modest compared with the potential savings at later stages.”<sup>171</sup>

6.14 In view of the positive responses received in respect of the proposal of mandatory assessment contained in the Discussion Paper, the fact that the Probation Services Amendment Bill signals the intent of the Department of Welfare to ensure the provision of the necessary probation services, and the fact that from an economic stance, the proposal is not unrealistic, the Commission therefore recommends that the legislation should provide for a compulsory assessment of every child by a probation officer (or by a person authorised by a probation officer) before he or she appears before the preliminary inquiry magistrate. As the AFReC report demonstrated, without the requirement of assessment, the benefits of

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<sup>167</sup> Unlike other national departments, the Department of Welfare and Population Development’s role is restricted to policy development, implementation co-ordination and monitoring. The nine provincial welfare departments are responsible for the welfare sector’s day-to-day operational activities related to the proposed child justice system. See AFReC report at 47.

<sup>168</sup> Such as demand for the services of places of safety from children accused of offences. The AFReC report estimated that expenditure on this and other services could fall by as much as 55%. See the AFReC report at 48.

<sup>169</sup> The stage in the AFReC model is assessment. Stage 4 refers to the preliminary inquiry.

<sup>170</sup> This figure includes not only increased spending on assessment, but also extra expenditure on diversion (R18 million), as well as the welfare contribution to the proposed monitoring system.

<sup>171</sup> AFReC report at 21. The argument continued: “It cannot be emphasised enough that these initial stages and the provision of diversion must be adequately financed, as it is here that the overall success of the proposed changes to the child justice system will be determined. If children are not properly assessed, if the preliminary inquiry is not effective in diverting cases, and if diversion is not properly funded and organised, then the enormous inefficiencies which currently exist in the court system will persist.”

diversion and the central role of the preliminary inquiry cannot be achieved. Assessment is therefore an essential starting point for the proposed new child justice system.

*Exemption from assessment in certain cases*

6.15 Ms S Kloppers, Public Prosecutor, Richmond, whilst supporting the idea of an increased role for probation officers before the child's first appearance in court, was of the opinion that the responsibilities conferred on the probation officer by the Discussion Paper would constitute an impossible burden on them, especially in rural areas where there are few full-time probation officers. However, the Commission is of the view that since assessments by probation officers are already taking place in many urban areas, and since the increased provision of probation services has been taking place at provincial level over the last five years, the requirement of mandatory assessment is feasible. The Commission concedes that in rural areas, where there are fewer cases, where distances between districts may be greater, and where probation officers are more thinly spread, this may prove difficult. It is envisaged that probation officers would in most cases be able to be contacted in order to assess a child within the time periods envisaged in the draft legislation. However, the Commission is concerned to ensure that children do not languish in detention in police custody for lengthy periods whilst awaiting assessment and the arrival of a probation officer. Therefore, the Commission proposes that two further provisions be included to ensure that the situation does not impede the progress of the matter to the preliminary inquiry or to court.

6.16 First, the Commission proposes that although the assessment of a child prior to appearance before the preliminary inquiry should be compulsory as a general rule, a provision allowing for assessment to be dispensed with, at the preliminary inquiry, should be included. Thus, the police may not hold a child in custody for longer than the prescribed 48 hours period before taking the child to court for the holding of a preliminary inquiry. At the preliminary inquiry, if assessment has not yet been effected, the inquiry magistrate may order that this be done, or, in the alternative, may dispense with assessment if compelling reasons to do so exist, and if this is in the best interests of the child. Clearly, unnecessary delay (especially if in a child is being detained) in order to wait for assessment, where the matter can in any event be diverted, would provide such compelling reason. A further protection is that

the decision that assessment can be dispensed with may only be made by the preliminary inquiry magistrate. It will therefore not be incumbent upon any individual probation officer to decide that assessment need not take place, either as a general proposition, or in respect of a particular matter.

6.17 Second, the Commission recommends that the legislation should allow persons other than probation officers employed by the state to conduct assessments. The contracting out of services by the Department of Welfare has a long history in South Africa.<sup>172</sup> This can be especially useful for the provision of assessment services in rural areas, where there is no need for full-time personnel, employed by the state, to perform assessments. Some options here include delegation of the tasks to social workers employed by other welfare or church organisations, as well as people living in the community who have been designated as assistant probation officers.<sup>173</sup> Thus the Commission foresees that appointments of assistant probation officers could broaden the pool of personnel available to perform assessments, especially in rural areas.

6.18 In addition to the above, the Commission proposes that provision should be made for probation officers to undertake **or authorise** assessments. This would mean that where the Department of Welfare's probation services are understaffed, or even where specialised assessment services can be provided through other organisations, a delegation of the task of assessment to other suitable persons<sup>174</sup> can occur. The overall responsibility for assessment will, however, remain that of the probation officer.

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<sup>172</sup> See South African Law Commission *Issue Paper on the Review of the Child Care Act*, Issue Paper 13 (April 1998) at 33 *et seq.* As an example, diversion services have until now been largely provided by NICRO, who receive subsidies from provincial welfare departments for this.

<sup>173</sup> The statutory recognition of the appointment and role of assistant probation officers is to be effected by the Probation Services Amendment Bill 15 of 1999. In a proposed amendment to section 1, the definition of authorised probation officer will be substituted with the following definition: "An assistant probation officer means a probation officer authorised or directed by the Minister to perform any functions entrusted to an authorised probation officer and, except in section 9 and 15, includes an authorised assistant probation officer."

<sup>174</sup> For example, trained child and youth care workers, social workers in private practice and so forth. Also, where assessment skills are available through drug counselling centres, clinics, schools' psychological services and so forth, such delegation might be desirable in the interests of avoiding duplication of services.

*Period of time within which assessment must take place*

6.19 Much comment was received during the workshops on the proposals in the Discussion Paper regarding the stipulated periods of time within which assessment should be effected. The proposals were that assessment must take place within 12 hours where a child was in detention in police custody, within 48 hours where a child had been in police custody, but had been released, and within 72 hours where an alternative to arrest had been used.

6.20 The Legal Services Department of the South African Police Service raised concerns about the fact that the success or failure of the child justice system hinges to a large extent on the availability of probation officers, and that this may prove to be difficult in rural areas and after normal working hours. The submission maintained that it was unclear what time limits will apply if a probation officer cannot be traced within the proposed 12-hour period. Similar concerns were raised at nearly all the workshops at which probation officers were present. Some respondents were also of the view that setting three different time limits could lead to confusion. It is noted that the proposed amendments to the Probation Services Act, which will provide for mandatory assessment of arrested children, provide for this - in all instances - to be effected within the first 48 hours.<sup>175</sup>

6.21 In the light of the responses, the Commission has reconsidered its proposals regarding the periods of time within which assessment should occur. The Commission recommends that all arrested children should be assessed as soon as possible, but no later than 48 hours after arrest. This accords with the proposed amendments to the Probation Services Act, and, in any event, the child will have to be assessed within that period, as the preliminary inquiry must take place before the expiry of the 48 hours. However, where One-Stop Child Justice Centres<sup>176</sup> are designated, or arrest, reception and referral services are established in terms of the applicable probation legislation, it is envisaged that most children will be assessed shortly after arrest, rather than towards the end of the 48-hour period stipulated. The Commission further recommends that where a child has not been arrested, and an alternative to arrest

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<sup>175</sup> Section 4A of the Probation Services Amendment Bill 15A of 1999.

<sup>176</sup> See, in this regard, Chapter 9.

has been used, the written notice handed to the child should specify the time, date and place for appearance at assessment. This would not then be linked to any specific period of time at all, as the urgency required by virtue of the fact that a child is in detention would not apply.

#### *Purposes of and procedures at assessment*

6.22 In view of the support received for the proposals in the Discussion Paper regarding the purposes and aims of assessment, these proposals have been retained. The objectives include estimating the probable age of the child if uncertain, establishing whether there are prospects for diversion, establishing whether transfer to a children's court should be recommended, formulating recommendations regarding the release or placement of a child, and establishing what measures, if any, need to be taken in regard to children below the minimum age of criminal capacity, who are referred for assessment by the police. In instances of the assessment of a child above the minimum age of ten years, the probation officer will be required to produce an assessment report, in the prescribed manner, which will be made available to the preliminary inquiry magistrate.

6.23 The Commission has both refined and elaborated upon the procedures for assessment as spelt out in the Discussion Paper. Detailed provisions as to who may be present at an assessment are included, and further provisions as to when an assessment can proceed in the absence of any of these parties, save the child concerned, were added. The submission of SAPS Legal Services that a police official should be allowed to attend assessment, referred to above, has therefore been addressed. A provision enabling the probation officer to consult with any person with the view to obtaining information relevant to the assessment of the child has been included, as have further duties of probation officers in connection with the assessment function.

#### *Referral and the role of the probation officer*

6.24 Referral is central to the concept of diverting children away from the criminal justice system.<sup>177</sup>

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<sup>177</sup> Diversion is explained more fully in chapter 7.

It is the culmination of the process of decision-making regarding how children should be channelled in the system. Discussion Paper 79 recommended that not only should probation officers have the duty to make recommendations concerning transfer to the children's court and diversion, where appropriate, but also that they should be given the power to refer cases directly for diversion in certain specified instances.

6.25 The Provincial Inter-Sectoral Committee on Youth in Conflict with the Law (Gauteng) fully supported granting limited powers to probation officers to decide to divert certain cases. The Gauteng Department of Welfare (Sub-directorate on Crime Prevention through Development and Restorative Justice) echoed this support, as did the Free State Department of Social Welfare. Ms F Cassim of UNISA was in favour of a specially trained official working in conjunction with a multi-disciplinary team to effect diversion, and she expressed overall support for the recommendation that the probation officer should play a key role in referring a child for diversion.

6.26 However, other respondents were less supportive of this suggestion. The Director of Public Prosecutions (DPP) for KwaZulu-Natal expressed concern about the role of the probation officer regarding diversion decisions. He submitted that "the responsibility conferred on the probation officer to assess the child, inform him of his legal rights, interview him and make decisions on what action must be taken is very onerous and, I believe, flawed." The DPP pointed out that the authority to prosecute lies with the prosecuting authority in terms of both the Constitution and the Criminal Procedure Act. The decision to prosecute is based on evidence in the police docket which is ordinarily not available to the probation officer. Thus the decision to prosecute or to divert is a legal decision and, in the opinion of the respondent, probation officers are not trained or equipped to take these decisions. The DPP made the additional point that the probation officer would be faced with a conflict of interests if the proposals in Discussion Paper 79 were to be adopted. On the one hand, the role of the probation officer would encompass interviewing, assessing, and caring for the child and, on the other hand, he or she would have also to assess and weigh the interests of the complainant or victim. The DPP concluded: "I would guard against blurring of roles of the professionals involved. The different disciplines must work together but as much as the prosecutor will not take over the role of the probation officer, so the probation officer must not 'become' the prosecutor."

6.27 Ms S Kloppers (Public Prosecutor, Richmond) expressed similar concerns regarding the powers of the probation officer to make decisions regarding diversion. This, she suggested, would usurp the prosecutor's role as *dominus litis*; an additional factor is that these decisions often require some legal knowledge. She suggested that the clause be amended to read that the probation officer should consult with the prosecutor, leaving the final decision to divert (in lieu of prosecution) with the prosecutor.

6.28 Mr S Collins (Magistrate, Pietermaritzburg) expressed the view that giving probation officers the power to make decisions to divert cases interferes with the principle that a prosecutor in a criminal matter is *dominus litis*, and as probation officers are not answerable to the Director of Public Prosecutions, this power cannot be delegated to them. The Deputy DPP of the Western Cape agreed with this view.

6.29 The Legal Services Department of the South African Police Service, although generally very supportive of the probation officer playing an increased role in the pre-trial process, also expressed concern about the probation officer making decisions about diversion, especially in view of the lack of legal training of such persons. In particular, it was averred that probation officers may be unable to assess whether or not there is sufficient evidence to proceed with the case, which could result in the infringement of the child rights. The Department thus concluded that "perhaps the decision to divert should be left to the prosecutor. The probation officer may then be required to make a recommendation to the prosecutor."

6.30 In view of the strong criticism of the possibility of the probation officer having the power to divert certain petty cases, the Commission has not retained this provision, and recommends consequently that the probation officer, whilst retaining a pivotal role in the pre-trial management of children, should not have the power to make decisions to divert children. Probation officers will assess each child and make a recommendation regarding diversion.

#### *The role of the prosecutor*

6.31 The Commission has reviewed the role of the prosecution in the referral process, as set out in

par 6.9 above. However, although the prosecution's role as *dominus litus* has been strengthened in the envisaged legislation, and although the prosecutor will be entitled to withdraw charges at any stage of the proceedings, including after assessment and before appearance at a preliminary inquiry, the Commission is of the view (supported by responses) that the primary mechanism for referral of children to diversion options should rest with the preliminary inquiry. The reasons for this are provided fully in Chapter 8. The provisions in the Discussion Paper regarding the powers of the prosecutor to refer children to diversion programmes have accordingly been deleted.

#### *Detailed assessment*

6.32 In a briefing session with the management team of the Inter-Ministerial Committee on Young People at Risk (IMC), concern was expressed about the fact that what was called "assessment" in the Discussion Paper is a rather superficial screening. A proper in-depth assessment of a child would necessitate a thorough process of investigation, preferably conducted by a multi-disciplinary team, in surroundings conducive to the child being relaxed. The assessment referred to in the Discussion Paper would be done at the court or the police station, by a probation officer, in a limited period of time, probably on average within approximately 30 to 45 minutes. The IMC team were of the view that this should not be called assessment. In addition, the team recommended that opportunities be provided for in legislation to allow, in exceptional circumstances, a case to be remanded at the first appearance at a preliminary inquiry, in order that a more thorough assessment could take place, preferably with the child being assessed in his or her own home or some other community setting, rather than in an institutional environment.

6.33 A similar comment was received in writing from the Director of Childline, KwaZulu-Natal. The Director's submission focuses on children charged with sexual offences. Childline offers medium and longer term programmes for therapeutic intervention for these children, who are generally referred from criminal courts<sup>178</sup> in the region. She suggested that where admission to a sexual offenders programme is to be considered, it should be possible to defer the finalisation of the preliminary inquiry until the

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<sup>178</sup> Both as diversion, and as a condition of suspension of postponement of sentence.

assessment process is complete. She submits that in complex cases, such as one in which one child has sexually abused another child, “the time period given within which the inquiry must take place is too short for an assessment to be completed in relation to a decision regarding diversion.” However, the submission acknowledged the inherent dangers in permitting a longer remand for thorough assessment. Such an approach may result in lengthy periods spent in detention for such children, and the leeway granted to postpone a case for detailed assessment may be abused, and become the norm rather than the exception.

6.34 These concerns have been noted by the Commission. With regard to the use of the word “assessment”, research has indicated<sup>179</sup> that the growing practice in South Africa regarding the assessment of children has been to use this word to cover both the initial or preliminary assessment which was meant in Discussion Paper 79, as well as to refer to a more complex and complete process of assessment. The Commission concedes that, ideally, assessment is a long term process involving observation of a child at close quarters by a well-trained multi-disciplinary team. It must be recognised, however, that this is very difficult to achieve within available resource constraints. The Commission has been at pains not to build compulsory processes into the proposed system which may prove too unwieldy or costly to be effected. Emphasis has been placed on protection of children from delays which may cause them to remain in custody for longer periods than are necessary. The Commission is furthermore of the view that although some arrested children may need to be the subjects of more in-depth assessment before sound decisions can be made, there are also many cases in which a brief assessment of the type proposed in the Discussion Paper would suffice. Probation officers will need training to equip them to distinguish clearly between children with differing needs in this regard. The Commission has, however, considered the valuable suggestions that there will be some children who may require more detailed assessment, and that provision should be made for such cases. Such cases include those where the child may be a danger to himself or others, where the child has a history of repeat offending or abscondment, where the child has a long history with the welfare authorities, where the child is using drugs or alcohol, or where the possible admission of the child to a sexual offenders programme,

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<sup>179</sup> There are a number of centres in the Western Cape carrying out this type of initial assessment, and these centres are called “Assessment Centres”. The word is used repeatedly in the Probation Services Amendment Bill (note 1, *supra*) to refer to the procedure contemplated in the Discussion Paper.

substance abuse programme or other specific intensive treatment programme is being considered. Limitations have however been included to ensure that this procedure is used only by way of exception, and these are discussed further in Chapter 8 below.<sup>180</sup> In addition, in view of its widespread acceptance, the Commission has retained the word “assessment” to describe the procedures performed by the probation officer, as detailed in this Chapter.

## CHAPTER 7: DIVERSION

### Overview of the proposals in Discussion Paper 79

#### *Introduction to the concepts of diversion and restorative justice*

7.1 Diversion means the referral of *prima facie* cases away from the criminal courts,<sup>181</sup> with or without conditions. The conditions can range from a simple caution, or participation in particular

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<sup>180</sup> See paras 8.39 and 8.40.

<sup>181</sup> See further L Muntingh (ed) *Perspectives on Diversion* NICRO National Office Cape Town: 1995

programmes, to reparation or restitution. Diversion affords the child an opportunity to avoid the stigmatising and brutalising effects of the criminal justice system, and to avoid the enduring disadvantage of a criminal record. The child is nevertheless held accountable for his or her actions, as diversion is predicated upon a requirement that the child should acknowledge responsibility for the offence. In addition, many of the youth diversion programmes that have been developed teach children about the impact of their offence upon others, and serve an important preventative purpose insofar as they impart valuable life skills.

7.2 Although not specifically included in any South African legislation, diversion is already practised to some extent<sup>182</sup> in South Africa, through the withdrawal of charges by prosecutors, usually on condition that the child attends a programme or undertakes community service.<sup>183</sup> The desirability of increasing access to diversion (especially for young people) has been well accepted in South African policy documents,<sup>184</sup> following the requirement of article 40(3)(b) of the United Nations Convention on the Rights of the Child to promote the establishment of laws and procedures to provide for measures for dealing with children accused of crimes without resorting to judicial proceedings. A recent evaluation of diversion programmes<sup>185</sup> undertaken by NICRO, in the course of which past candidates were traced in order to establish whether they had, for a period of a year after conclusion of the programme, refrained from reoffending, revealed that the recidivism rate was only 6%.<sup>186</sup>

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<sup>182</sup> According to L Muntingh of NICRO the organisation provided diversion for 8 000 children during 1998 and they hope to expand this to 10 000 during the year 2000. Some provincial Departments of Welfare also offer diversion services, and are currently expanding the range of available diversion options.

<sup>183</sup> A Skelton 'Children, young persons and the criminal procedure' in JA Robinson (ed) *The Law of Children and Young Persons in South Africa* Durban: Butterworths 1997.

<sup>184</sup> See the White Paper for Social Welfare (Department of Welfare, 1994), the National Crime Prevention Strategy (Government of the republic of South Africa, 1995), the Policy Document on the Transformation of the Child and Youth Care System (Inter-Ministerial Committee on Young People at Risk, 1996) and the National Programme of Action for Children (Department of Health, 1995).

<sup>185</sup> The programmes currently offered by NICRO are: the Youth Empowerment Scheme (YES), the Victim Offender mediation programme (VOM), family group conferencing (FGC), community service orders, and The Journey programme, for high risk children.

<sup>186</sup> See LM Muntingh 'Does Diversion Work?' November (1999) *Article 40* 8. This statistic represents, by international standards, an extremely low recidivism rate.

7.3 Recent case law has reviewed aspects of juvenile diversion with apparent approval, although the decision in *S v D*<sup>187</sup> suggests that, under the present legal regime, young people do not have any legal right to be considered for diversion, however appropriate and beneficial this might be in a particular instance. In *S v Z en Vier Ander Sake*<sup>188</sup>, the general guideline was laid down that before commencement of a trial the court must, in appropriate cases, promote the enrolment of the accused in a juvenile diversion programme. Specific reference was made to the diversion programmes offered by NICRO, and the judgment reproduces in full the directive of the Director of Public Prosecutions of the division regarding the procedures to be followed by prosecutors in effecting diversion.<sup>189</sup>

7.4 Restorative justice is a concept of justice which proceeds from an understanding that a peaceful society rests on the balance of rights and responsibilities. When this balance is upset by the commission of an offence, the purpose of justice is to restore the balance, repair the harm, heal relationships and encourage the victim and the offender to carry on with their lives. It is an approach which favours participation of the victim in the resolution of the conflict.<sup>190</sup> In the field of juvenile justice internationally, there has been a trend towards increased use of restorative justice methods. In New Zealand, the youth justice system centres on a procedure known as the family group conference in which the child is brought face to face with the victim of the crime, and the family (or extended family) then makes a plan to make amends for the crime, often involving restitution. Part of the plan is often formulating a plan to avoid future offending. The innovative New Zealand model has been the subject of experimentation, in various forms, in a number of countries.<sup>191</sup> Restorative justice approaches are suitable for both diversion and alternative sentencing options.

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<sup>187</sup> 1997 (2) SACR 673 (C).

<sup>188</sup> 1999 (1) SACR 427 (ECD).

<sup>189</sup> At 437c - 438h.

<sup>190</sup> A Skelton 'Developing a juvenile justice system for South Africa: international instruments and restorative justice' (1996) *Acta Juridica* 180. For further information about restorative justice see H Zehr *Changing lenses: a new focus for Criminal Justice* 1990, B Galloway and J Hudson *Restorative Justice: International Perspectives* Kugler Publication 1996.

<sup>191</sup> See J Considine *Restorative Justice: Healing the effects of crime*, New Zealand (1998); see further, J Hudson, A Morris, GM Maxwell, and B Galloway *Family Group Conferences - Perspectives on Policy and Practice* Australia: The Federation Press 1996.

*Inclusion of diversion and restorative justice as central features*

7.5 In Discussion paper 79, the Commission proposed that diversion of child offenders away from the criminal justice system (in cases where this would be appropriate) should be a central objective of the proposed new system.<sup>192</sup> The Commission stressed the importance of police, probation officers, prosecutors and presiding officers taking an imaginative and innovative approach to diversion. Given the fact that formal diversion programmes, such as those offered by NICRO, might not be available in every area of the country, the responsibility would rest on all responsible officials to examine how existing resources in the community could be used. It is interesting to note that in New Zealand, the State does not always provide programmes for children, but requests the family group conferences<sup>193</sup> to come up with their own “plans”.<sup>194</sup> These activities can be supervised by community members rather than by professionals. The Commission pointed out that in South Africa, a similar approach could ensure that in rural areas, where fewer opportunities for referrals to formal diversion programmes exist, the child could be required to carry out tasks such as carrying water from the river for neighbours, or tending animals. The utilisation of any existing services, provided by other non-governmental organisations,<sup>195</sup> community structures<sup>196</sup> or by other State Departments,<sup>197</sup> where these exist, was also encouraged.

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<sup>192</sup> See Discussion paper 79 pages 140 - 164 for a full discussion on diversion. See further AP van der Linden, GBCM van der Reep, FGA ten Siethoff & AEIJ Zeijlstra-Rijpstra *Jeugd en Recht* Houten: Bohn Stafleu Van Loghum 1994 at 96 where it is stated that the diversion philosophy has been introduced in several areas in the Netherlands with great success. See further S Terblanche and J van Vuuren 'Wat gemaak met kindermisdadigers?' (1997) *SACJ* at 174, 184 where support is expressed for the Juvenile Justice Drafting Consultancy's 1994 recommendations which are based on diversion.

<sup>193</sup> Which are constituted by the family of the child, the victim, a youth justice worker and other concerned parties.

<sup>194</sup> See Chapter 4 of Discussion Paper 79. The plans usually include an apology to the victim, compensation where applicable, and some type of community service. The community service very often takes the form of cleaning up the neighbourhood where the child lives (for example painting walls, or picking up litter off the beach).

<sup>195</sup> For example, organisations with dispute resolution and mediation programmes.

<sup>196</sup> See the proposals regarding community courts mooted in the Law Commission *Discussion Paper 87* on Community Dispute Resolution Structures.

<sup>197</sup> For example, substance abuse programmes offered by health departments.

7.6 In suggesting that diversion be formalised in child justice legislation, the Discussion Paper also noted that NICRO had in recent years expanded its diversion programmes (in number, range and provincial spread), and there were strong indications that government was intending to provide more diversion options in the future.

7.7 The Commission therefore concluded that it is both realistic and feasible to include diversion as a central feature of the proposed legislation. However, the Commission expressed the view that there would be a need for some detail in the proposed legislation regarding diversion options, and that matters such as the duration of diversion orders, the content and different forms of diversion should not be left entirely to the discretion of officials working within the system. The Commission was mindful of various risks if diversion was not properly regulated - risks such as the use of diversion options which are disproportionately severe, which contravene basic human rights, which are harmful or exploitative to the children concerned, or which are actually intended to further the sectoral or personal interests of the diversion provider.<sup>198</sup>

*Legislative guidance on diversion options in the Discussion Paper*

7.8 Flowing from the recommendation that probation officers should have a “bank” of possible diversion options to draw upon,<sup>199</sup> a list of possible diversion options, similar in effect (though more detailed) to the present section 297 of the Criminal Procedure Act<sup>200</sup> were spelt out in Bill A. In addition, reference was made in Bill A to a number of new orders,<sup>201</sup> which could be employed to assist in developing inexpensive diversion plans designed to fit an individual child. Some possibilities that were detailed were supervision and guidance orders, compulsory school attendance orders, positive peer association orders and placement under a reporting order. These were intended to be inexpensive and

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<sup>198</sup> Examples of this might include organisations using children to undertake unpaid work which profits the organisation, and religious groups providing diversion as a means of evangelising or recruiting young people.

<sup>199</sup> The options are listed in Discussion Paper 79 at page 153 para 8.43.

<sup>200</sup> Section 297 provides for sentencing alternatives other than imprisonment.

<sup>201</sup> The detail and content of these were apparent from the Forms which were attached to Bill A.

realistic options in less serious cases, and had as a central underlying theme the idea that they would be of assistance to parents and families.

7.9 The Discussion Paper also provided a set of minimum standards relating to the content of diversion options, in order to minimise the risks spelt out in para 7.7 above. For example, it was proposed that corporal punishment and public humiliation may not be elements of diversion, and that diversion programmes must not interfere with a child's schooling. These (and other) principles were premised on the idea that innovative diversion options may be developed at a local level for individual children where organised or formal services are not available or are not appropriate in a particular instance, but that guidance on what diversion seeks to achieve should be provided for in legislation.

7.10 In order for diversion to be an effective and realistic alternative, the Commission considered it essential that there should be consequences for non-compliance with diversion conditions. It was stated that these consequences should be clearly explained to the child and his or her parent or guardian by the person who makes the decision to divert. In cases of failure or non-compliance, it was recommended that the child should be arrested and should appear at a preliminary inquiry where the inquiry magistrate should inquire into the reasons for the failure. If the failure was due to a misunderstanding or to circumstances beyond the control of the child or his or her family, the child should be given an opportunity to complete the diversion, with the necessary support. The conditions or content of the diversion plan could then be altered. But, in situations where the failure was due to lack of co-operation or negligence on the part of the child, the criminal charge might be reinstated.

7.11 The Commission recommended that probation services should keep a record of each diversion decision made, and that such information should be kept on the child's file.<sup>202</sup>

### *Levels of diversion*

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<sup>202</sup> With the introduction of the integrated criminal justice information system this information will in the future be computerised. However, until such time as this becomes possible, alternative methods of record keeping should be used.

7.12 Diversion options can be imposed at different levels of severity - for example, there is a distinction between, on the one hand, an apology or a caution, and on the other, referral to an intensive treatment programme of medium-term duration. The Discussion Paper attempted to provide guidance to those choosing an appropriate alternative to prosecution. This was effected by incorporating in Bill A four distinct “levels” of intensity, although the Bill referred to these levels as “diversion in the first instance includes ..., diversion in the second instance includes ...” and so forth. The main aim of this was to ensure some degree of proportionality, so that a first offender for a petty offence does not attract a disproportionately severe set of conditions and obligations as a diversion.

*Cases qualifying for diversion*

7.13 The Discussion Paper raised the question as to whether the diversion of certain cases should be made compulsory, and whether certain (possibly more serious) cases should be excluded from consideration for diversion. An alternative approach would be to leave this in the discretion of those making diversion decisions. The Commission concluded, after some discussion and comparative analysis, that the latter approach should be supported, rather than the approach which excludes the consideration of diversion altogether in some instances.<sup>203</sup> This was further supported by policy initiatives in the field of the transformation of the child and youth care system,<sup>204</sup> and public responses which provided support for an individualised approach to each child who is in conflict with the law.

*Constraints regarding diversion of younger children*

7.14 The Commission recommended that all children should be entitled to benefit from diversion options, and that legislation should make it clear that youthfulness is not a barrier to referral. However, in accordance with the ILO Minimum Age Convention pertaining to child labour, it was proposed that

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<sup>203</sup> See the results of the IMC *Report of the Durban Pilot Assessment, Reception and Referral Centre* (Report on the Pilot Project, IMC, 1998) where respondents, including social workers and prosecutors, were asked whether there were offences categories for which they would not allow diversion. The preponderance of opinion from both groups was that, in practice, diversion decisions rest on the circumstances of the case, rather than on any classification of the charge.

<sup>204</sup> The IMC policy documents and process are relevant here.

children under the age of thirteen years should not be required or permitted to perform community service or other work<sup>205</sup> as an element of diversion.

## **Evaluation of comment and recommendations**

### *Inclusion of diversion and restorative justice as central features*

7.15 The proposed inclusion of a specific and detailed legislative framework for diversion was widely acclaimed by respondents and participants at workshops. In particular, submissions welcomed the proper regulation of diversion by law. NICRO wholeheartedly supported the increased emphasis placed on diversion in the child justice system, as was evident from the proposed legislation. The written submission pointed out that internal research and evaluations have shown that diversion is an effective and efficient way of dealing with young offenders, a recent study having found that only 6.5% of participants in NICRO diversion programmes re-offended in the first 12 months after attending a programme.

7.16 Ms S Kloppers ( Public Prosecutor, Richmond), also supported the various diversionary strategies, attempting to keep the child out of the criminal justice system, aiming to make the child accept responsibility for his or her own actions, and including the victim as a relevant role- player. Ms F Cassim of UNISA was also in favour of diverting child offenders away from the legal system. She was of the view that diversion should ideally be used for less serious offences, and that, as a consequence, diversions could safely be community-based. She continued to say that a variety of community-based programmes such as treatment, counseling, education, recreational activities and those which impart useful job skills could be used to divert children from criminal activities. She also supported the setting out of consequences for non-compliance with diversion conditions, as this would, in her view, make children accountable for attendance or compliance with conditions, and they will not consider diversion

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The present position is that community service orders imposed as a pre-trial diversion may not be imposed upon children below the age of 15. This is in accordance with the provisions of sections 297 of the Criminal Procedure Act, which limits community service orders imposed as an alternative sentence to persons 15 years and older. The selection of the age of 15 is in all probability linked to the minimum age at which children may work.

as a “soft” option.

7.17 The Inkatha Freedom Party strongly supported “the stated aim of providing individual responses to offences whilst holding the child accountable.” The IFP submitted further that practical problems may arise, and, in order to ensure success of the system, diversion should be closely monitored by the proposed Office for Child Justice and the proposed National Committee for Child Justice. Successes and failures should be reported to the Parliamentary Portfolio Committees on Justice and Welfare, in the opinion of the IFP, so that systems can be improved where necessary.

7.18 In the light of the responses to the Discussion Paper, the positive comments arising from the workshops that were held,<sup>206</sup> and the approval of diversion evident in recent case law,<sup>207</sup> the Commission recommends that diversion and restorative justice should be central features of the new Child Justice system and that legislative provisions should strive to ensure that opportunities to benefit from diversion and restorative justice processes are given a large degree of scope in the legislation. However, the Commission stresses that there should be an innovative and imaginative approach to diversion, with prosecutors, magistrates and probation officers playing a creative role in the development of individual diversion plans, in addition to the normal range of diversion options currently offered by NICRO and in some areas by the provincial Departments of Welfare.

*Legislative guidance on diversion options in the Discussion Paper*

7.19 The Free State Department of Social Welfare stated that the purposes of diversion, as stipulated in Bill A, were progressive and in the best interests of the child. The fact that this Bill required diversion to be sought as a first resort in certain circumstances was fully supported as it provided maximum

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<sup>206</sup> A consultative workshop dedicated to Diversion was held by the Commission, with NICRO practitioners from all the provinces, as well as some other diversion service providers, attending.

<sup>207</sup> Recent case law supporting the centrality of diversion regarding children accused of crimes is referred to in 7.3 above. In most regions, the DPP’s have issued guidelines on prosecutorial policy for diversion. In the constitutional court decision that resulted in the abolition of juvenile whipping as a sentence, *S v Williams* 1995 (7) BCLR 861 (CC), reference is made to the need to ensure the continued development of innovative alternatives for children accused of offences, albeit in the area of alternative sentencing.

protection to the child, in their view. The Department continued: “The chapter on diversion also requires and facilitates the importance of teamwork within the child justice system between the key role-players.” Mr S Collins described as a “useful innovation” the fact that the obligation to comply with a diversion order will arise by operation of the law (*ex lege*). At present the obligation is created by agreement (*ex contractu*), effectively restricting diversion to those children who are assisted by their guardians.

7.20 NICRO supported the view that diversion options should be set out in the legislation, and the organisation provided detailed comments, both by way of written submission, and during a dedicated workshop on the diversion provisions contained in the Discussion Paper, all of which have been considered in full by the Commission. The Free State Department of Welfare and Population Development was of the view that the listed options and, in particular, the inclusion of innovative orders such as compulsory school attendance and positive peer association, allowed for much creativity in the formulation and application of diversion options. This would set the tone for dealing with children in an appropriate and accountable manner, and the orders could be particularly useful for rural areas where formal resources are not always readily available.

7.21 In the NICRO report on the consultation with children, the children consulted showed much support for the orders referred to in the list of diversion options. When asked to give an indication as to whether they felt the orders would be useful, the following responses were received: with regard to supervision and guidance orders, 86% of the participants felt that this would have a positive influence on a child accused of offending, and suggested that the order should be administered by a school teacher, probation officer, psychologist, community member, social worker or a parent. With regard to the proposed reporting order, 96% felt that this would be a useful tool. The majority suggested reporting to a police station twice a week. The vast majority of the children interviewed, 94.8%, supported the compulsory school attendance order, expressing the view that if a child is at school, he or she is kept out of trouble, and that children can gain knowledge from school that could prevent them from re-offending. Support was also expressed by the majority of children for the family time order. The positive peer association order met with a mixed response from the children. Just more than half, 58.4%, responded positively, based on the view that “bad friends are often the reason children get into trouble” and “good influences will teach people not to commit crime.” Of those remaining, 44.8 felt that the order was a bad

idea because “one cannot choose someone else’s friends” as well as the fact that the order would be difficult to control and would only have a short-term impact. The idea of a good behaviour order, which includes the setting of tasks and duties to be undertaken at home, received support from 95% of the children. Similarly, 95% supported the order that contained a prohibition from visiting a specified place, because, they said, some places provide easy access to drugs and alcohol. They were of the view that being compelled to stay away from these places could keep one out of trouble and away from gangs.

7.22 The Commission therefore recommends the retention of provisions in the legislation dealing with the purposes of diversion, as they send a clear signal regarding the main aims of diversion to those providing services for children, as well as those developing individual responses for diversionary purposes. Having considered the principles proposed regarding the selection of cases, the Commission has decided that these principles are already applicable to all children covered by the proposed legislation, being enshrined in the Constitution or elsewhere in Bill B, and they have therefore been deleted.

7.23 As no adverse comment on this was received, it is proposed that the set of minimum standards relating to diversion should be retained, with some wording changes to reflect suggestions made during the consultation phase. It is worthy of mention again that diversion can only be considered where a child accepts responsibility for an offence, and that provisions to ensure protection of the child’s right to deny liability and insist on a trial have been clearly spelt out in Bill B.

7.24 Further to this, minimum standards for diversion are deemed necessary to prevent harmful practices, abuse and exploitation<sup>208</sup> of children through a seemingly innocent and beneficial process. These standards are, however, not unduly restrictive, as the overarching aim of including diversion in legislation is to promote flexibility and scope for innovation. The Commission has however noted concerns about the possibility of diversion being used as a vehicle for promoting personal or sectoral

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<sup>208</sup> Thus, Bill B provides that children may not be required to pay for admission to a diversion.

interests,<sup>209</sup> which, although not necessarily hazardous to children, would nevertheless be undesirable and lead to diversion as a whole being discredited. This has resulted in further proposals of the Commission. In summary, Bill B provides that where any diversion option with a predetermined content and duration<sup>210</sup> is offered to groups of children, whether this service is offered by a government department or a non-governmental organisation, such option<sup>211</sup> must be registered in terms of regulations to the legislation. This will allow exploitative or harmful diversion options to be de-registered, and their further use stopped, should the need eventuate. A further benefit of registration is that the proposed National Office for Child Justice, which will oversee registration, will be apprised of all formal diversion programmes being developed, and the Office will then be in a position to determine whether some can be made more widely available through replication. However, the Commission is of the opinion that the requirement of registration for formal diversion programmes will not impede the development of individual diversion plans tailored to individual children in (for example) rural areas.

7.25 Flowing from the overwhelmingly positive response to (especially) the proposed new orders that will ultimately form part of the regulations to the legislation,<sup>212</sup> the Commission has largely retained the detail on diversion options in Bill B. In order to assist court personnel and probation officers with inexpensive diversion plans which are designed to fit an individual child, references to the orders referred to above have been included in Bill B, although it is made clear that the ambit and content of such orders will be prescribed in regulations.<sup>213</sup>

### *Decisions on referral for diversion prior to the preliminary inquiry*

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<sup>209</sup> See the discussion in para 7.7 above. Vigilante groups, religious sects, and modern-day Fagins who target groups of children under the guise of providing a welfare service, are amongst those contemplated here.

<sup>210</sup> In other words, what is commonly understood in the welfare sector as a programme.

<sup>211</sup> The Bill does not use the word “programme”, as this concept is a rather nebulous one for the purposes of formulating an intelligible definition. A tailor-made course designed for only one child can be termed a programme, for example. Therefore, the Bill uses the terminology diversion options, and requires some of these to be registered.

<sup>212</sup> Attached to Bill A as Forms, to enable respondents to have proper insight into their proposed content.

<sup>213</sup> Definitions of the envisaged orders have been included in clause 52(6) of Bill B. Standard forms are intended for each of these orders, which can be filled in with specific details for each individual child. See, in this regard, the Forms attached to Discussion paper 79.

7.26 As has been explained in the chapter on assessment and referral, the proposed power of a probation officer to divert matters of his or her own accord which was recommended by the Commission in the Discussion Paper, has been abandoned owing to compelling arguments against this raised during the consultation phase. A consequence of the removal of the powers of the probation officer to divert before the preliminary inquiry, is that the emphasis on diversion (in the sense of how referral to programmes or other options should occur) has shifted to the preliminary inquiry stage of the proposed procedure.<sup>214</sup> The Commission therefore recommends that diversion decisions should only be effected at the preliminary inquiry, for reasons that are spelt out in the next paragraph.

7.27 Leaving the decision to divert to the preliminary inquiry stage not only enables a round-table discussion involving the probation officer, police, prosecutor and child to take place, but avoids the potentially undesirable situation that diversion plans are formulated, or diversion decisions are taken, by one role-player without reference to any other person or to an assessment recommendation.<sup>215</sup> Also, granting the power to refer a matter for diversion to the preliminary inquiry will ensure judicial awareness of all available options, thereby increasing the long-term effectiveness of the proposed inquiry procedure. The fact that diversion is an order granted by a magistrate may increase the potential impact upon the child concerned, and induce a greater degree of compliance with diversion conditions. Finally, the inquiry magistrate will be placed in a position to ensure that key principles, such as proportionality of diversion in relation to the alleged infraction, are adhered to in the referral process. Thus, although the prosecutor retains the power to withdraw matters prior to the holding of a preliminary inquiry, and indeed can indicate an intention to prosecute during the preliminary inquiry itself, if such prosecutor agrees to diversion, the referral, and development of the details of the diversion plan, will be undertaken by the inquiry magistrate.

### *Levels of diversion*

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<sup>214</sup> The preliminary inquiry as a mechanism for making more effective decisions on diversion received widespread support. See Chapter 8 in this regard.

<sup>215</sup> For instance, it has been alleged that in 1998, a prosecutor (misunderstanding the purpose and aims of diversion), was regularly “diverting” children by insisting that their parents “delegate” the parental power of physical chastisement to the court orderly. The diversion then consisted of corporal punishment in the court cells!

7.28 There was general acceptance of the idea that there should be different levels of diversion, as proposed in the Discussion Paper, and that these should be reflected in the proposed legislation. The AFReC report concluded that specifying levels of diversion has important benefits for future planning and implementation of the legislation, as exact costs can be attached to options at each level, with level one diversions being considerably less costly than those at a higher level.<sup>216</sup> But the Law Society of the Cape of Good Hope responded that the references in Bill A to “diversion in the first instance”, “diversion in the second instance”, “diversion in the third instance” and so forth needed to be clarified in order to convey the intended meaning.<sup>217</sup> It was also discovered in workshops that this terminology caused confusion, with some participants understanding that diversions listed under the “first instance” should be applied to first offenders, those in the “second instance” to be applied to children who have committed a second offence and so on. The Commission’s intention was that the levels should all be available for consideration in relation to any child, and that the selection of a specific option would depend on the particular child, his or her circumstances and the nature of the offence. The idea was merely to suggest that a range of possibilities is available, and that the chosen diversion plan should be proportionate<sup>218</sup> to the circumstances of the offence and the child concerned.

7.29 In addition, participants at the workshops voiced the concern that the four levels, as set out in Bill A, were overly detailed and unnecessarily complicated. And, given the fact that all diversion decisions will (as a consequence of the recommendations in para 7.27 above) be undertaken at the preliminary inquiry, it becomes apparent that the fourth level of diversion, which according to Bill A could only be effected by an inquiry magistrate, is now unnecessary.

7.30 In order to clarify both the terminology and content of the listed options, the Commission has reduced the number of levels to three, and grouped the options to reflect clearly short-term diversion orders, medium-term diversions, and far more intensive possibilities. In addition, the Commission

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<sup>216</sup> This is because of differences in the duration of orders at each level.

<sup>217</sup> The Legal Services Department of the SAPS also criticised this terminology as being confusing.

<sup>218</sup> Thus level 1 included the least onerous diversion options, and level 4 the most onerous ones.

recommends that the words “level one diversion” rather than “diversion in the first instance” be used, as the word “level” appeared during the consultations on the Discussion Paper to have a clear, common-sense meaning which everyone understood. Finally, Bill B now includes a clause explaining the purpose of the levels explicitly,<sup>219</sup> so that no misunderstanding can arise.

7.31 The Commission had raised questions in the Discussion Paper about the content of level four diversions which, for the first time, allowed for residential programmes and lengthy training programmes as diversion options. This was intended to provide for the most serious cases involving children over 14 years of age, where diversion is nevertheless desirable. The Commission had also proposed this more intensive diversion possibility because courts have been known to see diversion as a “soft option”, and have therefore been reluctant to divert cases of a more serious nature, even where the circumstances of the accused have indicated that diversion would be a suitable option. The aim of the Commission in proposing some “tough” diversion options was thus to provide for the possibility of diversion in a wider range of cases. However, the Commission was concerned about such severe sanctions being levied as diversion options and consequently invited respondents to comment. There was overwhelming support for the idea of these “tougher” options, and some service deliverers are already working on the development of suitable programmes.<sup>220</sup> Nevertheless, the Commission has retained some limitations, including the restriction that they may only be applied in respect of children of 14 years or older. The level four diversions are now referred to as level three diversions in Bill B.

#### *Cases qualifying for diversion*

7.32 The Commission received support for the proposal in the Discussion Paper that no offences should be listed for which diversion is either mandatory, on the one hand, or excluded altogether on the other. Rather, it was argued that the decision on whether to divert should be left with the persons present at the preliminary inquiry, who will be fully able to consider all the facts and merits of the particular case. The proposals in Bill A in this regard are therefore retained in Bill B.

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<sup>219</sup> Clause 52(2).

<sup>220</sup> Report on workshop on diversion and alternative sentencing with NICRO.

*Constraints regarding diversion of younger children*

7.33 In the NICRO report on the child participation process, slightly more than 20% of the children consulted responded that the appropriate minimum age at which children should be able to be allowed to perform community service should be 12 years; a similar percentage thought that 14 years was appropriate, 16% thought that 15 was appropriate and 18% thought that 16 was appropriate. With regard to the same issue, the NICRO written submission recommended that the minimum age for community service be brought in line with the Basic Conditions of Employment Act 75 of 1997, and that it be set at 15 years of age. No further comments on this matter were received.

7.34 The Commission has fully considered this suggestion, but has decided that, in the interests of making as wide a range of diversion options available to as many children as possible, there should be no lower age limit to community service, although care must be taken to ensure that the tasks set for a child to perform are proportionate to that child's age, and both the physical and emotional maturity of the child. Community service for children is not labour in any normal sense - rather, it should be seen as similar to the performance of chores, which most people would agree are suitable (and possibly desirable) for children below the age of 15 years. Further reasons include the fact that the principles set out in Bill B are designed to prevent any exploitation of children, as well as the fact that there will be judicial control over the content and duration of community service when it is used for diversion.

*Family group conferences*

7.35 The purposes and procedures of family group conferences were broadly sketched in the Discussion Paper, but finer details concerning (for example) who should bear responsibility for convening these conferences, and within which period of time, were not spelt out. No specific comment was received on this issue, save for the general response that the introduction of family group conferences as a restorative justice procedure in South Africa was to be welcomed, and that the inclusion of this option

in legislation would promote the replication of existing projects<sup>221</sup> using this form of dispute resolution. However, the Commission is of the view that detailed provisions to facilitate the holding of family group conferences do need to be included in legislation, in order to ensure that there is clarity about the procedure. Also, since the family group conference is essentially an extra-judicial procedure, the Commission deems it necessary to include provisions which ensure protection of the child's procedural rights during the process. Thus, more detailed provisions<sup>222</sup> on the convening of family group conference appear in Bill B, and similar considerations have led to the drafting of provisions concerning referrals to other restorative justice processes, such as victim-offender mediation. However, efforts have been made to retain some flavour of the informality and flexibility which are the hallmark of these procedures, and the legislation confers the right to regulate exactly how the family group conference is to proceed upon the participants themselves.

## CHAPTER 8: PRELIMINARY INQUIRY

### Overview of the proposals in Discussion Paper 79

8.1 The idea of a preliminary inquiry was not specifically raised in the Issue Paper and hence no comment on this issue was received. The Director of Public Prosecutions, Grahamstown, did however

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<sup>221</sup> See *Report on the Pilot Projects* (IMC, Department of Welfare and Population Development, 1998).

<sup>222</sup> This are based to some extent on the relevant provisions in the New Zealand Children, Young Persons and their Families Act, 1989. It has been raised, in relation to the use of the term family group conferences, that a more appropriate term for this process in South Africa should be sought. The New Zealand model is premised on a particular Maori conception of community and family, with the legislation referring explicitly to Maori terminology for clans, relatives and family. Thus family group conferences in South Africa cannot carry the same connotation, and it has been suggested that a restorative justice conference would better describe the process practised here. However, because "family group conference" is a term well-known and understood amongst persons working with child justice issues, the Commission has decided to retain the term "family group conference" in this Report.

suggest that the proposed legislation should provide for a pre-charge procedure (*in camera* and not in a courtroom) where an oral summary of the available evidence and all other relevant information could be placed before the magistrate by the prosecutor. The magistrate should then make a ruling as to where the case should be channelled. The National Council of Women of South Africa also proposed that juvenile court hearings should take the form of an inquiry and not a trial. Submissions were received from NGOs<sup>223</sup> in the child justice field advocating a more inquisitorial<sup>224</sup> system where children are accused of offences.<sup>225</sup> The Commission was influenced by the fact that the present adversarial system offers very little protection to children who appear without legal representation, and that an inquisitorial system could provide opportunities for children and their families to get more directly involved in the legal process.

8.2 The Commission's approach in developing a model for the preliminary inquiry was also influenced by the informal yet apparently successful youth justice systems prevailing in New Zealand and Scotland, as detailed in Chapter 4 of the Discussion Paper. However, the Commission was of the view that providing for completely new structures may prove to be too expensive and

therefore unrealistic. Therefore, the model proposed entails adapting existing infrastructure and human resources.

8.3 A further consideration was that there was a need to include in legislation provisions that will guarantee the application of international and human rights principles to the maximum extent.<sup>226</sup>

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<sup>223</sup> Non-governmental organisations have since 1993 called for a more inquisitorial system for children accused of offences. See, for example, *Report of the International Seminar on Children in Trouble with the Law* Community Law Centre (1993) and *Law Practice and Policy: South African Juvenile Justice Today* Community Law Centre (1995).

<sup>224</sup> Similar to the inquisitorial procedure that prevails in the present children's court inquiries. Several other investigations of the South African Law Commission are investigating the introduction of inquisitorial procedures in South Africa. See, for example, Committee Papers 808 and 809 (November 1999) prepared by Prof N Steytler and Judge R Nugent respectively for the attention of the Project Committee on the Simplification of Criminal Procedure (Project 73).

<sup>225</sup> See Discussion Paper 79 at 166.

<sup>226</sup> See for example article 40(4) of the Convention on the Rights of the Child.

Expansion of the use of diversion in the new child justice system would not occur as a result of assessment by probation officers alone. The Commission thus recommended a further procedure prior to the child's appearance in court, one key purpose of which would be to ensure that diversion is used as often as is appropriate and possible. A further goal would be to ensure that the detention of children is used only as a measure of last resort, and then for the shortest possible period of time.

8.4 In the Discussion Paper, the Commission set out in detail the manner in which it recommended that the proposed preliminary inquiry be developed.<sup>227</sup>

*Objectives of the preliminary inquiry*

8.5 The main objectives of the preliminary inquiry were identified in the Discussion Paper as follows: firstly, the inquiry would establish whether an assessment of the child has been effected by a probation officer, and if not, whether compelling reasons exist why this can be dispensed with. If social background or assessment reports have not been obtained, but are nevertheless required in order to assist the inquiry magistrate, they can be ordered at that stage.<sup>228</sup>

8.6 Secondly, the inquiry would ascertain, on the basis of the recommendations of the probation officer, whether the matter could be diverted. The inquiry would take account of the views of the child and family, probation officer (if a report has been deemed necessary), the prosecutor and any other relevant person. The preliminary inquiry would serve as a clearly identified point at which a final decision can be made as to whether diversion is possible, or whether the matter should be set down for plea and trial.

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227 See Discussion Paper 79 at 165 - 182.

228 There may be numerous reasons why a child inadvertently does not get to be assessed by a probation officer; the IMC *Report of the Durban Pilot Assessment, Reception and Referral Centre* noted instances where the police simply took the child directly to court, without first taking the child to the assessment officer. Other reasons may relate to the non-availability of probation services at that time, especially where social workers in a region serve more than one court centre, on a circuit basis.

8.7 In the Discussion Paper, the Commission proposed an inquiry that would be chaired by a magistrate, as magistrates already fulfil an inquisitorial role in the present procedure in the noting of the plea.<sup>229</sup> The Commission was of the view that this role in a preliminary hearing before the case proceeds to court would be one that magistrates would find familiar. Also, magistrates with specialisation in children's issues have become a possibility with the impending advent of the Family Court, as dedicated training in relation to child and family law will be available for justice personnel who intend to further their careers in these courts.

8.8 A third function of the preliminary inquiry would be to determine, if the matter is not to be converted to a Children's Court inquiry or otherwise diverted, whether the child can be released (either in the care of a parent or guardian or suitable other person), with or without conditions, or whether residential placement is required in the pre-trial phase. The function of determining bail, release or remand in a place of safety or other residential facility, such as secure care, is already one that falls to the presiding officer to decide. There would appear to be good reasons for introducing an inquisitorial approach to this critical phase of the proceedings, as it would enable the presiding officer to be appraised of a broad range of background information about the child and the case, which will improve decision-making regarding the most appropriate placement.<sup>230</sup> In addition, it

has been highlighted previously that bail hearings have a *sui generis* nature, and recent legislation has confirmed and extended the inquisitorial character of these proceedings.<sup>231</sup> The function of the inquiry magistrate in regard to aspects of the preliminary inquiry, namely the decision on release, placement or

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229 Sections 112 and 115 of the Criminal Procedure Act 51 of 1977.

230 Section 29 (as amended) of the Correctional Services Act made provision for the hearing of oral evidence prior to a decision to detain a child in prison under the 1996 legislation. The intention of this innovation was to provide the basis for an individualised inquiry for each child as to why detention in prison would be required, and to place a burden of adducing evidence to support that contention on the State; in the usual adversarial system in South Africa at present, it is frequently encountered that opposition of the prosecution to release on bail or on warning is not effectively opposed by an accused person, resulting in unnecessary custodial detention in the pre-trial phase. (See R Paschke *Report on the Mitchell's Plain Pre-Trial Services Project* Bureau for Justice Assistance 1997.) In moving towards fulfilment of the principle of detention in the pre-trial phase as matter of last resort, the Commission intends to ensure that the burden of showing the necessity of pre-trial incarceration lies with the state.

231 See M Chaskalson *et al Constitutional Law of South Africa* Cape Town: Juta 1996 at 5B-44.

detention, will therefore be entirely familiar.

8.9 The final objective of the preliminary inquiry identified in the Discussion Paper was to assess the sufficiency of evidence to support a prosecution. At present, the police can decide not to open a docket after a charge has been laid if they are of the opinion that there is insufficient evidence to sustain a charge, which indicates that there is an interim period during which further investigations can take place before an arrested person is formally charged. Bill A provided that the child is deemed not to be formally “charged” until assessment has taken place, and until the preliminary inquiry has been conducted. The preliminary inquiry would serve the additional purpose of checking that there is a minimum sufficiency of evidence to sustain a prosecution.<sup>232</sup> The Discussion Paper argued that since the purpose of the preliminary inquiry was to create a further pre-trial mechanism to avoid the necessity of cases proceeding to trial, it seemed important to allow the inquiry magistrate some powers to inquire into the adequacy of the State’s case to ensure that the child is not taken unnecessarily through the criminal process. The Commission envisaged, therefore, that the child would only be charged formally after the possibility of diversion has been explored by the inquiry magistrate, and the inquiry magistrate is additionally satisfied that there is a sufficient basis for the continuation of the case.

8.10 The Discussion Paper contained an in-depth discussion of the manner in which the inquiry magistrate could ascertain the sufficiency of evidence. In addition, the powers of the inquiry magistrate in the event of the evidence being too paltry, were considered.<sup>233</sup> The Commission reviewed two possible methods in which the magistrate could make this assessment on the sufficiency of evidence: the magistrate could be allowed access to the police docket or, alternatively, the magistrate could rely on *ex parte* submissions from the prosecution. The Commission recommended that the magistrate should not be handed the docket, but should request the prosecutor, the investigating officer or any other

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232 The statistics from the Durban Assessment, Reception and Referral pilot project show that in 43% of the completed cases in the sample, the outcome was a withdrawal of charges. It was not clear from available information what the reasons were for this: “positive” withdrawals (ie for the purposes of diversion) were not able to be differentiated from “negative” withdrawals (eg poor police investigation, insufficiency of evidence etc). However many children spent considerable periods in detention, only to have the case ultimately withdrawn.

233 See Discussion Paper 79 at 188.

relevant person to provide a report concerning the sufficiency of evidence to sustain a prosecution. If the magistrate found this information to be insufficient, he or she could close the preliminary inquiry and order that the child, if in detention, be released.

*Procedure of the preliminary inquiry*

8.11 The Discussion Paper contained detailed recommendations on the exact manner in which the preliminary inquiry should be held.<sup>234</sup> The inquiry should be convened in chambers, in an office or other suitable room, but not in a court.<sup>235</sup> The more informal and inclusive nature of the inquisitorial procedure suggested that all the information concerning the child (from the assessment report), the nature of the case, and the views of the family and possibly, the victim (through the participation of the prosecutor or arresting officer) would be available to the inquiry. Those present at the inquiry would include the child, a family member or another suitable adult prepared to take responsibility for the child, the prosecutor and the child's legal representative. The probation officer would also be present to explain the assessment report if necessary, and to defend recommendations in that report. The arresting or investigating officer could also attend the inquiry, should such officer's presence be required.

8.12 It was envisaged that, initially, the inquiry should ascertain whether an assessment has been effected, and if not, whether this can be dispensed with in the best interests of the child. If the assessment is still required, the magistrate would instruct the prosecutor to arrange for this to be done immediately.<sup>236</sup>

8.12 With an assessment report available, the inquiry magistrate would proceed to establish whether the case can be diverted, and after considering the views of the probation officer, as well as interviewing the child and the family, would make a decision whether or not diversion is a possible option. If the magistrate was of the opinion that diversion was desirable, diversion could then be effected by him or her.

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234 See Discussion Paper 79 at 176 - 192.

235 Cf section 8(1) of the Child Care Act 74 of 1983.

236 In instances where the probation officer is not present, another person needs to take responsibility.

8.13 The Discussion Paper proposed that the inquiry could be postponed for a limited period for the purposes of obtaining further information which might assist the court in deciding whether or not to divert. Such information might include the views of the victim. However, although the victim's opinions could be obtained, the victim's permission to divert, or willingness to participate in victim-offender mediation or in a family group conference, would not be regarded as a prerequisite for diversion.

8.14 It was proposed that if diversion is not possible or appropriate and the matter is to proceed to trial in the proposed child justice court, written reasons for referring the matter to that court would need to be recorded. Further, it was proposed that where it is established at the outset of the proceedings that diversion cannot take place because the child does not acknowledge responsibility for the offence, and intends to plead not guilty, the inquiry magistrate would not investigate the possibility of diversion, in deference to the presumption of innocence. Rather, the inquiry magistrate would request the prosecutor to set the matter on the court roll as soon as possible, and determine only the release or placement of the child pending first appearance in court.

8.15 In making the decision about possible diversion, it was recommended that the inquiry magistrate should have regard to formal and informal diversion possibilities, as well as to the different levels of available options. The inquiry magistrate would have an important role to play in ensuring the innovative development of diversion alternatives which are appropriate for local conditions, and would not simply be tasked with selecting from a predetermined list of formal programmes. Where no formal diversion options were available in the district, the magistrate would have to reach out to community organisations and other structures in an attempt to maximise diversion opportunities. Provisions to this effect were included in Bill A.

#### *Diverse aspects of the preliminary inquiry*

8.16 The Discussion Paper also dealt with other diverse aspects of the preliminary inquiry, which are summarised here. It was recommended that previous convictions and previous diversions could

be introduced during the inquiry in order to ensure that diversion decisions are taken with the fullest possible knowledge about a child's background. As to the question whether adult co-accused should appear together with children accused of the same offences at the preliminary inquiry, the Commission took account of the possibility that the presence of the adult co-accused might enable the inquiry magistrate to explore the child's role in the offending in full. For instance, the child may be under the influence of adults, and may therefore be in need of care and supervision. The Commission concluded, however, that the surrounding facts could equally be established without the presence of adult co-accused. Therefore it was proposed that such co-accused should not be in attendance at the inquiry, as this could divert attention from the child accused, and the appearance of adults could lead to an unwarranted burden upon the child justice system.

8.17 In the Discussion Paper it was recommended that the inquiry should be held as soon as possible, and no later than 48 hours after the arrest of a child.<sup>237</sup> This accords with the present constitutional rule regarding appearance in court after arrest within 48 hours.<sup>238</sup> The Constitution, in section 166, allows for "any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High courts or the Magistrates' courts".<sup>239</sup> In the Discussion Paper, the question whether appearance before the preliminary inquiry constitutes appearance before a court for the purposes of section 35(1)(d) of the Constitution was raised. In order to ensure constitutional compliance, the Commission proposed that the legislation should define the proposed child justice court structure as (a) the preliminary inquiry before a judicial officer and (b) the adversarial trial itself.

8.18 The Discussion Paper further recommended that, in addition to the criterion established by the

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237 It should be possible to convene an inquiry within 48 hours even in remote areas of the country. In order to ensure that assessment takes place timeously, it may be necessary to rely on the services of regionally based social workers, or even, if necessary, qualified personnel on an *ad hoc* basis (such as social workers attached to church organisations or child welfare organisations).

238 If the child was not arrested because an alternative method to ensure attendance at assessment had been used, the preliminary inquiry should be held within 72 hours of the alternative method being employed.

239 The Children's Court, established in terms of the Child Care Act 74 of 1983, might be seen as providing an analogy to the proposal here, as the Children's Court is recognised as an established court, and moreover follows an inquisitorial rather than an adversarial approach.

Child Care Act indicating where a child appears to be in need of care, there should be certain clearly defined circumstances in which a Children's Court inquiry should be considered in lieu of criminal prosecution or diversion. These instances were detailed in the Discussion Paper. Where one of these factors is present, transfer to the Children's Court must be considered, and reasons for *not* converting the case to a Children's Court inquiry noted.

8.19 Although the Commission recognised the disadvantage of requiring that the proceedings at the inquiry be recorded, as it could detract from the informal and participative tone, the Discussion Paper nevertheless recommended that the substance of the inquiry should be recorded, either in writing or on audio tape. Not only would records provide important information for monitoring purposes, but records would also be necessary to ensure that the child complies with agreements that were reached or conditions that were set at the inquiry.

8.20 The Commission recommended (with one exception) that no appeal should lie from the finding of an inquiry magistrate. The remedy for the child would lie in the fact that the matter will either be diverted or will proceed to an adversarial trial, in which case all the constitutional and procedural benefits of ordinary adversarial proceedings will apply. The exception referred to is where a decision to detain a child pending trial has been made. In the same manner as an appeal regarding a decision to refuse bail may be lodged, an appeal against a decision to detain was explicitly provided for.

## **Evaluation of comment and recommendations**

### *General*

8.21 The proposed preliminary inquiry was an area that stimulated a great deal of excitement and

debate among the respondents. The innovative notion of a pre-trial inquisitorial procedure at which diversion can be considered was applauded by many justice officials currently working in the juvenile courts.<sup>240</sup> Comment on and criticism of specific issues within the proposals were constructive, and many respondents proffered workable alternatives to the provisions in the Discussion Paper. Of the magistrates who supported the proposed preliminary inquiry, some<sup>241</sup> had particular expertise in children's matters. Magistrate Coetzee of Hopetown and Magistrate Gradner of Johannesburg both supported the idea of a pre-trial procedure but identified training as an essential component of the successful implementation of the system. Magistrate Venter of Cape Town was of the view that the introduction of an entirely new procedure with an inquisitorial element will succeed in diverting many children from the criminal justice system, and it is therefore a procedure which furthers the best interests of the child. Mr Laue, Acting Chief Magistrate, Durban, supported the preliminary inquiry and approved of the fact that the proceedings will be conducted informally in a relaxed, child-friendly atmosphere. Magistrate Collins of Pietermaritzburg noted with approval the fact that the obligation to comply with a diversion order would arise by operation of legislation, as opposed to the present situation where the obligation is created by contractual agreement.

8.22 The Commission has therefore decided to retain the proposed inquiry procedure for the following essential reasons: first, the introduction of an inquiry raises the status of diversion of children accused of offences from a discretionary issue as it is at present, to a requirement (by law) before a trial can commence. Second, it gives the ultimate diversion order an enhanced status. Whereas, previously, the child's agreement to participate in a diversion programme was based on a contractual arrangement with the prosecution, the diversion order agreed at the preliminary inquiry would be legally binding, with clear consequences for breaches of any conditions. Third, the preliminary inquiry would promote a restorative justice solution to children's offending by encouraging the participation of all the relevant persons, including the child and family members or adults that have a responsibility towards the child, at an

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240 Although the prosecutor at Richmond, Ms SL Kloppers, was of the view that the preliminary inquiry merely duplicates the function of the probation officer who conducts the assessment.

241 For instance, the judicial officer at Stepping Stones, which is a highly successful youth justice pilot project in Port Elizabeth.

informal and participatory form of round- table discussion.<sup>242</sup> This is conducive to an honest appraisal of the child's reasons for offending, social history, peer group influences and other relevant circumstances surrounding the commission of the offence, and hence the formulation of an individualised response to ensure the child's reintegration into society. Fourth, the preliminary inquiry is intended to promote and extend diversion for young people, as the obligation to find a suitable diversion option is placed not only upon the probation officer, but upon all those present at the preliminary inquiry. The inquiry magistrate, specifically, can engage community-based organisations and other service providers<sup>243</sup> to assist in sourcing diversion options to suit local circumstances.

8.23 Finally, the AFReC report, which undertook an economic costing of the child justice system proposed in the Discussion Paper, considered the possible impact of the preliminary inquiry in considerable detail,<sup>244</sup> and arguably provides the most cogent reason for retention of the preliminary inquiry procedure in this legislation. Characterising the proposed inquiry as "a method of screening cases in order to determine: (a) which cases should be dropped, (b) which cases should be diverted and (c) which cases should be tried in the child justice court", the report expects that it will "be a fairly speedy and cost effective method of processing cases". Further, as the detailed modelling and analysis in the report shows, significant savings can be made in the trial process by introducing the preliminary inquiry.<sup>245</sup> Based on current statistics, the report estimates that "about 60% of cases brought to the inquiry will be diverted, transferred to a children's court inquiry or dropped due to lack of evidence."<sup>246</sup> In consequence, it is estimated that the numbers of cases proceeding to trial will drop dramatically, to approximately a

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242 In order to ensure that those present can speak freely, a provision has been included to the effect that no information adduced at a preliminary inquiry by any person is admissible in any subsequent proceedings against the child. An evidentiary privilege is thus envisaged.

243 Through the local child justice committee.

244 At page 26 *et seq.*

245 Major savings are associated with reduced detention costs, transport costs, and personnel expenditure: see the AFReC report at 27 *et seq.* The sum quantified in the report is a potential saving of R246 million per annum over current expenditure.

246 AFReC report at 28.

quarter of the present number of cases proceeding to trial.<sup>247</sup> In sum, the new system will result in substantial savings in government expenditure.<sup>248</sup>

*Responses to the objectives and procedure of the preliminary inquiry*

8.24 One of the main objectives of the preliminary inquiry was to ascertain whether the matter can be appropriately diverted. In the Discussion Paper, the Commission identified the inquiry magistrate as the most appropriate role-player to make this decision. There were objections to this proposal for two reasons.

8.25 The first was in respect of the apparent erosion of the duties of the prosecutor as *dominus litis*. Magistrates JA Venter of Ladysmith, S Collins of Pietermaritzburg, TP Mudau of Johannesburg, C Maritz of Johannesburg and Van Rooyen of Bloemfontein, as well as the magistrate of Vulindlela, all objected to the interference with the principle of the prosecutor being *dominus litis*. The Director of Public Prosecutions, Pietermaritzburg and the Deputy National Director of Public Prosecutions<sup>249</sup> pointed to the blurring of the roles of the prosecutor and inquiry magistrate, and expressed concern over the legitimate authority of the magistrate effectively to stop a prosecutorial decision to proceed to trial by deciding to divert a case. The Commission has noted the concerns raised over this issue, and has reconsidered its view. Whilst retaining the position of inquiry magistrate, as well as this person's role as chairperson of the inquiry, the principle of South African law that the prosecutor, as *dominus litis*, is entitled to make the decision to proceed to trial in any given matter, has been explicitly retained. The draft Bill provides that, at the conclusion of the preliminary inquiry and after all relevant information has

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247 For the purposes of the model, the researchers assumed that all cases currently regarded as serious enough to warrant a two year prison sentence, would continue to be regarded as serious, and would therefore continue to be trial cases in the new system. In other words, serious cases form a constant in both the present and proposed model.

248 The report makes the point that the savings quantified in the research are only a small part of the overall benefits that will accrue (at 66) from the proposed new system, which include social benefits arising from the fact that recidivism rates for diverted children are very low, the reduction of pressure on the court system due to a reduced inflow of cases and consequent elimination of backlogs, and most importantly ensuring that remaining expenditure is apportioned more effectively than is the case at present.

249 In an interview with members of the project committee.

been considered, the inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted.<sup>250</sup>

8.26 A second shortcoming was identified at the consultative workshops and from the written submissions on the Discussion Paper. It was pointed out that having had sight of the assessment report, with the child's background details, and having possibly heard details concerning the commission of the alleged offence, the inquiry magistrate would have compromised his or her impartiality and would therefore not be able to preside in the subsequent trial. Many magistrates expressed concerns that the additional magistrates that the inquiry procedure would require would not be affordable within the Department of Justice's constrained budget. Magistrate Venter of Ladysmith raised the point that at smaller centres where there is only one magistrate, it will be necessary to call for the services of a magistrate from the neighbouring district to preside in the child justice court and this will result in disruptions at both centres and increased expenses for the State. The opposite view, supporting the division of the inquisitorial role from the role of presiding officer at the adversarial trial, was expressed by Magistrate van Renen of Wynberg. He was of the view that the proposed procedure will go a long way towards the prevention of unnecessary detention of children whilst awaiting trial and will also prevent many trials from commencing. Magistrate Goosen, of the Stepping Stones One Stop Centre in Port Elizabeth, was of the view that a second magistrate becomes unnecessary save in very exceptional circumstances. He quoted the statistics from the Stepping Stones files (where only a small number - fewer than five out of every 250 cases per month go to trial<sup>251</sup>) to support this. Recognition of the value of the inquiry procedure, yet concern about the duplication of magistrates that might be occasioned, led to a series of novel suggestions at a consultative workshop attended by policy-makers from the Department of Justice. One suggestion was that the preliminary inquiry should be conducted by either the Director of Public Prosecutions, a person designated by him or her or by the Children's Court Commissioner. Mr Deon Oosthuizen, of Justice College suggested that the control officer, who is an additional magistrate, should be given the authority to conduct the inquiry and that the definition of "magistrate" be extended to include an "additional magistrate".

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<sup>250</sup> Clause 61(1) of the draft Bill.

<sup>251</sup> That is, contested trials, where a guilty plea is not noted or the matter diverted.

8.27 The AFReC report that was undertaken to indicate the likely costing implications of the Discussion Paper specifically addressed the possible financial implications that would result from the necessity of having a second magistrate available to hear trials, as a consequence of the inquiry magistrate having to recuse himself or herself. The AFReC report points out that the inquiry magistrate would only have to recuse himself or herself from the hearing if he or she had heard information prejudicial to the impartial determination of the case.<sup>252</sup> Where, for example, a child indicates an intention to plead not guilty, the matter would be referred directly to the child justice court and there is then no reason why the inquiry magistrate should not preside at the trial. Second, the number of magisterial districts in which there is only one magistrate is relatively small: "If it is assumed<sup>253</sup> that all metropolitan and urban magisterial districts have more than one magistrate and that 50% of all rural magisterial districts have more than one magistrate, then only 90 magisterial districts are affected by this problem. According to the full scenario, a total of about 875<sup>254</sup> cases involving children would be referred to the child justice court each year. This is less than 10 cases per magisterial district per year. If the magistrate concerned has to recuse himself or herself in 60% of these cases, it would simply mean that he or she would have to swop days with a neighbouring magistrate six times a year."<sup>255</sup> The report concludes that there do not appear to be significant costs associated with the introduction of the preliminary inquiry. The Commission has thus proceeded on the basis that the inquiry procedure does not entail unrealistic expenditure for the Department of Justice.

8.28 However, the retention of the prosecutorial role as *dominus litis* still requires elucidation as far as the proposed role of the inquiry magistrate is concerned. Apart from the suggestions as to who should chair the inquiry proceedings provided by respondents cited in responses above, other comments were also received. In sum, the options here are an inquiry conducted by the prosecutor or one conducted by a judicial officer, ie a magistrate. (No respondents suggested that the probation officer or any other

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252 AFReC report at 57.

253 The report indicates that officials at the Department of Justice were unable to say how many of the 354 magisterial districts had only one magistrate.

<sup>254</sup> This figure pertains to the likely number of criminal matters involving children that would be referred to child justice courts for trials in those districts where there is only one magistrate.

255 AFReC report at 57.

person should chair the proceedings.)

8.29 The Commission, after much deliberation and consultation, has concluded that the inquiry is most appropriately chaired by a judicial officer. This could be the magistrate who serves as children's court commissioner (who is a magistrate in any event), if this person is so appointed. Similarly, the appointment of the control magistrate to serve as the inquiry magistrate is a matter for internal departmental administration, rather than one on which the Commission needs to express any opinion. However, the Commission does not accept the proposition that the prosecutor alone should conduct the inquiry, in the absence of a judicial officer. The reasoning for this follows.

8.30 Prosecutors are generally not experienced or trained in the conducting of inquiries, whereas this is an essential part of judicial office.<sup>256</sup> Also, as is clear from the wording of the relevant sections, the intention is that the inquiry should seek to arrive at decisions after consideration of a variety of factors.<sup>257</sup> For this reason, the Commission deems it necessary that both magistrate and prosecutor be present, together with other relevant persons, so that a round-table discussion can ensue. If only the prosecutor was responsible for the conduct of the inquiry, an imbalance might result, and decisions could then be taken by only one role-player. In the Commission's opinion, the presence of both parties will contribute towards a form of case conference where no single view dominates. Further, some of the decisions of the inquiry can be made only by a judicial officer, such as the release or placement decision, and the determination of age. Excluding the inquiry magistrate and allowing the prosecutor to chair the inquiry could therefore lead to a further court appearance for the purposes of remands, placement, or release, which would obliterate the cost and time-saving benefits of the inquiry alluded to above. Finally, discussions with a range of stakeholders have confirmed that magistrates (with the desired expertise and specialised training in the law pertaining to children) are more likely to remain in office in a particular jurisdiction, whereas prosecutors frequently move positions for the purposes of advancing their careers. Thus from the point of view of implementation and development of specialisation for the proposed new system, it is preferable to require the inquiry procedure to be chaired by a judicial officer designated for

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<sup>256</sup> For example, inquests, children's court inquiries, and maintenance court inquiries.

<sup>257</sup> Clause 61 of the draft Bill.

that purpose.

8.31 The Commission has clarified the role of the inquiry magistrate in Bill B,<sup>258</sup> and included a list of objectives,<sup>259</sup> which contribute to an understanding of the essential function and purposes of the preliminary inquiry. Not only is this procedure able to identify and effect referrals to diversion options, but it is spelt out that one function of the inquiry is to ensure that all available information relevant to the child, his or her circumstances and the offence is considered to enable informed decisions to be made about diversion and placement. The recommendations contained in the assessment report of the probation officer must be made available to those present, and must be considered. Further, the participation of the child and his or her family must be encouraged, in accordance with the principle enshrined in Article 12 of the United Nations Convention on the Rights of the Child.

8.32 The Discussion paper recommended that the inquiry magistrate be satisfied that the evidence is sufficient to sustain a prosecution, before allowing the matter to be placed on the roll of the child justice court for plea and trial. There was some comment at the workshops on this issue, both positive<sup>260</sup> and negative. Those who expressed negative views were of the opinion that this would represent an unwarranted interference with the prosecutor's role as *dominus litis*. Those who approved of the provision were nevertheless concerned as to how the judicial officer would be satisfied that a sufficiency of evidence existed. In the absence of a personal examination of the docket, they argued, the magistrate would merely have to rely on an *ex parte* statement by the prosecutor, which he or she would be unable to verify. Further, the nature of the test was for some participants not entirely clear: what standard is sufficient evidence on which to prosecute, and how would a magistrate - who is independent of the prosecuting authority - assess this? These valuable comments are to some extent addressed by the fact

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<sup>258</sup> Clause 60 of the draft Bill.

<sup>259</sup> Clause 56.

<sup>260</sup> Magistrate van Renen quoted the example of Swaziland where an indictment in the High Court is only granted after the Chief Justice is satisfied, on the strength of a summary of evidence placed before him, to indicate *prima facie*, that there is a reasonable chance of a conviction. He recommended that the prosecution should hand in a summary of the available evidence from which the prospects of a conviction can be judged.

that in the proposed legislation attached to this Report (Bill B), the prosecutor's role as *dominus litis* is confirmed and emphasized. The list of objectives includes the idea that the preliminary inquiry provides “an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial”. Apart from reducing the number of unnecessary prosecutions that stand little chance of success, another motivating factor is that diversion, too, should not take place where there is clearly no case against the child. To divert a child (sometimes to a fairly arduous and intensive programme) where there is no likelihood of a successful prosecution, would constitute a violation of the child's procedural rights. The Commission has therefore provided that diversion can only occur where there is sufficient evidence to prosecute.<sup>261</sup>

*Manner of conduct of the preliminary inquiry*

8.33 After consideration of the submissions and recommendations on the manner in which the preliminary inquiry be should be conducted, the Commission proposes that the inquiry magistrate should preside over the proceedings and be responsible for ordering assessments where these are still required, asking any necessary questions and eliciting any supplementary information to that contained in the assessment report. He or she would also be responsible for making the necessary age determinations, in order to establish whether the person or child falls under the jurisdiction of the proposed legislation.

*Information about previous convictions and previous diversions*

8.34 No substantial comment on the issue of whether previous convictions or diversions should be introduced at the inquiry was received. Ms Cassim of UNISA supported the recommendation, as did most workshop participants. In the absence of any major criticism, the Commission retains its recommendation that information concerning a child's previous convictions or diversions should be allowed at the preliminary inquiry in the interests of the administration of justice, the promotion of effective decision-making at the inquiry, and in the individual child's interests. Protection is provided through a provision stating that no information adduced at a preliminary inquiry by any person is

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<sup>261</sup>

Clause 51 of the draft Bill.

admissible in any subsequent court proceedings.

8.35 On the issue of the presence of an adult co-accused at the preliminary inquiry held in respect of a child, the comment received was somewhat varied. Ms Cassim supported the Commission's recommendation that the inquiry should be conducted without an adult co-accused being present. The Director of Public Prosecutions, Pietermaritzburg, was of the contrary view that this provision may infringe the adult's rights as an accused to be present during any proceedings which involve him or her. The SAPS expressed the view that the legislation should leave a discretion to be exercised in exceptional cases. The NICRO report on the views of children also revealed a mixed response, although a greater proportion (59.9%) of the children felt that children should attend the preliminary inquiry separately. Reasons given included the fact that they felt that adults might threaten children, or manipulate them to ensure that the children take the blame.

8.36 The Commission has reviewed the comments and recommendations, and has decided to retain its initial recommendation that the adult co-accused should not be present at the preliminary inquiry. Section 158 of the Criminal Procedure Act indeed makes provision for all criminal proceedings to take place in the presence of the accused. However, this legislation does not envisage that the preliminary inquiry would form part of the criminal proceedings in respect of the adult co-accused. Unless application for a joinder of the trials is made, the proceedings in respect of a child and an adult co-accused will remain separate. There is no need for adult co-accused to be present at the preliminary inquiry, and no prejudice will accrue to the adult co-accused who is not present at the preliminary inquiry, particularly as Bill B provides that no information adduced at a preliminary inquiry is admissible in any subsequent court proceedings. In any event, the inquiry magistrate retains the discretion to require the presence of any person at the inquiry: this power could be used to request further information of an adult co-accused where necessary. As regards cases involving two or more children, a provision has been included to enable a joint preliminary inquiry to be held in respect of such children, with the further provision that different decisions concerning diversion may be made in respect of each child.

8.37 The proposed informality of the proceedings was raised by the SAPS, who questioned why references to the "leading of evidence" were present in the Discussion Paper. They posed the query as

to whether this was intended to mean “evidence provided under oath”. The Commission has taken note of this query, and, since the intention is not to require formal evidence under oath to be given, replaced the word “evidence” with “information” where appropriate.

8.38 There was considerable support for the Commission’s recommendation that the preliminary inquiry be conducted in less formal surroundings. Ms Cassim expressed the view that this would make the child more comfortable. Some magistrates expressed concern that, besides the courtroom, there is often no available room large enough to hold the inquiry, which could include many people, and that structural changes might be necessary to courts at considerable cost to the Department of Justice. The Commission reiterates that its vision for the proposed system does not entail structural changes. In those courts where there is no room large enough to accommodate the persons attending, the child justice staff would need to devise an innovative plan, even if it means re-arranging the furniture in a courtroom so that a child-friendly, round-table atmosphere can be created. Thus Bill B provides that the preliminary inquiry may not be held in a court unless no suitable place other than a court room is available.<sup>262</sup>

8.39 Comments were received concerning the proposals in the Discussion Paper in respect of the requirement that the inquiry must be opened within 48 hours of arrest of the child, and that only two remands, not exceeding 48 hours, be permitted, after which period the inquiry must be closed. Some respondents questioned whether this was realistic in view of the constrained resources of both the police and probation officers to trace family members. SAPS queried what would happen if the investigation had not yet been completed by the expiry of the final remand. The Magistrate, Nongoma, expressed concern that 48 hours is too short a period within which to finalise the proposed inquiry. At the workshop held with non-governmental organisations and various commissions, though, concerns were raised about the fact that pending the expiry of the 48 hour periods, which might amount to six days in total, the child could be held in police custody. Further, a submission was received from the director of Childline, Durban, in which strong arguments were made for a more extended period of inquiry where children are accused of sexual offences.<sup>263</sup> This would be necessary in order to establish whether

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<sup>262</sup> Clause 56(5) of the draft Bill.

<sup>263</sup> See further Chapter 6 for more detail concerning this submission.

admission to a specialised programme for sexual offenders is appropriate. The Inter-Ministerial Committee on Young People at Risk also supported provision for an extended remand period where deeply troubled children may require in-depth assessment.

8.40 The Commission is of the view that the preliminary inquiry must be convened no later than 48 hours after arrest in order to satisfy the requirements of section 35 of the Constitution. However, given that family members may not have been located, or that diversion options may still need to be explored, the Commission is of the view that two remands should be possible, in order to give the inquiry a fair chance of achieving its stated objectives. The two periods are only for 48 hours on each occasion, and as an additional protection the second 48-hour remand may only be granted if there are substantial reasons to believe that such remand will enhance the prospects of diversion of the child concerned. As regards the possibility that the investigation may not be finalised after the expiry of all time periods, the Commission's objective in setting those time limits was to encourage the police to finalise the investigation of cases against children within the prescribed periods. Also, as the inquiry is an interim procedure, cases cannot be kept in limbo at this stage for indeterminate periods. In exceptional instances where lengthy or complicated investigations cannot be completed timeously, the inquiry should then be closed and the matter set down for plea and trial in the child justice court.<sup>264</sup>

8.41 In short, the approach contemplated in the Discussion Paper addresses both the concerns of those who feel that 48 hours may be too short a period, as well as those who have the interests of children in police custody at the forefront. The general position in the Discussion Paper regarding time periods and remands has therefore been retained.

8.42 Further, the Commission has acceded to the request for an extended period, in exceptional cases, where admission to a sexual offenders programme or a drug or alcohol rehabilitation programme is being considered; where there is a possibility that the child may be a danger to himself or herself or to others, or where more detailed assessment of a child is indicated. Provisions to this effect are therefore included in the legislation. In order to address the concern that this might result in lengthy periods of

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264 Diversion is still a possibility after the conclusion of the preliminary inquiry, which reduces prejudice to the child in respect of whom an investigation was not completed.

detention for children, two provisions have been drafted to mitigate this possibility.<sup>265</sup>

8.43 The SAPS held the view that the reference to 48 hours should be amended to provide for extended periods where the 48-hour period expires after court hours or on a day which is not a court day, in a fashion similar to section 50 of the Criminal Procedure Act. The Commission supports this recommendation, and has drafted the legislation accordingly. It is believed that the limited circumstances under which the second 48-hour remand may be granted will provide sufficient protection.

#### *Conversion to a children's court inquiry*

8.44 There was general approval of the recommendations of the Commission in respect of the proposals regarding conversion of criminal matters to children's court inquiries. Magistrates Bezuidenhout of Kimberley and Louwrens of Johannesburg were of the view that the conversion to a children's court inquiry should not be mandatory upon the existence of the criteria mentioned. Magistrate Louwrens suggested that such a conversion should only occur if the probation officer and the prosecutor deem it necessary. Magistrate Venter held the view that the fact that a child was found to be abusing dependence-producing drugs should not necessarily justify a finding that such child is in need of care. Thus general support was received for the proposal in the Discussion paper that whilst decision-makers should be alerted to certain situations where a children's court inquiry might be appropriate, the discretion not to recommend or order a conversion should be retained. Therefore the proposals in the Discussion Paper in respect of conversions to children's court inquiries are retained.

8.45 No comment was received in respect of the recommendation that the decisions made at a preliminary inquiry - including the decision not to divert the matter - should not be subject to appeal. The Commission therefore retains the proposal that, as a general rule, no appeal should lie from the decisions made at the inquiry. The remedy for the child who is not diverted lies in the fact that the matter will proceed to an adversarial trial, in which case all the constitutional and procedural benefits of ordinary

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265 First, this special remand may not exceed 14 days, and second, unless this is impossible or not in the best interest of the child, the assessment must be effected at the child's home (see clause 66 of the draft Bill).

adversarial proceedings apply. An appeal should, however, be possible in respect of a decision to detain a child pending trial. This decision should, in the view of the Commission, be capable of being taken on appeal, in the same way that a decision to refuse bail can be taken on appeal.



## CHAPTER 9: COURT PROCEDURES

### Overview of the proposals in Discussion Paper 79

#### *Introduction*

9.1 In order to give effect to international standards,<sup>266</sup> Discussion Paper 79 provided for a form of differentiated court to deal specifically with children accused of crimes. It was proposed that the atmosphere of such a court and the roles of the officials serving in this court should be defined by legislation. The procedure would be less formal and less adversarial than a standard criminal court, involving greater participation by the child and family. There was a realisation, though, that achieving a child- friendly atmosphere would rest as much on the attitude and training of the court officials as it would on legislative provisions.

9.2 In order to develop increased specialisation, it was envisaged that in areas where there are sufficient numbers to warrant it, a special criminal court at district court level would be set aside and named the child justice court,<sup>267</sup> and, as far as possible, the court would be served by specially selected and trained staff.

#### *Jurisdiction*

9.3 In the Discussion Paper, the difficulties occasioned by rural and urban differences were debated

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<sup>266</sup> Article 40(3) of the UN Convention on the Rights of the Child provides that “ 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...”. According to R Keightley ‘Capacity to be held accountable for wrongdoing’ in Boberg’s *Law of Persons and the Family* edited by B van Heerden *et al* 2<sup>nd</sup> edition Cape Town: Juta 1999 at 866 “(t)his last mentioned provision places South Africa under an obligation to establish a specific juvenile justice system and to move away from the present position in terms of which juveniles are dealt with under the same system as adult offenders.”

<sup>267</sup> The setting aside of a court as a ‘juvenile court’ already occurs in most major urban centres in South Africa, although there is no special training for the personnel working in such courts.

at length.<sup>268</sup> There was also a discussion regarding the possibility of attempting to provide for a child justice criminal court within the emerging family court structure.<sup>269</sup> It was suggested that in rural areas, dedicated or full-time child justice courts would probably not be required, owing to the fact that there are far fewer cases where children are accused. However, it was felt that a measure of specialisation would still be possible, to be achieved through training of the relevant personnel.

9.4 The Discussion Paper proposed a court structure based on the geographical jurisdiction of the district courts, as opposed to that of the present Regional Court structures. This was intended to promote accessibility of child justice courts to parents, families and communities. The Commission proposed, however, that these child justice courts should have an increased sentencing jurisdiction of a maximum of five years imprisonment, as this would limit referrals to Regional Courts, which enjoy higher sentencing jurisdiction, but would lack the specialisation of the proposed child justice courts. Nevertheless, it was envisaged that referral of certain matters to Regional or High Courts would still be possible in specified circumstances, as set out in para 9.5 below.

9.5 The Commission proposed that the Regional Court would have jurisdiction to try all offences, except treason, if the likely sentence would exceed the proposed jurisdiction of the child justice court; if there were adult co-accused in the matter and a separation of trials would result in a miscarriage of justice or prejudice to the victim of the alleged offence; or if there were multiple charges and one or more of those charges were murder and rape.<sup>270</sup> It was further recommended that the Director of Public Prosecutions should be empowered, if certain specified circumstances exist, to refer a matter for trial to a Regional or High Court.

### *Procedure*

9.6 It was further proposed that the procedural rules of the Criminal Procedure Act 51 of 1977

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<sup>268</sup> Discussion Paper 79 at 196 - 8.

<sup>269</sup> Discussion Paper 79 at 210.

<sup>270</sup> In respect of these offences, Regional Courts and High Courts currently enjoy exclusive jurisdiction.

should apply in respect of matters such as the taking of plea, leading of evidence, competent verdicts and so forth. Thus, regarding the trial in the child justice court, the Commission recommended the preservation of an essentially accusatorial trial procedure, which was regarded as important for the protection of the child's procedural and constitutional rights. However, it was proposed that additional legislative rules should cover the conduct of proceedings in the child justice court so as to further the child-friendly atmosphere referred to above, and to introduce limited inquisitorial aspects. Further, the few protections accorded children during the trial process by the present Criminal Procedure Act would be incorporated in this legislation, and deleted from the Criminal Procedure Act.<sup>271</sup>

9.7 Consequently, the Discussion Paper required that the proceedings be conducted as informally as possible (with due regard to the child's due process rights), and in an atmosphere conducive to the full participation of the child and his or her family. Second, a legislative provision was proposed to the effect that the presiding officer should, where it is in the best interests of the child, be mandated to intervene to question witnesses and to participate in eliciting evidence favourable to the child. Third, measures were included to ensure that children's trials are finalised speedily, especially where children are awaiting trial in detention. Fourth, it was proposed that the magistrate should be empowered to stop the trial at any stage, even after conviction, if it appears to him or her either that the child is in need of care (the present section 254 of the Criminal Procedure Act), or that the matter could be diverted without further attention of the trial court, and any finding of guilt would be deemed not to have been made.<sup>272</sup>

9.8 The Discussion Paper included provisions enabling the child to have the assistance of a parent, guardian or another appropriate adult at the trial, along much the same lines as the provisions currently to this effect in the Criminal Procedure Act. As regards special evidentiary provisions, the Commission proposed a provision to indicate that pre-trial confessions, admissions or evidence obtained at an identity parade from a child, where persons such as the child's parents, an appropriate adult or a legal

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<sup>271</sup> For example, the provision requiring that the proceedings be conducted *in camera* where a child accused is concerned. See R Keightley in Boberg's *Law of Persons and the Family op cit* at 875 - 876.

<sup>272</sup> The wording of this provision was derived from the present section 254 of the Criminal Procedure Act 51 of 1977.

representative were not present, would be regarded as inadmissible at a subsequent trial.<sup>273</sup> A child justice court was also required to review cases where children were awaiting trial in detention (either in a prison, or a place of safety or secure care facility) every 14 days,<sup>274</sup> not only to satisfy itself that the child was being treated in a manner and kept in conditions that take account of such child's well-being, but also to inquire as to whether detention remained necessary.

9.9 The Commission was concerned that children tried in Regional Courts or High Courts in the exceptional circumstances referred to in par 9.5 might forfeit many of the protections included in this legislation, owing to the less specialised nature of these courts in practice. However, it was considered that, as far as possible, children transferred to superior courts<sup>275</sup> should continue to enjoy the protections accorded children in terms of the proposals in the Discussion Paper after referral to a higher court. It was therefore proposed that a Regional or High Court hearing a matter in which a child is accused should be required to observe the same objectives, principles and procedures as those proposed in relation to the child justice court.

#### *Separation and joinder*

9.10 The Commission proposed, as a starting point, that a separation of trials should ordinarily occur in all cases involving children who are co-accused with adults.<sup>276</sup> However, in the interests of the smooth administration of justice, the Commission proposed that any person (the child concerned, an adult co-accused, a legal representative or the prosecution) would be able to apply for joinder of the trials. It was envisaged that this application should be brought before the court in which the trial of the adult would

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<sup>273</sup> See *S v Kondile* 1995 (1) SACR 394 (SE), and the discussion of this case in J Sloth-Nielsen 'Annual Juvenile Justice Review' (1995) *SACJ* 331. See, too, *S v Manuel* 1997(2) SACR 505.

<sup>274</sup> The 14 day review of detention was derived from the provisions of section 29 of the Correctional Services Act 8 of 1959 (as amended), which currently govern aspects of child detention.

<sup>275</sup> The possibility of transfers to other district courts was also contemplated upon a successful joinder application where one party was accused before another district court. The provisions of this legislation could, in these circumstances, apply to ordinary district courts as well. See para 9.10.

<sup>276</sup> *De facto* separation would have occurred during the preliminary inquiry stage of proceedings, as this procedure was designed only for children accused of offences.

take place, and that it should be launched prior to the commencement of the trial. A court hearing such application would be empowered to order a joinder of trials where it is shown by the applicant, on a balance of probabilities, that a separation of trials would not be in the interests of justice and that without joinder, substantial injustice might occur.<sup>277</sup>

*Conversion of trial to a children's court inquiry*

9.11 With regard to children above the minimum age of criminal capacity, the Discussion Paper suggested that the transfer of a case to a Children's Court should be possible, but not in any way compulsory,<sup>278</sup> as is currently the position. This transfer is at present provided for in section 254 of the Criminal Procedure Act, and the Discussion Paper proposed that a similar provision be included in the proposed legislation. However, in order to focus increased attention on the possibility of using this transfer procedure,<sup>279</sup> the Discussion Paper proposed, in addition to the more general provision referred to above, that the legislation should highlight certain additional circumstances<sup>280</sup> which would require that consideration must be given to the possibility of transfer to the children's court, and reasons provided if a decision is taken not to convert the case.

*Assistance by parent or guardian*

9.12 Section 73 of the Criminal Procedure Act 51 of 1977 provides for the assistance of an accused person under the age of 18 by his or her parent or guardian in criminal proceedings.<sup>281</sup> This includes the right to assistance in the pre-trial stage of the proceedings, such as identity parades, pointing outs and

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<sup>277</sup> Discussion Paper 79 at 359.

<sup>278</sup> The possibility of compulsory transfers in certain cases had been mooted in *Issue Paper 9*.

<sup>279</sup> In *Issue Paper 9*, local research was cited indicating that fewer than 5% of juvenile criminal trials were converted to children's court inquiries, despite the fact that substantial numbers of accused children objectively meet the criteria of being in need of care (for instance, many children appearing in criminal courts are street-children without adequate adult supervision).

<sup>280</sup> *Discussion Paper 79* at 213.

<sup>281</sup> See R Keightley in Boberg's *Law of Persons and the Family op cit*.

confessions. 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: assistance by parents or guardians cannot be equated with, and is not a substitute for, legal representation. In the Discussion Paper, it was argued that the right of a child to be assisted by his or her parent or guardian must be clearly separated from the right to legal representation. Accordingly, the Commission recommended the inclusion in the proposed legislation of provisions substantially similar to the present provisions concerning parental assistance, and the deletion of the equivalent provisions in the Criminal Procedure Act. Similarly, provisions were proposed regarding warning of parents or other appropriate adults to appear for trials.<sup>282</sup>

### **Evaluation of comment and recommendations**

#### *A model for a new child justice court*

##### *Jurisdiction*

9.13 The Department of Welfare and Population Development in the Gauteng Provincial Government supported the establishment of a court at district level with a particular identity, which is less formal and adversarial than the standard criminal courts. Ms F Cassim, lecturer in the Department of Criminal and Procedural Law at UNISA, was in favour of the establishment of a child justice court with trained personnel at district court level, and also supported the idea that such court should be less formal and adversarial than the criminal courts.

9.14 A problem that was raised during consultations on the Discussion Paper related to the proposal that the proposed child justice court should be a court at district court level. The particular complaint concerns the rank of the magistrate who would preside. At the workshop with Department of Justice professionals, the effect of the requirement of specialisation was raised. Magistrates and prosecutors expressed concern that, after having received specialised training for placement in the child justice court,

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In a similar vein to section 74 of the Criminal Procedure Act.

they might be rotated and placed in another court, thus denuding the proposed child justice court of its specialised staff. Together with this concern, they questioned the implicit limitation on career progress that would occur if no future career path in Regional Court were possible. The written submission from Stepping Stones One-Stop Youth Justice Centre addressed this issue, which was of concern to them as a result of the specialised skills that they have developed over the duration of this pilot project.<sup>283</sup> In the submission, it was suggested that the rank of child justice magistrate should be between that of a senior magistrate and a regional court magistrate. It was argued that this would ensure that such magistrate will seek a career in the “child justice system”.

9.15 The AFRcC report concluded that in urban areas there is likely to be sufficient work to allow child justice magistrates to specialise exclusively in cases involving children, and suggested that specialisation would be further facilitated by allowing such magistrates to deal with cases involving children from a number of magisterial districts.<sup>284</sup> The report suggested, however, that in most rural areas the number of cases involving children would not justify the appointment of magistrates to work exclusively on cases involving children. The report therefore recommended that child justice magistrates should be designated so as to allow them to give priority to the preliminary inquiry process and trials involving children, but that they should be not be appointed to work exclusively on cases concerning children. In other words, they should be required to perform normal duties during the remainder of their time.<sup>285</sup> The report concludes that “the Child Justice Bill should not under any circumstances be seen to be creating another special class of magistrate. It should rather be seen as assigning responsibility for a particular sub-set of activities associated with the normal life of the court”.

9.16 The AFRcC report makes that point that the substantial savings<sup>286</sup> that will accrue to the Department of Justice upon implementation of the proposed legislation are “unlikely to translate into

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<sup>283</sup> In 1999, the Stepping Stones initiative was selected as a recipient of the Impumelelo award for innovation in government.

<sup>284</sup> AFRcC report at 57.

<sup>285</sup> In the same way as Commissioners of Child Welfare generally perform other judicial functions.

<sup>286</sup> Which is estimated to be in the order of about R12 million per annum.

savings to the Department's budget. Rather, magistrates' and prosecutors' time will be freed to deal with other matters before court. Thus implementing the new child justice system will benefit the functioning of the entire justice system.<sup>287</sup>

9.17 The Commission recognises that the rotation of staff is inevitable, and that this may affect the retention of specialised staff, but is also of the opinion that this is a matter for the administration of the Department of Justice, rather than being one which should (or could) be addressed in legislation. Nor, in the opinion of the Commission, is it desirable or necessary to require the appointment or designation of any particular rank of magistrate within the categories of possible appointments at district court level. This may inhibit implementation of the legislation in rural areas (if senior positions are not provided for there) altogether. However, in view of the proposed provisions enabling the establishment of One-Stop Child Justice Centres, as discussed in para 9.18 below, it is likely that some senior positions within such centres may be provided for by the administration. In addition, since a Regional Court may be included in such centres, a career path for those wishing to proceed to become Regional Court magistrates will be possible.<sup>288</sup> This, the Commission submits, will address some of the issues raised by the respondents above.

#### *Geographical jurisdiction*

9.18 One of the more serious issues that has arisen in respect of jurisdiction concerns the extension of the current jurisdictional boundaries of the magistrates' courts. It is envisaged that specialised One-Stop Centres will be established to deal with children in trouble with the law. The Stepping Stones One-Stop Youth Justice Centre in Port Elizabeth is a successful pilot project that implements this concept and deals with the child from the moment of arrest to appearance in court. All services, such as detention facilities, probation officers, diversion service providers and justice personnel, are located under one

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<sup>287</sup> At 44.

<sup>288</sup> This possible merger of the One-Stop Child Justice Centres with the Family Court in the future will also assist in the creation of career paths for personnel wishing to specialise in child and family practice. See the discussion of this issue in para 9.20.

roof. The AFReC report concluded<sup>289</sup> that this model is the most cost-efficient to government, as major savings can be effected through saving on transport costs, court time, and detention costs. However, the researchers observed that greater efficiencies could be brought about by allowing such centres to be used by several neighbouring magisterial districts. A single centre servicing a number of rural magisterial districts, the report argued, is far more likely to achieve the threshold size required for cost-effectiveness. Magistrate Goosen of Stepping Stones, who was interviewed about this suggestion, strongly advocated for the merging of the jurisdictional boundaries of the district court in the same way in which the Regional Court functions. For example, he suggested that the Stepping Stones Centre, outside Port Elizabeth, could easily service Uitenhage as well. Magistrate van Renen of Wynberg supported the idea of extra-territorial jurisdiction and argued that this would cater for the smaller centres, where there are insufficient human resources available for specialised magistrates.

9.19 The Commission strongly supports the concept of One-Stop Centres for children who commit crimes, and further supports the suggestion that such centres should necessarily have extended jurisdictional boundaries so as to ensure that they are cost-effective and beneficial to as many children as possible. The Commission therefore recommends that provisions should be included in the legislation to enable the establishment of such centres by the Minister of Justice, in consultation with other relevant ministers.<sup>290</sup> The Commission further recommends that such centres should be entitled to hear cases where the offence was committed outside the boundaries of proclaimed magisterial districts, and accordingly proposes legislation to complement the provisions of section 2 of the Magistrates' Courts Act 32 of 1944 in this respect.<sup>291</sup> The provisions empower the Minister to proclaim different jurisdictional boundaries for the proposed new One- Stop Child Justice Centres.<sup>292</sup>

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<sup>289</sup> At 56.

<sup>290</sup> Clause 72 of the draft Bill.

<sup>291</sup> A proposal by Welfare, Justice and SAPS to create a One-Stop Centre to serve 11 magisterial districts in the Cape Peninsula area has stalled as a consequence of the fact that present legislation does not allow children who have committed offences in one magisterial jurisdiction to be tried elsewhere. This is despite the fact that considerable funding has been made available for this project.

<sup>292</sup> Clause 72(5) of the draft Bill.

9.20 There has been some discussion as to the possible inclusion of the child justice court into the proposed new family courts structure. In a written submission the Chief Family Advocate, Ms B Hechter, referring to the plans for a unified family court, submitted that to establish another structure dealing with “children’s issues on child justice” would amount to a duplication of services. The child justice court is firmly framed within the criminal justice system, with the prosecutor playing a pivotal role both with regard to the decision to divert cases, and the management of cases in the child justice court. Early debates on the issue of inclusion of juvenile courts within the family courts was marked by a lack of enthusiasm for the inclusion of such criminal courts.<sup>293</sup> Although the thinking with regard to this may have shifted at a policy-making level in recent months, the practice on the ground does not appear to have moved very far in the direction of inclusion of juvenile justice courts into the family courts system. Current research indicates that the main work of the present family court pilot projects is the granting of divorces, and that there is little support from the pilot projects themselves for including juvenile criminal cases in the ambit of the family court.<sup>294</sup> Over and above these concerns, there are some practical matters which complicate the question of whether or not child justice courts should be included in the family court. First, there is some doubt as to whether the family court would be a suitable place to have temporary police cells for the accommodation of children overnight. Second, the proposals of the AFReC report concerning the establishment of One-Stop Child Justice Centres are coupled with suggestions that these centres should serve a wider geographical jurisdiction and that the boundaries should be determined in relation to the proximity of police stations,<sup>295</sup> something that is not necessarily going to accord with the approach of the family court system. Third, the child justice court is planned to operate at a district court level, whereas the planned family court is to operate on a Regional Court level. These jurisdictional differences would therefore need to be harmonised before any incorporation could take place. Finally, the Commission is not averse to an eventual merger with the family court structures but cannot recommend this as a concrete proposal at this stage, given the legislative uncertainty regarding the future

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<sup>293</sup> See *Discussion Paper 79* at 210 and 211 where the 1997 Hoexter Commission Report is discussed. Also see Department of Justice *Justice Vision 2000: And Justice for All* September 1997 at 25 *et seq.*

<sup>294</sup> Draft Report on the Family Court Pilot Projects entitled ‘Making something out of nothing’ Law, Race and Gender Research unit, University of Cape Town, February 2000.

<sup>295</sup> In order to obtain maximum savings regarding police transport costs, and to ensure that centres are accessible to police from outlying areas.

family courts. It is submitted, though, that the proposals drafted by the Commission in respect of the child justice court are flexible enough to allow for this court to be incorporated into the family court system at a later stage, if this is found to be desirable.

### *Sentencing jurisdiction*

9.21 There was much comment and discussion on the proposal in Discussion Paper 79 to increase the sentencing jurisdiction of the child justice court to a maximum of five years' imprisonment.

9.22 A clear message was evident from many of the submissions that children should be kept out of the Regional Court system wherever possible, and that a proposed increase in sentencing jurisdiction to accord sufficient sentencing powers to district courts was warranted for this reason alone. During a workshop held with officials concerned with policy and administration in the Department of Justice, it was suggested that the child justice court should be retained within the magistrate's court system and its sentencing jurisdiction increased to a maximum of 15 years' imprisonment, so as to prevent cases from going to the High Court; in the alternative, at least an increase of the sentencing powers to the point where most referrals to the Regional Court could be avoided, was mooted. The Stepping Stones One-Stop Centre team in Port Elizabeth suggested that the sentencing jurisdiction of the proposed child justice court be increased to ten years' imprisonment. This, it was argued, would entail the benefit that more serious cases could be dealt with by the specialised child justice court, and not moved to the Regional Court, where less specialisation would be available. A further argument advanced by Stepping Stones was that if one of the aims of the proposed legislation was to finalise children's cases as soon as possible, then it would be better to keep these matters away from Regional Courts, as the Regional Court roll in most areas is compiled approximately ten months in advance. Ms Cassim of UNISA, the Inkatha Freedom Party and Magistrates Laue of Durban and Venter of Cape Town supported the proposed increased sentencing jurisdiction.

9.23 However, Magistrate Collins of Pietermaritzburg and Magistrate Louwrens of Johannesburg expressed concern that the increased sentencing jurisdiction might lead to some anomalies in respect of sentence. They provided, as an example, a potential case of a child and an adult who might both be

convicted of the same offence, the former by a child justice court and the latter by another district court, with the child receiving a maximum sentence of five years' imprisonment in the child justice court, and the adult receiving the usual maximum in the district court of three years' imprisonment. This, they argued, would result in prejudice to the child. The Magistrate of Nongoma was of the view that the general sentencing jurisdiction of the magistrates' courts needs to be increased to five years to accommodate this eventuality.

9.24 Magistrate Louwrens of Johannesburg and Magistrate Coetzee of Hopetown did not support the proposed extended sentencing jurisdiction and emphasised that children should be referred to higher courts for sentence where appropriate. Magistrate van Renen of Wynberg did not deem the proposed maximum sentence of the child justice court of five years to be appropriate in the light of current legislation providing for various minimum sentences to be imposed unless compelling or substantial reasons exist.<sup>296</sup> It was Mr van Renen's submission that, as regards cases which may fall under that legislation, the child justice court should first consider sentence, and only if it is found that no special and compelling reasons exist to deviate from the prescribed minimum sentences, should the case be referred to a higher court for the imposition of such prescribed sentence.

9.25 The Commission's reasoning behind the recommendation in the Discussion Paper to provide for increased sentencing jurisdiction of the child justice court was to afford further protection to the child accused. The Commission was then of the view that due to the availability of specialised personnel to these courts, the child justice court would be the best forum to consider sentence. Increased sentencing jurisdiction would facilitate more serious cases being finalised in this court. Shortly before the release of the Discussion Paper, however, amending legislation which increased the sentencing jurisdiction of the district courts from 12 months' imprisonment to a maximum of three years' imprisonment was put into effect.<sup>297</sup> Similarly, the sentencing jurisdiction of Regional Courts increased from ten to 15 years imprisonment. Together with the submissions received on this aspect, the Commission's deliberations have been materially affected by this amendment. The (substantially smaller) difference between the

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<sup>296</sup> See the Criminal Law Amendment Act 105 of 1997, discussed further in Chapter 11.

<sup>297</sup> Section 6 of the Magistrates' Courts Amendment Act 66 of 1998, promulgated on 7 October 1998.

present district court jurisdictional limit of three years' imprisonment, contrasted to the five years proposed in Discussion Paper 79, is now more difficult to justify. Additionally, the argument that most cases would be able to be finalised at district court level is of diminishing value when seen in the light of the increased regional court jurisdiction, as the margin of difference between five years imprisonment and 15 years' imprisonment is considerably more than the differential between the original proposal of five years' imprisonment and the (then) upper limit in the regional court of ten years' imprisonment. In other words, considerably fewer cases might benefit from being retained at district court level rather than being transferred to the Regional Courts, although the increased Regional court jurisdiction does imply that fewer cases would be transferred to the High Court as court of first instance.

9.26 The Commission has taken note of the concern raised by respondents that children accused of more serious crimes could be prejudiced by having higher sentences imposed, due to the proposed increased sentencing jurisdiction, by comparison with adults convicted of the same offence.

9.27 In view of the above considerations, the Commission has reviewed its position on the increased sentencing jurisdiction of the child justice court and now recommends that the child justice court retain the same sentencing jurisdiction as the other districts courts, which is currently a maximum of three years imprisonment.

#### *Procedure and court environment*

9.28 The NICRO report on the consultation with children illustrated that, when children were asked to discuss experiences with the criminal justice system, the words most frequently used revealed fear, intimidation, confusion and a sense that the process had occurred without their meaningful participation. Most children reported that they felt they had not really been heard, and that the people making the decisions did not know much about them or their individual circumstances. When asked to make suggestions regarding a more appropriate court environment, the following emerged:

- \* There should be a more informal physical layout, with the relevant people sitting around a table, not dressed in formal attire. One participant stated that the magistrate's clothes

scared him.

- \* The court should be closed, with no unknown persons in attendance.
- \* Language understandable to children should be used. In this regard various aspects such as the use of the mother tongue, simple vocabulary and the manner of speaking were mentioned.
- \* Court rooms should be more child-friendly, with colourful posters, paint, furniture and “sweets”.
- \* A person should be available to greet the accused child and to explain what is going to happen. The child’s parents and a social worker should also be present at all times.
- \* One participant, on the other hand, felt that nothing should be changed, stating that “children are supposed to feel guilty and scared in court.”

9.29 As far as the atmosphere of the New Zealand Youth Court is concerned, the Children, Young Persons and Their Families Act of 1989 appears to contemplate an environment that is more relaxed, informal and child-friendly. However, the Youth Court setting has been criticised as still being too formal.<sup>298</sup> The South African Department of Justice in its Policy Document on the Model Court envisages the child justice court as being “less formal and less adversarial than a standard criminal court, involving greater participation by the child and family.”<sup>299</sup> It is not specified in that document whether (and how)

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<sup>298</sup> GM Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* Wellington: Social Policy Agency and the Institute of Criminology, Victoria University of Wellington 1993 at 149 provides for following insight: “(w)e have come to the conclusion that the Youth Court has, in most areas, failed to create the kind of environment anticipated by the Act. While for lawyers, judges and court staff it is noticeably more relaxed and informal than other criminal courts, to us as outsiders it was undoubtedly a very formal and alien setting and one which seemed little different in atmosphere from the Children and Young Persons Court which operated before the Act. If the courtroom seemed formidable to us after the familiarity of many weeks of observation, it must surely appear even more so to the young people who appeared before it and their families.”

<sup>299</sup> Department of Justice *Policy Document on the Model Court* compiled by CHJ Badenhorst at 78.

legislative provisions could further this goal. The “Children’s Promise” being promoted by the Office of the President includes the development of “child friendly courts” as a key objective.

9.30 The Commission is of the opinion that the guiding provisions included in the Discussion Paper provide an adequate legislative framework to further the goal of more child-friendly court environments, where this is possible. The provisions encourage the maximum degree of informality conducive to the full participation of the child and his or her parents, without necessarily requiring the expenditure of large amounts on capital assets or improvements. The Commission is confident that, in planning new court buildings as well as in the establishment of One-Stop Child Justice Centres, the Department of Justice will pay attention to physical planning with due regard to the need for child-friendly court environments. Thus, in the absence of adverse or supplementary comment on this issue, the Commission consequently retains those proposals that were put forward in the Discussion Paper.

9.31 The Department of Welfare and Population Development in the Gauteng Provincial Government supported the idea that the protections afforded accused children in the child justice court should apply, as far as possible, to any matter transferred to a higher court.<sup>300</sup> Ms Cassim agreed that the legislative rules covering the conduct of proceedings in the child justice court should also apply to proceedings where children are accused in the Regional or High Court to safeguard the interests of the child. Consequently, the Commission again recommends that the provisions in the Discussion Paper that provided for this should be included in the legislation.

#### *Lay assessors*

9.32 Some respondents raised questions about whether lay assessors should be used in the child justice court. Magistrate Coetzee of Hopetown was of the view that lay assessors can play a large role in sentencing as they involve the community directly. The staff at Stepping Stones argued, though, that their experience has shown assessors to be unhelpful where specialised services are available. At the workshops, mixed views were expressed, but generally the weight of opinion was against the use of

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<sup>300</sup> Either by reason of the offence for which the child is charged, or because a heavier sentence is expected.

assessors. The Commission remains convinced that the specialist nature of the child justice court would be seriously eroded with the introduction of lay assessors. The proposed new system has been designed to give children as much protection as is possible and to ensure that their cases are presided over by professionals trained to balance the best interests of the child against those of the community. The Commission retains the position adopted in the Discussion Paper that the composition of the bench in the proposed child justice court should not include lay assessors.<sup>301</sup>

*Children co-accused with adults*

9.33 The issue of whether there should be a separation of trials where children are co-accused with adults elicited substantial comment. The Department of Welfare and Population Development in the Gauteng Provincial Government stated that when children are co-accused with adults, the separation of children from adults should be compulsory. Ms F Cassim was also in favour of the separation of trials involving children and adult co-accused, and agreed with the proposed application procedure for joinder of trials. She was of the view, however, that the child justice court should be the appropriate court to sentence the child in all instances, and that where joinder applications had been granted and the child tried together with the adult in an ordinary district court, the legislation should provide that the matter must be remitted for sentence to the child justice court.

9.34 During a workshop with people concerned with the development and implementation of policy in the Department of Justice, it was pointed out that with a separation of trials, the case of the child may be finalised sooner than that of the adult co-accused. The question was posed whether evidence relating to the case of the child would be admissible in the case of the adult.

9.35 The Office of the Director of Public Prosecutions, Pietermaritzburg, argued that the decision to separate or join trials should be solely that of the Director of Public Prosecutions. It was further submitted that joint trials are often necessary to prove the prosecution's case adequately, and that it is undesirable to subject witnesses to testifying at two separate trials. The response contended that if there

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<sup>301</sup> See clause 77(2) of the draft Bill.

is a fear that an adult offender will intimidate a child offender, the child could be placed in a separate room and be linked via closed circuit television to the court room.

9.36 The comment from magistrates was varied on this controversial aspect. Magistrate Collins of Pietermaritzburg and Magistrate Louwrens found the proposals in the Discussion Paper in this respect to be acceptable. Magistrate Coetzee strongly supported the provision that, where joinder was ordered, the child would follow an adult to the court in which the adult would ordinarily be tried, rather than the adult moving to the child justice court for the trial. Magistrate Venter concurred with this and submitted that the knowledge that a child co-accused could end up in an adult court would act as an effective deterrent to would-be child offenders. Magistrate Venter was also of the view that the proposals regarding joinder were necessary to prevent prejudice. He added, as an example, that it would be unreasonable to expect the victim of a gang-rape to be subjected to cross-examination twice. The Magistrate of Nongoma also supported the proposals concerning separation of trials, but opposed the notion that an application for joinder could be brought by any party, on the grounds that the principle laid down in section 153(4) of the Criminal Procedure Act may be infringed.

9.37 Magistrate van Renen was of the view that where there have been successful joinder applications, the magistrates who hear these matters will have to be *au fait* with the child justice legislation. It was therefore Mr van Renen's submission that in cases of successful joinder applications, it might be necessary to direct that the adult should follow the child to the child justice court rather than the converse.

9.38 Magistrate Maritz was of the view that where a child commits an offence with an adult, he or she should be prosecuted together with that adult and that there should be a separation only in exceptional cases, for example where the accused did not actively participate in the offence or where there are numerous adults being charged. Magistrate Gradner, too, was of the view that separation should only take place in exceptional circumstances and submitted further that where a child commits an offence with an adult and was not influenced by the adult but was a co-perpetrator, he or she should be treated as an adult.

9.39 The NICRO report shows that 67.2% of the children interviewed felt that adults who are co-accused should not be tried in the child justice court because, in their view, an adult could put all the blame on the child, knowing that the child might not be punished, and adults could threaten or intimidate the child and force him or her to take the blame.

9.40 Those children who felt that an adult co-accused should be tried together with children who are co-accused in the child justice court advanced the motivation that such adult could support and protect a child.

9.41 The Commission retains its recommendations in respect of mandatory separation of the trials of a child and his or her adult co-accused, subject to a joinder application which may be instituted.<sup>302</sup> The proposed legislation confirms that an application for joinder may not be made unless there are compelling reasons for joinder of the trials. If an application for joinder succeeds, it is recommended that the trial should be held in the court in which the adult is to appear, which court must ensure that the child receives the protections envisaged by the proposed draft Bill as far as possible.

### *Criminal capacity*

9.42 In view of the recommendation to retain the *doli incapax* presumption where children are over ten years of age but below 14 years,<sup>303</sup> the Commission included provisions in the legislation detailing how the issue of rebuttal is to be addressed by trial courts.<sup>304</sup> As was repeated at consultations on both the Issue Paper and the Discussion Paper, the concern has been that in the past, the rebuttal was dealt with in a rather perfunctory fashion. This aspect has therefore been addressed, and a provision allowing for an evaluation of the child's cognitive, emotional, psychological and social development by a suitably qualified person that may be requested by either the prosecution or the defence has been included. It is also recommended that such an evaluation should be conducted at state expense, as the Commission

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<sup>302</sup> Clause 80 of the draft Bill.

<sup>303</sup> See para 3.28 in this regard.

<sup>304</sup> Clause 79 of the draft Bill.

expects the number of children between ten and 14 years of age who have not been diverted and who do end up in court to be relatively low. A further provision placing the burden of proof on the prosecution (as was the case at common law) has also been included. It is also required that a child who is at least ten years but not yet 14 years of age and who is appearing before a court should be legally represented, at state expense if necessary.<sup>305</sup>

#### *Time limits related to the finalisation of trials*

9.43 Provisions restricting the period for which a child could be detained whilst awaiting trial, in order to ensure speedy finalisation of trials where children are in custody, were included in Discussion Paper 79.<sup>306</sup> Some comment was received at the workshops concerning this provision, most particularly where children are on trial for serious offences, and court proceedings cannot be completed within that period. The Commission has therefore provided, as a general rule, that a child must be released if in detention awaiting trial and the trial is not concluded within six months after the plea. Where children are charged with serious offences,<sup>307</sup> however, the release provision should not apply.

#### *Referral to the Children's Court*

9.44 Ms F Cassim remarked that she is in favour of exercising caution in the referral of children to the Children's Court. During a workshop held with personnel from the Department of Justice who are responsible for implementation of policy, it was suggested that the Commissioners presiding in the Children's Court should be considered for appointment as specialised child justice magistrates.

9.45 Magistrates Venter, Collins, Van Rooyen, Coetzee, Maritz and the Stepping Stones One- Stop Centre supported the discretionary conversion of a case involving a child under 18 years to a Children's

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<sup>305</sup> See clause 98(1)(c).

<sup>306</sup> At 360. The proposal in the Discussion Paper was there where a trial had not been finalised after six months, the child would have to be released. The trial could, however, continue to completion.

<sup>307</sup> See items 1, 2 and 3 of Schedule 3 to the draft Bill, ie murder, rape or armed robbery.

Court inquiry as provided for in the Discussion Paper. Magistrate Louwrens also supported the fact that conversion or transfer to the Children's Court should not be mandatory, and submitted that transfer should only be considered once the probation officer and the prosecutor deem it necessary; and further, that courts should be empowered, at any time before sentence is passed, to convert the proceedings to a Children's Court inquiry, as present provisions stipulate. Magistrate van Renen particularly supported the provisions requiring that consideration be given to the possibility of transfer to the Children's Court in certain specified instances, and where a decision not to transfer the matter is made, that reasons for not doing so must be furnished.

9.46 Due to the fact that the proposals in Discussion Paper 79 received much support among the respondents, the Commission therefore retains its recommendations in respect of the provisions enabling referral of a child to a Children's Court. The Commission further retains its view that, in addition to the normal "child in need of care" test, further criteria should be included in legislation to indicate circumstances under which such transfer must be considered.<sup>308</sup>

## CHAPTER 10: SENTENCING

### Overview of the proposals in Discussion Paper 79

10.1 Three factors influenced the Commission's approach to the sentencing proposals encompassed in the Discussion Paper. First, of particular importance in regard to juvenile justice, was the development of restorative justice as a primary objective of criminal justice. A second factor was the Constitution: it has been stated that the traditional aims of punishment have been affected by the Constitution, and that sentencing must be re-appraised and developed in the spirit of the Constitution.<sup>309</sup> The third factor was the approach to sentencing that can be gleaned from the international documents on child justice, where references to *rehabilitation* have been overtaken by an emphasis on *reintegration* of the child into society.<sup>310</sup> The Constitutional Court's decision in *S v Williams*<sup>311</sup> suggested that South Africa's child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards.

10.2 Although the Criminal Procedure Act provides for a range of sentences and conditions of

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309 'The Law of Criminal Procedure and the Bill of Rights' in *Bill of Rights Compendium* Durban: Butterworths (looseleaf with updates) 1996.

310 Van Bueren points out that the approach adopted by the Convention on the Rights of the Child establishes clearly now that the aims of a child justice system should be that children have the right to be treated in a manner consistent with the child's age, and that the system should promote the child's re-integration into society. Also see AP van der Linden, GBCM van der Reep, FGA ten Siethoff and AEIJ Zeijlstra-Rijpstra *Jeugd en Recht* Houten: Bohn Stafleu Van Loghum 1994 at 94 where it is stated, in respect of the Netherlands, that in child criminal law the aims of resocialisation and re-education should be regarded as complimentary to the traditional aims of punishment relating to adults.

311 1995 (7) BCLR 861 (CC). In this decision the sentence of juvenile whipping was declared to be unconstitutional. Prior to this, whipping was the most prevalent sentence for juveniles, with some 35 000 children having been sentenced to this form of punishment each year.

suspension or postponement of sentence which may be imposed upon children (or those persons who, at the time of commission of the offence, were below the age of 18 years), it has been brought to the attention of the Commission during the consultation phase that sentencing officers do not utilise the above range of options creatively. The current sentencing provisions in the Criminal Procedure Act, outlined in the Discussion Paper at 217 - 220, have been regarded as being quite wide.<sup>312</sup> The Constitutional Court, too, regarded the existing penalties as permitting of a more flexible but effective approach in dealing with child offenders.<sup>313</sup>

### *General framework and principles*

10.3 In Discussion Paper 79, the Commission retained a large degree of discretion for sentencing officers.<sup>314</sup> Although some clear limitations were proposed, such as a restriction on the sentence of imprisonment of children below a certain age, the overall aim was to promote the use of a range of sanctions in an innovative way, and to encourage restorative justice-oriented and community-based sentencing<sup>315</sup> options. For purposes of clarity it was proposed that the available sentences be set out in a framework based on whether they were non-custodial, or involved restriction of liberty. The Commission was further of the view that proposed legislation should not include any provision for prescribed minimum sentences, recently introduced in South Africa by the Criminal Law Amendment Act

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312 *IMC Interim Policy Recommendations* at 54.

313 *S v Williams and Others* 1995 (7) BCLR 861 (CC) at 883. In addition, the Constitutional Court, after considering current sentencing options and trends in child justice and penology, endorsed the development of alternative sentence and diversion possibilities, citing examples of a non-custodial nature. See, also the distinctive approach to juvenile sentencing adopted in the recent case of *S v Z* 1999 (1) SACR 427.

314 Despite the fact that in other youth justice systems sentencing hierarchies have been introduced to guide courts in the selection of appropriate penalties and to provide a greater degree of consistency in sentencing this approach was not followed in the Discussion Paper. See C Cunneen and R White *Juvenile Justice: An Australian Perspective Melbourne*: Oxford University Press 1995 at 220 for an explanation of the New South Wales and Victoria sentencing laws, which include measures designed to prevent a court from imposing a sentence at one level unless it is satisfied that a sentence at a lower level of the hierarchy is inappropriate.

315 Community Courts and Alternative Dispute Resolution are discussed in the SA Law Commission *Issue Paper 8* 'Alternative Dispute Resolution'; see *Discussion Paper 79* at 223 for an overview of the relevance of this Issue Paper to child justice.

105 of 1997.<sup>316</sup> This legislation exempts children under the age of 16 from such sentences, and further supports the concept of different criteria being applied in respect of the application of the legislation to children of 16 years, but under the age of 18.

10.4 The alternative sentencing proposals in the Discussion Paper were influenced by sentences that are currently available in South Africa. In addition, new sentence possibilities that have proved useful options for young offenders in other jurisdictions were included.<sup>317</sup> Restorative justice options were specifically spelt out as possibilities. The list of available options included referral to a family group conference or victim-offender mediation,<sup>318</sup> restitution, compensation and reparation to the victim of the offence, as well as orders intended to promote the child's reintegration into his or her family or community.

10.5 Many children serve terms of imprisonment without a pre-sentence report having been requested or provided. It was therefore proposed, in accordance with the international rules<sup>319</sup> and also with South African court decisions,<sup>320</sup> that pre-sentence reports should be mandatory before any residential sentence can be imposed, and that no admission to a prison or reform school be valid without a certification on the warrant that a pre-sentence report had been obtained. Further, the Discussion Paper provided that pre-sentence reports should be placed before a sentencing officer in all cases, except where the child was convicted of an offence referred to in Schedule 1 (to Bill A),<sup>321</sup> or where requiring such report would cause undue delay prejudicial to the best interests of the child.

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316 In operation since 1 May 1998. Section 53(1) of the Act provides that the provisions will cease to have effect after the expiry of two years from the date of commencement of the Act, with the proviso that they may be extended by the President with the concurrence of Parliament, for one year at a time.

317 The aim being to extend, as far as possible, the range of alternative sentencing options.

318 The Discussion Paper proposed that the court retain the power to impose a sentence other than that recommended by a family group conference, victim-offender mediation or other alternative dispute resolution proceeding.

319 Beijing Rule 16 requires that a child's background and circumstances be made available to the competent authority in social inquiry reports in all except minor cases. See G Van Bueren *The International Law on the Rights of the Child* Dordrecht: Kluwer Academic Publishers 1995.

320 *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).

321 See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

10.6 The question was raised in the Issue Paper as to whether evidence of previous pre-trial diversion should be admissible at the sentencing stage of any subsequent trial. South African law would at present not permit this, as it is not a previous conviction. Allowing such evidence to be admitted would have the practical effect of exposing the fact that a child had previously attended a particular programme, which had not benefited the child.<sup>322</sup> In Discussion Paper 79, the Commission proposed that whilst evidence of previous diversion may be presented at sentencing stage, it may not be used in aggravation of sentence, but only to assist the court to determine a suitable sentence option.

### *Specific sentences*

#### Imprisonment

10.7 The Discussion Paper sought to give effect to the principle that detention should be a matter of last resort. Imprisonment is of special concern where young children have been convicted. In order to protect young children from this, the Discussion Paper proposed that the sentence of imprisonment for children below a certain age (14 years) be excluded.<sup>323</sup> In addition, mindful of the Beijing Rules,<sup>324</sup> the Discussion Paper proposed that imprisonment only be imposed upon children who have been convicted of serious and violent offences. Also, in compliance with the international instruments, the Discussion Paper proposed that life imprisonment be excluded as a sentence option for children.

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322 The disadvantage, however, is that the previous diversion would have been based on the child's volunteering to accept guilt, which is not equivalent to a previous conviction. The admission of this evidence therefore poses the spectre of prejudice to the procedural and constitutional rights of the child.

323 In practice very few children below this age are admitted to serve prison sentences. On 31 April 1999 only ten children under the age of 14 years were serving sentences of imprisonment in South Africa (see August (1999) *Article 40*). Section 29 of Act 59 of 1959, as amended, prohibited the pre-trial detention in prison of children below the age of 14.

324 Rule 17(1)(c) states that deprivation of liberty, as a measure of last resort, is only to be imposed when a child has committed "a serious violent act against another person or persists in committing other serious offences".

Reform schools<sup>325</sup>

10.8 Sentencing a child to attend a reform school has been characterised as a drastic measure which leads to the detention of the child for a substantial period of time and exposure of the child to other child offenders who may exhibit even worse anti-social behaviour than the child himself or herself. The Discussion Paper contains a summary of judicial precedent which has provided courts with guidance as to the procedure to be followed when this sentence is being considered.<sup>326</sup> The Issue Paper drew attention to the IMC investigation into places of safety, industrial schools and reform schools,<sup>327</sup> which revealed numerous problems with respect to these institutions. It was observed that children sometimes serve longer sentences in reform schools than they would if imprisonment were imposed. But if this sentence were not available, children could then be sentenced to the more harmful option of imprisonment.<sup>328</sup> Since the publication of both the Issue Paper and the Discussion Paper, there have been some developments in practice,<sup>329</sup> although the future of reform schools within Provincial and National Education Department Policy has to date not been fully clarified. It appears that the reform schools in

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325 A child may only be referred to an industrial school by the Children's Court under the Child Care Act 74 of 1983.

326 *R v Langeveldt* 1957(4) SA 365 (C); *R v Rabotapi* 1959 (3) SA 837 (T); *S v Motsoaledi* 1962 (4) SA 703 (O); *S v Mvulha* 1965 (4) SA 113 (O); *S v Maasdorp* 1967 (2) SA 93 (G); *S v Mkwanazi* 1969 (2) SA 246 (N); *S v Bosman* 1969 (4) SA 217 (NC); *S v H* 1978 (4) SA 835 (EC); *S v T* 1987 (2) SA 508 (C). Notably, the Criminal Procedure Act itself provides no guidance to sentencers as to the circumstances under which the discretion to sentence a child to detention in a reform school should be exercised.

327 *IMC In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* July 1996.

328 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 services can be accessed as a sentencing option.

329 Some reform schools have allegedly improved facilities, reviewed inappropriate disciplinary procedures, and engaged with other role-players in the child justice sector (such as the IMC). At the same time, however, the numbers of children sentenced to reform schools has declined dramatically for reasons that have not been fully researched.

the Western Cape<sup>330</sup> are to close, and new facilities will open in their stead.<sup>331</sup> Despite the uncertainty surrounding the future of this sentence option, the Commission felt it necessary to retain the option of a similar residential sentence. However, after receiving submissions from the education sector to the effect that the name “reform school” would disappear, this sentence was referred to in Discussion Paper 79 as “a sentence with a residential element”.<sup>332</sup>

10.9 Discussion Paper 79 proposed that the guidelines as to when a reform school sentence would be appropriate should be included in legislation. These guidelines emphasised that the presiding officer must be satisfied that a sentence with residence is required because of the seriousness of the offence; the protection of the community; the severity of the impact of the offence upon the victim; and the fact that the child has failed to respond previously to non-residential alternatives.

10.10 Attention was also paid to the question of the length of these sentences<sup>333</sup> in the Discussion Paper. Because the Commission was of the view that reform school sentences can be disproportionately long, as well as being aware of the fact that two years can be too short (either for educational or other reasons<sup>334</sup>) it was proposed in Discussion Paper 79 that reform school sentences should not be imposed for less than six months. As a maximum it should be possible, in exceptional circumstances, with reasons

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330 Six of the nine reform schools in the country are located in this province. Transfers to the Western Cape schools of children sentenced to reform school in other provinces appears to have halted due to a lack of clarity about which province should bear financial responsibility.(see *S v Mtshali and Mokgopadi*, case A863/99 WLD reported in *Article 40, supra*).

<sup>331</sup> See *Article 40, supra* (Interview with Minister Helen Zille).

332 A reference to reform school sentences were retained in clause 76 of Bill A in order to avoid confusion as to what was intended by the term “sentence with a residential element”.

333 At present in effect a two year sentence (see section 291(1) read with section 290(1)(d) of the current Criminal Procedure Act 51 of 1977), which can be extended by a further two years, as long as it is not extended beyond the 18th birthday of the child. Children themselves have frequently requested to be sentenced as adults (so that they may receive a short term prison sentence), rather than face the possibility of a four year reform school stay.

334 With the proposed minimum age of admission to prison, a reform school sentence will be the only available option for children below this minimum age. A few of these young children may have committed serious offences in regard to which the community requires adequate protection, and a lengthy reform school sentence might then be the only option.

for this noted on the record, to refer a child to reform school until the age of 18.<sup>335</sup> The usual maximum term, where such exceptional circumstances do not exist, should remain two years. In addition, no administrative extensions of sentences should be allowed, and any proposed extensions beyond the sentence envisaged by the initial sentencing officer should have to be reviewed by a court. It was proposed that the present automatic review procedure applicable to this sentence should be retained.

### Fines

10.11 The Issue Paper suggested that a monetary fine may be excluded from the range of sentence options provided for in proposed legislation, but that such exclusion should not preclude the possibility of payment of money as an aspect of reparation or restorative justice. There was substantial support for this view.<sup>336</sup> Therefore, the Discussion Paper proposed that monetary fines payable to the State should be excluded as a sentence option. Most respondents agreed that restitution, reparation to the victim and compensation in monetary form should be retained as valuable components of a restorative justice approach, and a proposal to this effect was included. In addition, where a victim is unknown, or where a so-called “victimless offence” has been committed, an option which furthers restorative justice aims was proposed. A sum could be payable directly to a charity or welfare organisation involved with children and identified, with motivating reasons, by the child who is thus sentenced, in lieu of payment to a specific victim.

### *Alternative sentencing*

10.12 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

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335 Thus a child of, for example, 13 years, convicted of a serious, violent offence could serve this sentence as an alternative to imprisonment.

336 It was borne in mind that it is usually parents who eventually have to pay the fines imposed on their children.

(including the negative condition not to re-offend) in order to be legally enforceable. The Issue Paper raised the question whether it would be desirable for legislation to provide that alternative sentences be imposed independently, without the necessity of always linking these to suspended or postponed sentences.<sup>337</sup> The Issue Paper also raised the idea of the inclusion of further intermediate sentences in legislation, so as to provide sentencing officials with a wider range of available options.

10.13 Discussion Paper 79 reviewed literature which suggested that present alternative sentences, such as the rendering of some specific benefit or service to the aggrieved person and community service, are not used as widely as they might be. A problem specific to child offenders is that according to present legislation, community service may not be imposed on a child below the age of 15 years.<sup>338</sup> Community service also needs to be imposed for a period of at least 50 hours. In Discussion Paper 79, the 1973 Minimum Age Convention on Child Labour was considered, and, in particular the principle that children between the ages of 13 to 15 years may do *light* work which is unlikely to be harmful to their health or development and which will not prejudice their attendance at school. It was argued, therefore, that there is scope for subjecting children below the age of 15 years to community service, as long as account is taken of the age and maturity of the child. Many service providers believe that children of 13 years and older are able to perform community service, and that it would be a valuable sentence option. Discussion Paper 79 proposed, therefore, that community service should be an independent sentence option for children from the age of 13. Further, since it had been argued that the statutory minimum of 50 hours would inhibit the use of this sentence for children, and may be disproportionately severe for younger children, Discussion Paper 79 proposed that the minimum be dispensed with.

10.14 The well-known programmes offered by NICRO, which are suitable both for diversion and as sentence options, were included in the list of available sentences proposed in the Discussion Paper. The emerging trend to couple innovative programmes for young people with a residential component was also

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337 What is regarded as a condition of sentence in South Africa may be imposed independently in some foreign jurisdictions. Section 283 of the New Zealand Children, Young Persons and Their Families Act, 1989 includes in its range of sentencing options sentences such as payment of reparation towards emotional harm or loss of or damage to property, restitution and community work.

338 The rationale behind the age limitation is probably founded upon the principle that children should not be subjected to forced labour. However, community service is arguably a justifiable limitation to the principle that children should not work.

discussed.<sup>339</sup> Recent pilot projects involving experiential learning provide one such example, and as programme options develop, it is possible that other programmes too may require short-term stays in residential care.<sup>340</sup> In order to facilitate the development of these alternatives to imprisonment, it was proposed that the legislation should provide more flexible options with regard to periods of residence.<sup>341</sup> Thus Discussion Paper 79 proposed provisions enabling the sentencing officer to impose a requirement of attendance at more intensive programmes, of longer duration than those usually available. In addition, provision was also made for a residential requirement to be attached to these sentences. The desirability of linking these sentences to the acquisition of skills and vocational training<sup>342</sup> influenced the formulation of these new sentence options in the Discussion Paper.

10.15 Postponement of the imposition of sentence is an option with which South African magistrates are familiar, especially in juvenile cases. Postponing the imposition of sentence resembles diversion - postponement of sentence is currently used when the child is required to attend a programme. If the programme has been successfully completed, the sentencing officer will, on the return date, often impose a caution and discharge, or similar sentence. Discussion Paper 79 recommended that both suspension and postponement of sentences should continue to form part of the array of sentencing options available to the judicial officer, but that imprisonment, although it can be partially or fully suspended, should not be an automatic alternative sentence to any other sentence.<sup>343</sup> It was thus proposed that a child who failed to comply with conditions of a suspended sentence would have to be returned to court for reconsideration of the question as to whether imprisonment (or any other alternative sentence) was

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339 This is sometimes linked to the fact of a child being homeless or living in unstable family circumstances, and therefore unable to qualify as easily for an alternative sentence.

340 These may be offered by government (such as in secure care facilities or reform schools) or by non-governmental organisations.

341 However, unfettered placement of young people in residential programmes cannot occur without close monitoring and vigilant protection of the rights of young people who are placed there even for short periods of time.

342 An important element of the newly established "The Journey" programme (lasting six months) being run by NICRO.

343 If detention is to be considered as a matter of last resort, it seems logical that it can be considered only after the efficacy and possibility of serving the contemplated alternative has been exhausted and the possibility of imprisonment considered independently. See, too, the approach of Erasmus J in *S v Z supra*, as well as the judgement in *S v S* 1999 (1) SACR 608 (WLD).

warranted.

### *Correctional supervision*

10.16 Correctional supervision, introduced in 1993, is also a community-based sentence composed of various measures, such as house arrest and attendance of programmes.<sup>344</sup> It is considered a severe punishment, and has been used for offences such as rape, major thefts and assaults. It is apparent that it can be used for any offence.<sup>345</sup> As a sentence in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977, the first type of sentence of correctional supervision, it can only be imposed after consideration of a report of a probation officer or of a correctional officer. Section 276(1)(i), the second type of correctional supervision, makes provision for conversion of a prison sentence into correctional supervision. It is unknown to what extent sentences of correctional supervision have been imposed upon children, but some correctional officials have expressed discomfort with the idea that young children below, say, 15 years,<sup>346</sup> be included within the ambit of this sentence.

10.17 In Discussion Paper 79, the view was expressed that it would be preferable to link the imposition of correctional supervision as a sentence to the minimum age of admission to prison. In this way, correctional supervision could be a real alternative to imprisonment as was always intended. It was further noted that correctional supervision as contemplated in section 276(1)(h) of the Criminal

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344 See M Chaskalson *et al Constitutional Law of South Africa op cit* at 28 -3.

345 VG Hiemstra *Suid Afrikaanse Strafproses* 5<sup>th</sup> edition by J Kriegler Durban: Butterworths 1993 at 673.

346 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.

Procedure Act should be the form of community correction primarily available in the child justice sphere, and this was provided for in the Discussion Paper.<sup>347</sup> However, in order to ensure that children who are serving terms of imprisonment are not deprived of access to correctional supervision where this could ensure their release from detention, a provision to the effect that the Commissioner of Correctional Services may release any child from imprisonment into a correctional supervision programme was included in the Discussion Paper.

### *Diversion after conviction*

10.18 Discussion Paper 79 canvassed the possibility of enabling diversion after conviction. It was suggested that a sentencing officer might, in lieu of imposition of sentence, refer a matter to a family group conference or restorative justice process. It was argued that where diversion occurred after conviction, the conviction should then fall away, as is currently the case with the conversion to a Children's Court inquiry.<sup>348</sup> It was therefore proposed in the Discussion Paper that the possibility of referral to a Family Group Conference (FGC) after conviction should be included as an option for a sentencing officer, but that the recommendations of such conference must be referred back to court for judicial consideration. The court could agree with or differ from the recommended sentence, but in the latter instance would have to provide reasons for doing so.

## **Evaluation of comment and recommendations**

### *General framework and principles*

10.19 Most respondents expressed the view that the sentencing options spelt out in Discussion Paper

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<sup>347</sup> Thus no equivalent to the present section 276(1)(i) of the Criminal Procedure Act was included.

<sup>348</sup> The New Zealand model is a useful benchmark in this regard: the way in which the legislation provides for diversion after conviction is by requiring that a court must refer a matter after conviction to a family group conference, after which the judge can confirm the agreement reached. It should be noted that in the New Zealand child justice legislation, such referral after conviction is mandatory.

79 were as broad as was possible given the present infrastructure in South Africa.<sup>349</sup> The magisterial sub-cluster, Ladysmith, and the Magistrates, Hopetown and Durban, were of the view that the Discussion Paper included all possible sentencing options, and that no additional suggestions appeared necessary. Agreement was also expressed with the formulation of the options pertaining to custodial sentences,<sup>350</sup> and it was strongly suggested that sentencing guidelines definitely be included in the final legislation by these judicial officials.<sup>351</sup> By contrast, the sub-cluster, Newcastle, was concerned that some provisions appeared to “take away” the sentencing discretion of the courts. The submission did not provide alternative proposals, however. In a similar vein, the Magistrate, Vulindlela, did not recommend the inclusion of guidelines or sentencing principles, but on the grounds that “they can never be exhaustive”. The Magistrate, Pietermaritzburg, referred the Commission to the judgement of Judge Erasmus in *S v Z en Vier Ander Sake*,<sup>352</sup> and commented that all that is needed to be known about sentencing is contained in that judgement, thus obviating the need for any legislation on sentencing.

10.20 The submissions received from the Magistrate's Court, Johannesburg, highlighted the divergence of opinion concerning the provisions on sentencing in the Discussion Paper. One magistrate viewed the proposals as “radically ending the discretion that courts have and should have in the exercise of their judicial powers”,<sup>353</sup> whilst colleagues from that same court viewed the sentencing proposals as entirely adequate, “acceptable and realistic”.<sup>354</sup>

10.21 The Gauteng Provincial Department of Welfare suggested that the legislation should delineate in more detail when sentences with a purely retributive character may be imposed. The Magistrate,

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349 Ms Cassim, Unisa, suggested however, that consideration be given to further alternatives such as electronic monitoring and "boot camps".

350 See too, the submission of the Magistrate, Cape Town: “It is clear that a lot of thought has gone into the formulation of custodial sentences and (the provisions) are supported.”

351 The Magistrate, Durban, commented that “it is always useful to have guidelines where possible”.

352 *Supra*. The judgement was reported after the release of *Discussion Paper 79*. A convenient summary of the judgement is provided in August (1999) *Article 40 supra*.

353 In particular, this magistrate did not agree with the proposed maximum sentence of 15 years imprisonment, as it did not address the problem of serious crime and the overall interests of the community.

354 The Magistrate, Bloemfontein, was in agreement with the proposals concerning sentencing provided for in the Discussion Paper.

Hopetown, stressed that lay assessors can play a large role in sentencing, as the community is then directly involved. As a general point, several respondents commented that sentencing will be a fruitless exercise if the necessary infrastructure and facilities are not in place.

10.22 The submission from Police Legal Services requested that it be specified where a child should be detained pending transfer to a reform school, and recommended that detention in police cells be expressly excluded.

10.23 The Commission concludes that the comments referred to in the above paragraphs are largely supportive of the proposals contained in the Discussion Paper, and that the general framework outlined in the Discussion Paper should therefore be retained. The provisions<sup>355</sup> of Bill B clarify that children subject to this legislation must be sentenced in terms of the provisions of the proposed legislation, which then replaces the Criminal Procedure Act as far as sentencing is concerned. It is proposed that purely retributive sentences should be kept to a minimum, as such sentences would upset the balance between offender, victim and community that the proposed legislation seeks to achieve. The judicial precedent contained in the seminal judgement in *S v Z en Vier Ander Sake* has been utilised to supplement the general sentencing provisions contained in the proposed legislation, in particular as far as the judicial emphasis on follow-up and monitoring of young people serving alternative sentences are concerned.<sup>356</sup>

10.24 As regards assessors, the view has already been expressed that, due to the intention to facilitate specialisation in the child justice system, assessors would not be appropriate. However, it must be pointed out that the legislative proposals encourage community involvement in the child justice system in a variety of ways, including the proposed local child justice committees and through diversion.

10.25 The Commission agrees that children should not be detained in police cells after the finalisation of the preliminary inquiry, and provisions to that effect are clearly provided for in Chapter 4 in Bill B on detention of children and release from detention.

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<sup>355</sup> See clause 84.

<sup>356</sup> See clause 88 in particular.

*Specific sentences*

10.26 The NICRO report detailed the views of the children consulted about what they believed to be the most effective form of punishment for serious offences committed by children. More than half of the children consulted, ie 57%, suggested long-term imprisonment as a suitable sanction.<sup>357</sup> The report explained, in the analysis of the findings, that the children's views were influenced by a lack of awareness of alternative sentences. The report indicated further that the participants were of the view that, at present, residential sentences such as reform schools and imprisonment are inappropriately handed down, and that their use should be restricted in legislation to certain specified cases.<sup>358</sup> With regard to less serious offences, the participants were of the view that the appropriate sentence options could be: community service, fines, reform school referrals, suspended sentences, short terms of imprisonment, attendance at diversion programmes and house arrest.

*Life imprisonment*

10.27 The Gauteng Provincial Department of Welfare agreed with the proposal in Discussion Paper 79 that life imprisonment should be excluded as a sentence option for children. The NICRO report recorded that 94.8% of the participants felt that this sentence should be excluded from legislation.<sup>359</sup>

10.28 In view of the fact that international rules require that life imprisonment for offences committed as a child be excluded as a sentence, and in view of the support from responses received concerning this proposal, the Commission proposes the retention of this limitation in the legislation.

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<sup>357</sup> It must be borne in mind that some of the children were themselves serving severe sentences for serious offences.

<sup>358</sup> The participants suggested the following: serious crimes such as murder, rape and robbery; when a person is a danger to society or the community or the victim; and “when a person has been given a warning and will not listen.”

<sup>359</sup> Some of the reasons given by the participants were: “a life sentence for a child is cruel and inhumane”; “a child can still change his or her ways if given guidance and support”; “a child is too immature to learn anything from a life sentence”; “a child still has his or her life ahead”, and “everyone needs a second chance”.

### *Imprisonment*

10.29 The Magistrate, Hopetown, whilst supporting the proposed increase in sentencing jurisdiction of the child justice court to five years, was of the opinion that where children are concerned, long term imprisonment should be avoided. Many submissions questioned the maximum term of 15 years' imprisonment proposed in Discussion Paper 79, suggesting that it was unrealistic and that it would encourage older persons to use children in the commission of serious criminal offences.<sup>360</sup> The Inkatha Freedom Party submission proposed a possible exception to the proposed 15-year maximum sentence where a child had been convicted of a Schedule 2 (to Bill A) offence. The NICRO report showed that when participants were asked what an appropriate alternative to a life sentence would be, imprisonment in varying maximum terms was proposed. The majority of respondents (36%) suggested a term of between six and ten years, 28% a sentence of 11 to 15 years, and 17.5% a sentence between two and five years. The responses tend to show that children's perceptions of both the duration of time and what constitutes a "lengthy sentence" differs from that of adults, which explains the fact that most children opted, in the most serious cases, for a sentence between six and 15 years.

10.30 The NICRO report revealed that the participants supported the proposal of a minimum age of admission to prison. While 31% proposed 16 years as the minimum age, 24% thought that a person should be 18 years of age. The next significant grouping was of the view that 14 years should be set as the minimum age.<sup>361</sup> In all, 67% of respondents proposed an age of 16 or above, reflecting a clear view that young children do not belong in prison. At the consultative workshop held with officials from the Department of Correctional Services, the opinion was expressed that if a minimum age for admission to prison as a sentence is to be included in the legislation, an amendment to the Correctional Services Act must be brought about, so that both Acts reflect the same rule.

10.31 The Commission received overwhelmingly positive responses to the notion of introducing a

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<sup>360</sup> Support was expressed in several written responses, as well as at many consultative workshops, for the creation of a criminal offence where adults have in fact used a child to commit an offence.

<sup>361</sup> Some of the reasons given by the participants were: young children need to be in school to secure a better future; younger children are still dependent on their parents; younger children are vulnerable to gangs and abuse in prison; and younger children cannot handle prison emotionally.

minimum age for the imposition of a sentence of imprisonment, and accordingly proposes<sup>362</sup> that such sentence may only be imposed upon a child who at the time of the commission of offence is 14 years of age or above. The Department of Correctional Services does not have facilities or programmes for children below the age of 14 years, and such children would have to be sentenced to reform school if institutionalisation is deemed appropriate. Further, in view of the support received for the inclusion of international principles, the Commission has provided<sup>363</sup> that imprisonment may only be imposed if substantial and compelling reasons exist because the child has been convicted of an offence which is serious and violent, or because the child has previously failed to respond to alternative sentences, including available sentences other than imprisonment. A further provision to ensure that detention is used as a last resort has been included, clarifying that imprisonment may not be imposed in respect of a Schedule 1 (to Bill B) offence.

10.32 An offence creating criminal liability for adults or persons over the age of 18 years who incite, persuade, induce or encourage children to commit offences has been included in the section of the legislation dealing with offences and penalties.<sup>364</sup> In view of the concern that specialised child justice legislation may create the impression that adults can use children with impunity in the commission of offences, this has been deemed to be an important addition to the substantive criminal law.

10.33 In view of the reservations that were expressed about the possibility of a maximum term of imprisonment in child justice legislation, the Commission has revised its proposal in this regard. The Commission considered the possibility of introducing a maximum term in relation to each charge, but was concerned that this might lead to effective multiplicity of charges in order to ensure the possibility of lengthy sentences. This could then result in extremely lengthy effective sentences (say several 15- year terms) being imposed, albeit with a limitation on the maximum term for each count. In addition, setting a maximum higher than 15 years (say 25 years) may inadvertently serve as a signal that children should receive such severe sentences. In view of these considerations, the Commission has opted not to set a

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<sup>362</sup> See clause 92(1)(a).

<sup>363</sup> Clause 92(1)(b).

<sup>364</sup> Clause 117(3).

maximum term of imprisonment, and trusts that the fact of youthful age will play a large role in mitigating excessively long sentences for children.

10.34 The Commission has, as a result of suggestions received at workshops and consultations, included a provision<sup>365</sup> that requires that any period of time spent in prison whilst awaiting trial must be deducted by the presiding officer from a prison sentence imposed.

### *Reform schools*

10.35 Participants at the workshop held by the Commission in George supported the retention of a provision creating a sentence similar to the present reform-school sentence, in view of the necessity of a sentencing option for children with special behavioural problems who have been convicted of offences. A dedicated workshop was held at the University of the Western Cape with wide representation from staff at existing reform schools, as well as the Western Cape Education Department, on the specific provisions pertaining to reform schools contained in the Discussion Paper. Generally, there was agreement regarding the idea of including provisions on reform schools in child justice legislation (as distinct from referring to this option only in legislation pertaining to the education sector). However, the term “reform school” was regarded as having negative connotations, and it was argued that it needed to be replaced. Participants were of the view that any extensions of or release from such a sentence should be the prerogative of the school itself, rather than any sentencing officer. In a submission received from the Western Cape Education Department subsequent to the workshop, it was proposed that the words “reform school” used in the Discussion Paper be replaced with “residential facility for compulsory residence”.

10.36 The unequal distribution of reform schools in the various provinces led to comments about the desirability of a sentence which cannot be implemented due to practical constraints.<sup>366</sup> The inclusion of an intermediate residential sentence for children in order to minimise the use of detention in prison as a

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<sup>365</sup> Clause 92(5).

<sup>366</sup> See the comments of the Magistrate, Richmond, in this regard, and the recent decision of Judge Nugent in *S v Mtshali and Mokgopadi* (Case A863/99 WLD).

sentence is regarded by the Commission as being essential. Furthermore, alternatives to imprisonment are required under the Convention on the Rights of the Child and other international instruments, in order that imprisonment be a measure of last resort. Finally, there is a long tradition in South Africa of referrals of young people to educational institutions (such as reform schools) in lieu of imprisonment. It would, it is submitted, represent a significant step backwards to revert to a situation where no alternative to imprisonment was available in law. Thus, despite the practical implications that may arise given the provincial inequalities in the existing provision of facilities, the Commission has decided to retain the option of an alternative residential sentence, albeit with the change of designation as suggested by the Western Cape Education Department. The Commission is further of the view that the government will have the responsibility of ensuring the availability of at least one such resource for the northern, southern and eastern parts of the country. This recommendation is strengthened by the findings of the AFReC report. The report suggested further that, in order to avoid the provincial inequities of the past, this should be regarded as a national funded mandate in the same way that academic teaching hospitals (which provide resources to other provinces) obtain funding nationally.<sup>367</sup>

10.37 It was further proposed in the submission of the Western Cape Education Department that after imposition of the above-mentioned sentence, the order should be referred to the relevant Provincial Head of Education to designate an appropriate facility. It appears that the submission suggested that this should be provided for in legislation. Once a young person has been admitted to a residential facility managed by a Provincial Education Department, the Western Cape Education Department submitted that further decisions concerning such child should be effected in terms of the Child Care Act 74 of 1983, save that it was submitted that in its view, the possibility of administrative extension of the duration of such order (currently provided for in section 16 of the Child Care Act) should not apply. It was proposed that “the duration of the sentence should be stated in terms of a minimum and a maximum period of residential care, with the option of discharge from the effect of the order (sentence) by the Head of the Provincial Education Department before the expiry date or maximum period stated on the order, based on the realisation of the developmental goals set by the institution”.

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<sup>367</sup>

AFReC report at 64.

10.38 A further proposal made by the Western Cape Education Department was that the legislation should include a provision to allow individuals the option of remaining at the facility in order to complete their education after expiry of the maximum period.<sup>368</sup>

10.39 The proposal to the effect that it should be possible to impose a sentence of shorter duration than the present two year sentence, and that provision should be made for a minimum and a maximum length, appears to accord with the proposals in Discussion Paper 79. Save for minor changes of wording, therefore, the provisions in Bill B follow similar lines.<sup>369</sup> The proposal in the Discussion Paper regarding administrative extensions of this sentence has, with due regard to the comments received by the Western Cape Education Department, been altered. It is now specified<sup>370</sup> that except where a child wishes to remain in a facility to complete his or her education, administrative extensions of these sentences may not be effected.

### *Fines*

10.40 Ms Cassim of Unisa was in favour of fines being retained, on the basis that children who can pay fines should be enabled to do so. She agreed with the proposals in the Discussion Paper, though, that moneys received should be payable to children's or welfare organisations, rather than the State. She was therefore of the opinion that fines can be used as an aspect of restorative justice. The NICRO report recorded that the majority of children who participated in the study (63%) were in favour of the retention of monetary penalties, although the only motivation given was that if "parents can afford to pay they should be allowed to do so". The 36% of respondents who opposed the inclusion of fines were better able to motivate their position, arguing that children are supposed to be at school and cannot work for money; that a fine is no real deterrent; that a child without resources may reoffend in order to be able to

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368 This has been effected in clause 91(4) of Bill B.

369 See clause 91(1).

370 See clause 91(3).

pay the fine; and that parents end up paying the fine, implying that the court punishes the parent and not the child.

10.41 The Commission holds the view, as supported by most respondents to the Discussion Paper, that fines should not be a competent sentence, save where monetary penalties are used to further restorative justice sentencing goals.<sup>371</sup> The arguments raised to support the retention of the possibility of bail are not on all fours here: bail is frequently paid by a third party as security for an accused person to return to stand trial. Payment thus serves as an inducement. Fines, however, serve no such purpose, as the trial is by then already complete, and the practice shows that children's parents - where they can pay - are therefore held liable for children's misdeeds. The Commission has further provided that where a statutory offence specifies a fine with an alternative of imprisonment, a presiding officer sentencing a child for the commission of such an offence may impose a range of specified alternatives other than the fine.<sup>372</sup>

#### *Correctional supervision*

10.42 The Benoni office of the Department of Welfare, Gauteng, was of the view that this sentence was not a desirable option for children, and proposed the expansion of the sentence involving placement under supervision by a probation officer in its stead. However, as much as the expansion of supervision by probation officers is a desirable alternative sentence,<sup>373</sup> the Commission believes that correctional supervision can play a valuable role in ensuring that children, whilst receiving a severe sentence, nevertheless avoid incarceration in prisons. Support was expressed at the workshops for the proposal that only one of the two forms of correctional supervision be provided for in regard to children, in order to ensure that this sentence is used as an alternative to imprisonment. The proposals in the Discussion Paper are therefore retained.

#### *Alternative sentences*

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<sup>371</sup> See clause 94.

<sup>372</sup> *Ibid.*

<sup>373</sup> See the comments of Judge Erasmus in *S v Z en Vier Ander Sake supra*.

10.43 The Benoni Office of the Department of Welfare, Gauteng, supported the various orders proposed in Discussion Paper 79,<sup>374</sup> a view which was echoed at all of the workshops held by the Commission. The orders increase the possibility of imposing alternative sentences. The submission from the Benoni Office also mooted the possibility of weekend detention camps for teenagers convicted of offences, during which rigorous behaviour modification could take place. The Western Cape Education Department remarked, in relation to diversion and to alternative sentencing, that clarity is needed on what is meant by “attendance at *a specified centre or place for a specified vocational or educational purpose*”, and questioned how tuition fees in this regard will be funded if “specified centre” refers to a technical college or some other educational or training centre. This is a valuable insight, but the wording used in the proposed legislation already appears in section 297 of the Criminal Procedure Act, and does not appear to have occasioned problems in the past. Clearly, if the specified centre is one that is staffed and funded by the Education (or Welfare)<sup>375</sup> Department, that Department will fund the implementation of the alternative sentence, as is currently the case.

10.44 The Commission believes that most alternative sentences suggested by respondents can be accommodated within the framework of the alternative sentences that have been proposed. In view of the positive responses to the alternative sentences proposed in Discussion Paper 79, the proposals in this regard have been retained.

#### *Suspended and postponed sentences*

10.45 A comment received from a Johannesburg magistrate expressed surprise at the provision in Discussion Paper 79 enabling the passing of sentence to be postponed for a period not exceeding three years. The magistrate averred that there has never been a problem with the (present) five-year period for postponement of the passing of sentence, and this period should therefore remain as the statutory period. However, the Commission is desirous of furthering the principle that children should be treated

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374 The orders can be used either as diversion options or a sentences.

375 For example, drug and alcohol rehabilitation centres.

differently from adults, and in a manner appropriate to their age. Five years is a very long time (from a child's perspective) to await finality on the case.<sup>376</sup> Thus the Commission prefers the formulation in the Discussion Paper. The Benoni Office of the Department of Welfare, Gauteng, suggested expanding the option of postponing sentences, but does not suggest how this should be provided for in concrete terms in legislation. Further, they advocated the expansion of the option of placement under the supervision of a probation officer, in the sense that it can be usefully coupled with community service (presumably also supervised by the probation officer). In this way the need for correctional supervision diminishes, since it is not (in their view) a suitable sentencing option for children. The legislation has been drafted with the emphasis on the maximum use of alternative sentences, including placement under the supervision of a probation officer, with or without an additional condition of performance of community service. The Commission has thus retained to a large extent the proposals in the Discussion Paper, with minor editorial revisions.

*Evidence relevant to sentence*

10.46 Both the Gauteng Provincial Department of Welfare and The Law Society of the Cape of Good Hope were of the view that evidence of previous diversion should be able to be considered in aggravation of sentence. One reason given is that where the same offences have been committed, a previous diversion is an indicator of the child's behavioural tendencies, which are relevant to sentence. A similar view was expressed at the workshop held by the Commission in Pietermaritzburg, but different grounds were cited: it was argued that the magistrate who knows about a previous diversion cannot be expected to ignore it during sentencing. However, the Commission cannot agree that a previous diversion should be regarded as equivalent to a previous conviction, as this would violate the procedural rights of the child: a judicial finding of guilt did not occur. The Commission, after reconsideration, believes that it would be best not to interfere with the presiding officer's discretion to decide on a particular sentencing option after having heard all evidence relevant to a decision on sentencing. The draft Bill is

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<sup>376</sup> This argument does not apply with regard to suspension, since the matter is then finalised. Setting conditions of suspension of sentence - for example, the obligation not to reoffend - can be a useful preventive measure, and the Commission has therefore retained the possibility of suspension of any part of a sentence for a period not exceeding five years.

therefore silent on this issue.

*Pre-sentence reports*

10.47 Many respondents and participants at the workshops supported the introduction of legislation making the provision of pre-sentence reports mandatory before sentence.<sup>377</sup> The Law Society of the Cape of Good Hope supported the requirement of a pre-sentence report in all cases where a residential sentence is to be imposed, but cautions that resources would have to be put in place in rural and less populated areas to provide the personnel to implement this requirement. Concerns were also expressed about the length of time pre-sentence reports can take.<sup>378</sup> The magistrate, Johannesburg, was of the view that, because petty offences will have been diverted, pre-sentence reports should be required in respect of each and every child who is convicted of any offence in the child justice court. At the workshop held by the Commission with practitioners from the Justice sector, including prosecutors and magistrates, the concern was expressed that the provision requiring mandatory pre-sentence reports was somewhat at odds with the provision in Discussion Paper 79 granting sentencing officers the discretion whether to follow the recommendations of the probation officer contained therein. The view was expressed at the workshop held in George that the recommendations of probation officers are frequently not accepted by justice officials (ie magistrates or prosecutors) because some personnel from the Justice Department are not familiar with the new developments and thinking regarding child justice.

10.48 The Commission agrees that because petty cases will have been diverted, pre-sentence reports should be required before the imposition of sentence in all but petty cases.<sup>379</sup> Further, the Commission agrees that it is highly desirable to require such reports to be prepared within a specified period of time, and a provision requiring the preparation and placement before the court of such report within one month after the report has been requested, has therefore been included in Bill B.<sup>380</sup>

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<sup>377</sup> For example, the Gauteng Provincial Department of Welfare.

<sup>378</sup> The concern was addressed in clause 85(2).

<sup>379</sup> See clause 85(2).

<sup>380</sup> See clause 85(6).

10.49 The Commission is further of the view that an unwarranted interference with the discretion of the sentencing officer would occur if he or she were not empowered to deviate from the recommendations of the probation officer. In the Commission's view, requiring social history reports is valuable for the sentencing officer, but does not replace judicial discretion.

10.50 An objection was recorded by Mr T P Mudau, Magistrate Johannesburg, to the proposed requirement in Discussion Paper 79 that a certificate be issued that a probation officer's report had in fact been placed before a court upon imposition of a residential sentence. The objection centred on the proposed creation of a criminal offence of admitting a child to a residential facility without such certification being attached to the warrant of detention. This view was reiterated at a number of workshops, and the Commission has therefore not retained this provision.<sup>381</sup>

10.51 The Gauteng Provincial Welfare Department advised that probation officers who provide pre-sentence reports should be more familiar with the resources available in the community, and warn that probation officers often recommend institutionalisation of children merely because this is an option with which they are familiar. The Commission agrees with this concern and recommends continued in-service training of such officers.

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<sup>381</sup> A better route to ensuring that social history reports are presented in these cases would be to lodge an appeal against, or review of, the sentence.



## CHAPTER 11: LEGAL REPRESENTATION

### Overview of the proposals in Discussion Paper 79

#### *The right to legal representation*

11.1 Like adults, children who are accused of offences have a right to legal representation 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 availability of Legal Aid should also be explained to each accused person. However, in over 80% of cases accused persons under 18 years of age appear before the courts unrepresented.<sup>382</sup> The reasons for this are spelt out in the Discussion Paper.<sup>383</sup>

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382 J Raulinga, D Siditi and T Thipanyane in L Pollecutet *al Legal Rights of Children in South Africa* National Institute for Public Interest Law and Research 1995 at 63, 86 and 101. There are some indications that this proportion may have decreased in recent times, as the endeavours of the Legal Aid board to increase the availability of legal representation pursuant to the 1996 Constitution have taken effect.

383 At 266 - 277.

11.2 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. As yet there is no case law to embellish the meaning of “substantial injustice” as it relates specifically to children. In the Discussion Paper it was argued that it was therefore necessary to ensure that the proposed child justice legislation should give a clearer explanation regarding the rights of the child to be legally represented.<sup>384</sup> International law also provides for legal representation for children in criminal proceedings.<sup>385</sup>

11.3 Although deprivation of liberty generally begins as soon as the child is apprehended, the practical reality is that a lawyer will under ordinary circumstances not be involved at this point. In most cases, the first real opportunity to apply for representation through the legal aid system will be on the day that an accused first appears in court. Even then, although an application for the appointment of a legal aid lawyer can be made, an accused person will not see this lawyer on that date, and is likely to make contact with him or her only on the next remand date, particularly if such person is in custody.<sup>386</sup>

11.4 The Discussion Paper therefore contained provisions requiring children to be advised of their right to legal representation by the arresting officer and again by the probation officer at the time of the assessment. However, if no lawyer has been appointed prior to the first appearance before the inquiry

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384 It has been argued that where a child is prosecuted in the courts with the possible result of a criminal record, a substantial injustice will occur if he or she is not legally represented. See A Skelton ‘Developing a juvenile justice system for South Africa : International instruments and restorative justice’ (1996) *Acta Juridica* 180 at 190.

385 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. The Convention makes it clear that a child is specifically entitled to legal assistance as soon as the child is deprived of liberty. Article 37(d) provides that every child deprived of liberty has the right to “prompt access to legal and other appropriate assistance”.

386 Although the majority of the respondents to the Issue Paper agreed that the child’s right to legal representation should be implemented from the earliest possible opportunity, the Natal Law Society disagreed with this view and recommended, in order to preserve Legal Aid funding, that attorneys should be appointed only when a trial is imminent and diversion to ancillary organisations is not applicable.

magistrate, the inquiry magistrate should again explain the right to legal representation. It was further proposed that if, after finalisation of the preliminary inquiry, a legal representative has not yet been appointed, and if the child is to be remanded in custody or referred to court for the plea, the inquiry magistrate should ensure the provision of legal representation for such child.

*A model for effective legal representation*

11.5 In an attempt to propose a more effective model for legal representation for children accused of offences, three possible options were presented for comment in Issue Paper 9:

- (i) Children should be allowed to engage their own attorneys at state expense.
- (ii) There should be some specialised form of legal representation. An appropriately trained special public defender could for instance provide consistent, good quality legal representation for young people.
- (iii) The current judicare system could be extended by providing for some form of specialisation in children's rights.

11.6 Many respondents were critical of the suggestion embodied in option (i) above in that it is likely to give rise to many problems in practice. Option (ii), providing for representation by the office of the public defender, was met with concern that the system is not yet operative nationally, which means that only children living in the larger centres would benefit from these services. The respondents who favoured the third option were particularly partial to the specialisation requirement.

11.7 The Discussion Paper once again addressed the need for some degree of specialisation.<sup>387</sup> Examples of ways in which specialisation has been achieved in foreign jurisdictions were provided, and the strengths and weaknesses of different forms of legal representation for children pointed out. The

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387 N Zaal and A Skelton 'Providing effective representation for children in a new constitutional era: Lawyers in the Criminal and Children's Courts' (1998) 14 *SAJHR* 519 make the following point: "It will be essential to provide representatives whose inter-personal skills and motivation enable them to gain the trust of children who are traumatised or who have clashed with authority."

public defender system has the advantage of bringing together a group of lawyers who can gain expertise in representing children. The weakness of this model tends to be huge case-loads, high turnover, under-funding and, in South Africa, the limited geographical availability of this scheme. Court-appointed attorneys do not share these problems, but studies have shown that they are often inexperienced and not specialised and, in the USA, may lack independence from the judiciary which appoints them.<sup>388</sup> Contractual systems have the advantage of being independent, but questions have been raised about cost-cutting by lawyers at the expense of effective legal representation of the child.<sup>389</sup> In addition, lengthy delays are often caused when lawyers on legal aid briefs request remands as a consequence of their full diaries.

11.8 The Discussion Paper pointed out that the development of a model for effective legal representation for children accused of crimes is happening against a changing landscape in the field of legal representation. Whilst there has been much positive debate about future models, the South African government has not yet endorsed a clear plan for effective legal representation for indigent accused. It was therefore argued that in the South African child justice system we may need to continue to have a mixed system, pending final proposals regarding the future direction of the Legal Aid Board.

11.9 The Discussion Paper thus proposed that the building-blocks for the development of an effective model of legal representation<sup>390</sup> should be put in place. To this end, the Discussion Paper set the requirement of accreditation if private practitioners are to be paid by the Legal Aid Board and legal representation is therefore to be at state expense. (However, if a child or his or her family selects and pays for their own legal representative, implying that they may choose any lawyer they deem fit, it would constitute an undue interference with their freedom to require that such lawyer must be accredited.) In order to be accredited, the lawyer should agree to abide by the principles and minimum standards for

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388 J Knitzer and M Sobie *Law guardians in New York State: A study of the legal representation of children* New York 1984.

389 C Ogletree 'Providing counsel for indigent defendants: The case for affirmative action' in *The Right to Legal Representation: A Public Defender Service in a Democratic South Africa* Proceedings of a Conference held by the SA Legal Defence Fund in Johannesburg, October 1992.

390 It should be noted, in this regard, that clauses 82(5) - (9) of Bill A were a restatement of the 1996 amendments to section 8 of the Child Care Act 74 of 1983, which deals with the provision of legal representation in the children's court.

the legal representation of children in the child justice court. Once accredited, the name of the lawyer concerned may be placed on the Legal Aid roster and cases involving child accused will be referred to these lawyers. The Legal Aid Board and professional associations, together with non-governmental organisations, universities and other role-players, were mandated to develop further guidelines or practice rules to supplement the proposed legislation and to convey relevant information about child justice law to legal representatives acting under the provisions of the proposed legislation.

### *Waiver*

11.10 The question was also posed whether children should have the right to refuse legal representation, although exercising this right would leave them unprotected. The Issue Paper argued that if a child were to waive the right to legal representation, 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 responses to the Issue Paper<sup>391</sup> indicated strong support for this idea, and the Commission was persuaded that the right to waive legal representation would place at risk the rights of children in the criminal justice system, particularly with regard to any child remanded in custody or any child proceeding to plea and/or trial in more serious matters.<sup>392</sup> It was thus recommended that once a decision has been taken that the matter should be remanded for plea in court, a child must be legally represented, save where the offence is a petty offence listed in a schedule to the Discussion Paper.

11.11 The Discussion Paper further proposed that a child should have an opportunity to request a different lawyer if there is some impediment to the lawyer/client relationship, resulting in the child's

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391 Bernadine Dohrn, in her paper on "Legal Representation of Youth in Delinquency Proceedings" presented at the UNDP/SA Law Commission conference on drafting legislation on juvenile justice in Gordon's Bay, November 1997, paid particular attention to the issue of waiver. She points out that in the USA, in some states, up to 50% of children are not legally represented in court proceedings, and that most children who proceed without an attorney waive their right to counsel at the detention hearing. Dohrn commented: "The Issue Paper appears to confirm a 'right' by child clients to refuse legal representation. This approach is in direct contradiction to years of efforts in the US to assure that children are not defenceless at the legal proceedings against them."

392 Other mechanisms have been built into the system to ensure that less serious cases are, for the most part, diverted out of the system.

declining the services of a particular lawyer on Legal Aid brief. However, if the child refuses to give instructions to any lawyer because he or she does not want a lawyer, the Discussion Paper provided that a lawyer should be present throughout the trial proceedings, be permitted to address the court on the merits, and be allowed to lodge an appeal after conviction and sentence, if this would be in the child's best interests. Thus such person would not be the child's legal representative, but would play a "watchdog" role to promote the best interests of the child. In this way, the proposals balanced the child's expressed wish not to benefit from legal representation with the idea of promoting the best interests of the child.

### *Diversion and legal representation*

11.12 The Issue Paper also invited proposals on whether compulsory legal representation should be provided in cases where children are to be diverted.<sup>393</sup> The Discussion Paper embodied the more pragmatic view that, given the scarcity of resources in South Africa, the provision of legal representation in cases where children are not going to be prosecuted may not be the most effective use of legal aid lawyers' services.<sup>394</sup> The view was also linked to the feasibility of requiring legal representation to be

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393 The view that young people should be legally represented in every case, even when they are to be diverted, stresses the risks to procedural protections which diversion occasions. 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. There are also practical considerations which militate against lawyers being available at the assessment stage, when diversion decisions may be taken. In addition, the cost implications of requiring legal representation during assessment must be given due weight.

394 Bernadine Dohrn, note 10 *supra*, puts forward a further reason why legal representation need not be a prerequisite in cases to be diverted. She describes how a juvenile court system can become swamped by petty cases which can actually be more effectively handled by communities. These cases can transform a working adversarial system into an over-burdened and dysfunctional court, in which caseloads and time per case escalates. If the provision of legal representation is made a requirement linked to diversion, the systemic advantages described by Dohrn may well be lost.

made available within a few hours of the arrest, especially in less serious cases. The Commission was of the view that any risks to constitutional and procedural rights could be limited by the inclusion of principles to guide the process and practice of diversion. The Discussion Paper concluded further that legal representation should not be a prerequisite for assessment, diversion or the convening of a preliminary inquiry, although the child who exercises his or her right to legal representation may obviously choose to have a lawyer present at any of these procedures.

### **Evaluation of comment and recommendations**

11.13 The consultative process embarked upon by the Commission included a dedicated workshop on the issue of legal representation attended by a wide range of people from the profession and professional associations. The Legal Aid Board prepared a submission for consideration at the workshop (submission A). Subsequently, a further detailed submission was received from the Legal Aid Board (submission B).

11.14 The NICRO report on the consultation with children showed that, of the children who participated in the consultation, 51.7% had legal representation in their own cases, whilst 39.1% did not. The perception of 83.3% of those who had legal representation was that having a lawyer positively influenced the outcome of the case. Of the participants who did not have legal representation, 66.7% felt that having a lawyer would positively influence the outcome of a case. Both groups gave similar motivations, including the assertion that a lawyer can speak on behalf of a child who could otherwise become nervous and implicate himself; that lawyers are knowledgeable and ask the right questions; that lawyers can protect a child's rights; that they can argue for a lighter sentence, and that everyone is entitled to the best possible defence.

11.15 The children who had negative perceptions about legal representation and its likely benefits, gave the following reasons as their motivation: Legal Aid Lawyers work half for the client and half for the State; legal representation can be expensive and children can ably speak for themselves.

*The matters for which legal representation must be provided*

11.16 The Legal Aid Board expressed concern that the Discussion Paper provided for legal representation at State expense even for Schedule 1<sup>395</sup> (less serious) offences, which would, in their view, not be required by the Constitution, nor be provided for under the Board's own rules. In a submission to the Commission, the Legal Aid Board pointed out that it interprets the constitutional obligation to mean that "the accused faces imprisonment without the option of a fine and cannot afford the services of a lawyer".<sup>396</sup> The reasoning behind this argument appeared to be motivated by financial constraints, rather than disagreement about principles. The Board urged that the budgetary implications of the Bill be given careful consideration. The Board pointed out that the State is currently battling to provide legal aid as required by the Constitution, and if the provision of legal aid were to be expanded into new areas, as proposed in the Discussion Paper, a commensurate expansion of the Board's budget would have to occur. In view of recent reports<sup>397</sup> about the dire financial straits in which the Legal Aid Board finds itself at present, it must be conceded that fiscal considerations are of paramount concern. Clearly, a principled approach dictates that irrespective of the offence for which the accused is appearing in court, the fact that a child may face a sentence involving loss of liberty must be an indication that substantial injustice might result. Thus, even where a child is charged with a Schedule 1 offence, if there is a possibility of a sentence involving deprivation of liberty (for example, as a result of prior convictions), that child should be provided with legal representation. Therefore, although the Commission agrees as a starting-point with the Legal Aid Board's submission that legal aid is generally not required where the child is to be charged with a Schedule 1 offence, legal representation at state expense should be mandatory where the prosecutor is of the opinion that a sentence involving deprivation of liberty may result.<sup>398</sup> This approach implies that the decision as to when legal aid will be necessary where a child appears in court on a petty charge will have to be made prior to commencement of plea in the child justice court. The Commission therefore recommends that, when the preliminary inquiry is finalised, and it appears to the prosecutor that the risk of a sentence involving deprivation of liberty exists, the

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<sup>395</sup> Schedule 1 refers to the Schedule annexed to Bill A in the Discussion Paper. The Schedule has been retained in a slightly amended form in Bill B.

<sup>396</sup> Legal Aid Board, Submission B (29 April 1999).

<sup>397</sup> See *Business Day* 4 October 1999.

<sup>398</sup> This prosecutorial decision is similar to the decision that had to be made as to whether an accused faced the possible imposition of the death penalty, and consequently whether *pro deo* counsel had to be appointed.

prosecutor should advise the child of the necessity of legal representation. A second situation in which legal representation at state expense must be provided is where the child is in detention awaiting trial, and a third situation requires legal representation at state expense if a child who is at least ten years of age but not yet 14 is to be prosecuted.<sup>399</sup> If no lawyer has been appointed at the time of commencement of proceedings in the child justice court, the prosecutor concerned must inform the presiding officer in the child justice court prior to plea that the trial should not commence without legal representation.

11.17 Concerning the scenario where, in respect of a charge on a Schedule 1 offence, a legal representative is not appointed, and the child is nevertheless given a sentence involving deprivation of liberty, the Commission has considered whether this would be a ground for setting aside of the sentence, and whether this should be expressly provided for in this legislation. However, after careful consideration of case law in the area of the appointment of *pro deo* counsel in cases where the imposition of the death penalty was possible, and mindful of the fact that children's sentences will in the ordinary course be subject to automatic review by a High Court judge, the Commission does not recommend that the absence of a legal representative in the above circumstances should automatically vitiate the trial. Rather, the Commission is of the opinion that in the ordinary course of review, this would be a factor to be taken into account by the reviewing judge.

11.18 The Commission believes that the possible introduction of One-Stop Centres, especially in larger metropolitan areas, will facilitate the appointment of specialised public defenders to represent the children who appear in those courts which form a part of these centres. This will entail a cost saving to the Legal Aid Board, as lawyers from private practice will be unnecessary in a large percentage of cases in which representation is required. In addition, since the public defenders will be full-time salaried staff, no extra costs will be incurred if they are made available for children charged with Schedule 1 offences, as personnel will generally be available to provide such representation within the course of an ordinary day's work.

11.19 At the consultative workshop on legal representation held by the Commission, the Legal Aid

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<sup>399</sup> See clause 98 of the draft Bill.

Board expressed the view that its mandate, according to its founding legislation, was to ensure the provision of legal aid, and not to supervise or administer accreditation of professionals in private practice. The Discussion Paper had proposed that accreditation be effected by the Legal Aid Board itself. The concern raised by the Board has merit, as the Board is a creature of statute. Consequently, the Commission now proposes that the system of accreditation be effected and maintained by the proposed National Office for Child Justice (which would be required in this regard to consult with the Legal Aid Board and the Association of Law Societies prior to effecting any de-registration).<sup>400</sup>

*Principles pertaining to legal representation*

11.20 The Legal Aid Board suggested that, while the principles set out in clause 81 of Bill A<sup>401</sup> were desirable, some of the provisions were unduly prescriptive while others fell within the domain of the presiding officer. The provisions, they argued, could lead to unnecessary appeals on the ground of non-compliance. In particular, the Board was of the view that one provision purported to permit the child client to dictate the conduct of the proceedings, which is unacceptable as it is the lawyer who is in charge of the conduct of the case, whilst the client instructs on the facts. The Board proposed that the section rather be amended to allow the child to give "independent instructions concerning the case" (submission A). As regards the suggestion that children be allowed to consult with practitioners in the language of their choice, the Board pointed out that it did not have the funds to provide interpretation, and queried who would pay such interpreters. These valuable points are accepted by the Commission, and it is proposed that a principle merely be included to reflect the child's right to speak in a language of his or her own choice with the assistance of an interpreter, where necessary.<sup>402</sup>

11.21 In submission B, the Board pointed out that whilst the aims and aspirations of the Discussion Paper were laudable in seeking to ensure a relationship of trust and confidence between the client and his or her legal representative, they did not consider that such matters can be provided for in legislation.

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<sup>400</sup> See clause 101 of the draft Bill.

<sup>401</sup> See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

<sup>402</sup> See clause 5(b) of the draft Bill.

The envisaged accreditation system, they suggested, will be sufficient to ensure an acceptable attorney/client relationship. The principles contained in the Discussion Paper should be severely curtailed, in their opinion, and the Board recommended that these ideals rather be contained in a handbook for Law Societies, as well as in directives from the Magistrates' Commission. However, the consultation with children conducted by NICRO revealed the dire need for some practice rules to be provided for in the body of the legislation itself, as a protection for children. The submission from the professional staff (welfare and justice) of Stepping Stones Youth Justice Centre in Port Elizabeth was firm on this point: "The present legal aid system does not work to the benefit of young people. The appointed attorneys cause unnecessary delays, they are inexperienced, and are not on board with the restorative justice system. There is no statutory obligation for lawyers to learn about the Youth Justice System."

11.22 The envisaged accreditation system will, in the opinion of the Commission, not address the position where, as is hoped, full-time public defenders are attached to One-Stop Child Justice Centres.<sup>403</sup> The sanction of losing accreditation, and thus future access to referrals from the Legal Aid Board for children's cases, will not be an inducement in the instance of permanent employees. This provides an additional reason for retaining some of the principles initially proposed in the Discussion Paper. The workshop with non-governmental organisations held by the Commission also produced vociferous support for the retention of these provisions, and the Association of Law Societies was not against the suggested provisions.<sup>404</sup>

#### *Waiver of legal representation*

11.22 Most respondents agreed that a child should not be entitled to waive legal representation. The Benoni Office of the Gauteng Department of Welfare supported the proposals of the draft Bill in this regard. Ms F Cassim of the Faculty of Law, UNISA, was not in favour of a child waiving the right to legal representation, and supported the proposal to have a lawyer present throughout the court proceedings to safeguard the child's rights. The NICRO report on the views of children indicated that

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<sup>403</sup> Described more fully in Chapter 9.

<sup>404</sup> See clause 96 of the draft Bill.

the majority of participants who enjoyed legal representation agreed that a child should not be able to refuse legal representation except in the case of a minor offence. Even amongst those who did not have legal representation in their own cases, 66.7% agreed that waiver should not be an option. The remainder of the group who had legal representation was either undecided (3%) or opposed to the proposal (16.7%). All who opposed the proposal that waiver be excluded gave similar reasons, namely, that lawyers postpone cases for too long a period of time, that children can decide for themselves whether they wish to have legal representation, and that lawyers on Legal Aid briefs cannot be trusted. Despite these views, it is clear that the majority of children who were consulted agreed with the recommendations set out in the Discussion Paper. Therefore, the limitation on the right to waiver is retained in the legislation,<sup>405</sup> and it is hoped that the concerns expressed above by the children who opposed this view will be allayed by the introduction of accreditation, training and so forth.

11.23 The Legal Aid Board<sup>406</sup> pointed out that the **assistance** of a legal representative appointed where the child refuses legal representation cannot be equated with legal **representation**, and that the legislative provisions should distinguish the concepts accordingly. Moreover, a person acting in a "watchdog" role cannot be of effective assistance without the opportunity of cross-examination with the object of discrediting state witnesses or raising reasonable doubt about the acceptability of evidence. "There can be little benefit to the child to have the lawyer sit in court, observing that vital questions have been left unasked, evidence left unchallenged or necessary objections not raised, and then to address the court on an unsatisfactory defence case." Further, the Board proposed that a lawyer appointed to assist (rather than represent) a child should have full rights of access to the docket, the right of access to negotiations with the prosecutor and the right to be present at interviews with relevant parties. The subsequent submission by the Board (submission B) provides an alternative suggestion: that an enabling provision conferring upon the child justice magistrate the right to request the Legal Aid Officer to appoint a legal representative *amicus curiae* should be considered, in a manner similar to the *amicus curiae* procedure in the Constitutional Court.

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<sup>405</sup> Clause 100 of the draft Bill.

<sup>406</sup> In submission A.

11.24 As regards the second proposal referred to above, the Commission is of the view that it would not promote the aims of the proposed legislation. Leaving the decision as to when an *amicus* should be appointed to each magistrate may promote inequality in the administration of child justice. In addition, there are clear financial disincentives to these appointments, and such appointments will undoubtedly be the exception. The Commission, however, is in agreement with most of the views of the Legal Aid Board expressed in submission A, which echo the agreement expressed by other respondents as referred to previously. Therefore, where a child declines to have legal representation (either provided for by the Legal Aid Board, a public defender or a private practitioner), the Commission proposes that the draft legislation should provide for the appointment of a legal representative to assist, who would serve to protect the child's interest and ensure an adequate challenge to the State's case. Some of the envisaged functions of this person, as spelt out in the Discussion Paper, are usefully augmented by the additional functions suggested by the Legal Aid Board in submission A, and have been included in the draft Bill (Bill B).<sup>407</sup>

*Recovery of costs of legal representation from parents who can afford this*

11.25 The Discussion Paper proposed a mechanism for the recovery of costs of state-provided legal aid, where the parents are able, yet unwilling, to pay for a lawyer. The thinking in this regard was heavily influenced by the wording of section 8A of the Child Care Act, as amended in 1996 to provide for legal representation in the Children's Court. However, the Legal Aid Board submitted that it may cost more to attempt to collect moneys expended than the amount collected could justify, especially as the child will, in the vast majority of instances, be from an indigent background. A tariff of fees will have to be drawn prior to implementation of the Act, if such provision were to remain. Mindful of this concern, the Commission has, however, included a similar provision in Bill B, leaving the discretion as to whether costs should be recovered to the Legal Aid Board (clause 98(4)).

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<sup>407</sup>

Clause 100(5) and (6).

*Procedure for obtaining legal representation*

11.26 The Board raised<sup>408</sup> some comments about the procedure for obtaining legal representation as provided for in the Discussion Paper. The Discussion Paper, in its opinion, adequately set out the requirement that the Legal Aid Board be requested to ensure the appointment of a legal representative under its constituent legislation,<sup>409</sup> rendering any further provisions unnecessary. In particular, the Board pointed out that "making appointments for a legal aid recipient to consult with a lawyer is not one of the functions of a legal aid officer and neither the Board's officials ÿ nor can the employees of the Department of Justice reasonably be called upon to assume the responsibility for a legal practitioner's consultations". Further, since all legal aid instructions are given in writing on a prescribed form, and all legal aid recipients are informed of the particulars of the appointed legal practitioner, they suggested that no provisions to this effect should be included in the proposed legislation. Finally, the Board suggested that the provision in the Discussion Paper that the legal representative, where the child is in detention, should consult with such child within seven days of receiving instructions at the place where he or she is being held (where this is within a reasonable distance of the court), should be reviewed to remove the time constraints and to obviate unnecessary disputes as to what a reasonable distance from the court may have been where the practitioner has been unable to meet time limits. These useful suggestions from the Board have to a great extent been incorporated in the proposed legislation, which now provides that the appointed legal representative must consult with the child before the next court date, where the place of detention is within a reasonable distance of the court in which the child is appearing.

11.27 Police Legal Services raised a concern about the practicality of the provision in the Discussion Paper which required that, where a child exercises his or her right to have a legal representative appointed at state expense, the police officer, probation officer or prosecutor must **forthwith** request the Legal Aid Board to appoint such a person to represent the child. They posed the question as to what should happen after hours, as the Legal Aid Board does not provide for applications to be received after office hours. The Police Legal Services averred that this difficulty would place the police official in an

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408 In submission A.

409 Act 22 of 1969.

untenable position. However, the Criminal Procedure Act, in the present section 50(5), similarly places a duty upon the police to notify a probation officer **forthwith** about the arrest of a child. There is therefore current precedent for this wording, despite the fact that probation officers are equally seldom available after hours. However, the alternative wording has been incorporated to address the difficulty raised by Police Legal Services. The new wording allows for the communication that legal representation is sought to be referred to the Legal Aid Officer as soon as such officer is available.<sup>410</sup>

### *Accreditation*

11.28 The proposals in the Discussion Paper concerning the introduction of a system of accreditation of lawyers acting on legal aid briefs defending child accused were widely approved by respondents at the consultative workshop on legal representation. The workshop was attended, *inter alia*, by representatives from the Association of Law Societies and from various Legal Aid Clinics. However, while the Legal Aid Board did not oppose its designation as the body which would create and maintain the roster of specialised legal representatives, it expressed doubts about some aspects of the provisions which concerned training.<sup>411</sup> In the Board's view, the Legal Aid Act, 1969, does not permit the Board to provide training to the legal profession, and appropriate courses should rather be provided by universities, colleges or Justice College. The Director of Public Prosecutions, KwaZulu-Natal, maintained that Justice College in-service training is available only to civil servants. Moreover, specialised knowledge about the proposed legislation (including diversionary procedures and sentencing) will be required of private-sector lawyers. A better option, in their opinion, would be to create a type of public defender who is specially trained to work with children. This was also the content of the suggestion submitted by Stepping Stones Youth Justice Centre. The reasons given by Stepping Stones staff for proposing that public defenders be provided for in the legislation as a constituent element of any One-Stop Child Justice Centres that may be set up, are the following:

\* delays caused by attorneys appointed by the Legal Aid Board,

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<sup>410</sup> Clause 99(2) of the draft Bill.

<sup>411</sup> In submission A.

- \* their inexperience;
- \* their lack of knowledge of restorative justice and diversion; and
- \* their insistence on tendering pleas of guilty to finalise a case quickly (and collect the fee), rather than emphasising the benefits of diversion.

11.29 The NICRO report on the consultation with children stated that 46.7% of the children who did enjoy legal representation indicated that they had had problems with the services of legal aid lawyers. The most common problems were that the children did not feel that their appointed lawyers was "100% on their side"; that the lawyer did not show up for court and the case ended up being postponed for months; that the child told the lawyer one story, while the lawyer told the court another; that the lawyer tried to convince the child to turn state witness; and that the lawyer tendered a guilty plea without consulting the child. The remaining participants reported no problems with the services of legal aid lawyers, and viewed their interaction with the legal aid lawyer as having been a positive one. The facilitator of the consultation process observed that participants who had enjoyed legal aid services were, in general, far more positive about legal aid and about the benefits of legal representation than were participants who were not represented. This, the NICRO report concluded, could indicate that some of the negativity about legal representation may be attributable to perceived faults in the legal aid system, rather than to actual failings in practice.

11.30 The Legal Aid Board submitted<sup>412</sup> that it is planning to provide salaried staff at Legal Aid Centres in various towns, and that travel and accommodation expenses would be paid where practitioners have to travel to areas where there are no practising lawyers. This would, therefore, appear further to support the idea that where One-Stop Centres are set up in metropolitan and urban regions, a salaried public defender would be the most cost-effective option for the Board. According to recent press reports, where salaried staff of the Legal Aid Board are available, accused persons (including children) would have to avail themselves of this option, and would not then be entitled to choose state-sponsored legal representation by an attorney in private practice.

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412 In submission A, in relation to a comment on the provisions of clause 84(6) in Bill A, which they argue is unnecessarily prescriptive.

11.31 In accordance with this policy, where the draft legislation provides for the establishment of One-Stop Centres, reference is also made to the possibility of these Centres providing offices for persons who provide legal assistance to children.<sup>413</sup>

11.32 A remaining issue is the question of legal representation currently being provided by candidate attorneys at Legal Aid clinics. According to available information, some ten candidate attorneys complete their articles under the supervision of a salaried attorney. This system, too, is seen as complementing the provision of legal aid in a cost-effective manner,<sup>414</sup> and it has been mooted that where such clinics exist, access to Legal Aid Board-appointed private practitioners will be severely restricted. In short, accused people requiring legal representation will of necessity use the Legal Aid clinics. The difficulty with this is that sanctioning the provision of legal representation by the candidate attorneys placed at university law clinics would expose children accused in the child justice court to the most junior and inexperienced law graduates. In addition, it must be borne in mind that, on all available information, the current curricula in Schools of Law at Universities in South Africa contain no course or module on juvenile justice, diversion, or any other aspects of child justice. Thus, not only do candidate attorneys starting out at the clinics lack practical experience, they also have no academic or theoretical grounding in this area. It is therefore proposed that the legislation specify that an attorney under whose supervision a candidate attorney falls may delegate the powers to represent a child. However, the delegation may only take place in respect of those candidate attorneys who have had 12 months' experience.<sup>415</sup> The Commission is of the view that this compromise addresses the practical need to ensure the provision of legal representation by the Legal Aid clinics (and such other clinics as may be established by the Board) in a way that is affordable to the Legal Aid Board, yet it does not sacrifice the need to ensure that legal representation of children accused of offences is of an adequate standard. After some discussion the Commission has concluded that this requirement of one year's experience should also apply in respect of candidate attorneys serving articles of clerkship in private practice.

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<sup>413</sup> Clause 72(3)(a) of the draft Bill.

<sup>414</sup> In addition to providing articles of clerkship and practical experience to (especially disadvantaged) graduates, who might not otherwise be able to enter the profession.

<sup>415</sup> This is currently a requirement for candidate attorneys wishing to appear in Regional Courts, and thus the idea of limiting the representation of children to representation by candidate attorneys with one year's experience is not an entirely new idea.



## **CHAPTER 12: APPEAL, REVIEW AND MONITORING**

### **Overview of the proposals in the Discussion Paper 79**

12.1 The Discussion Paper proceeded from the premise that the piecemeal manner in which child justice has functioned until now, with child offenders being regulated by a range of legislative provisions in different Acts, and being kept in a range of different institutions, leads to the conclusion that the entire proposed system should be monitored to ensure effective implementation. Several international juvenile

justice instruments also support monitoring, inspections and complaints mechanisms.<sup>416</sup> It has already been suggested that the proposed expansion of diversion should also be subjected to regular review and monitoring.<sup>417</sup>

### *Appeal and review*

12.2 At present, appeal and review are the only methods of control over child sentencing. The present review criteria<sup>418</sup> do not protect children sufficiently. For example, monitors and social workers have found numerous cases of children serving prison sentences imposed as alternatives to paltry fines, which they cannot pay. The Commission agreed with the view expressed by most respondents to the Issue paper that the present system of automatic review by judges of the High Court should be extended, and that in principle all sentences involving a residential element should be subject to the review procedure.<sup>419</sup> This conforms to the principle that detention be used as a measure of last resort.

12.3 In addition to the automatic review procedures, it was proposed that a superior court's inherent right of review of irregularities in proceedings of lower courts should continue to be applicable to the child justice system.

12.4 It was further proposed that the current law with regard to appeals from lower courts, as well

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416 For example Rules 72 to 78 of the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.

417 See Chapter 7.

418 See Chapter 11. Sentences of imprisonment imposed by longerserving magistrates, and sentences falling below other thresholds set in the Criminal Procedure Act, frequently escape High Court scrutiny. In addition, sentences imposed by Regional Courts and sentences where the accused was legally represented are not reviewable.

419 The Discussion Paper proposed that no exceptions should be made for cases where the magistrate has been in office for a particular period of time, nor should the fact that the accused was legally represented at any time during the proceedings disqualify the case from being subject to this type of review. Decisions of regional courts should also be reviewed. Further, the experiences with monitoring of the implementation of section 29 of the Correctional Services Act have shown that regional courts have often breached the provisions intended to protect children, and that children who are tried in regional courts are frequently faced with long delays in their cases. This suggested that in order to ensure the effective implementation of the protective provisions of this legislation, regional courts should be included within the ambit of automatic review procedures.

as appeals from the local or provincial division of the High Court, should be retained.<sup>420</sup>

### *Monitoring*

12.5 The Issue Paper highlighted various options which singly or in combination would enhance effective implementation of the proposed legislation. Various possibilities were raised with regard to monitoring on both a local (or provincial) level and on a national level. The district level assessment centre committees, which were established in many jurisdictions in the Western Cape when pre-trial assessment of children was implemented in 1994, were referred to,<sup>421</sup> as well as recent efforts to monitor awaiting-trial children that were implemented through the provincial IMC structures in various provinces. Several possibilities for a national monitoring body were presented for debate,<sup>422</sup> and specific issues worthy of monitoring were highlighted, such as diversion and the thorny issue of children in prison and other institutions linked to the administration of child justice.

12.6 In response to overwhelming support for this proposal in the Issue paper, the Commission proposed the establishment of a *child justice committee* in relation to each magisterial district, with a range of functions and duties. It was suggested that the committee would comprise at least the child justice magistrate, the inquiry magistrate, the prosecutor, probation officer or officers, representatives from the Police, a representative from the legal aid clinic if there is one in the region, and service providers such as shelter staff, a delegate from NICRO or other organisations presenting diversion programmes, as well as lay persons from community-based church or welfare organisations who have an interest in child justice.<sup>423</sup> This was proposed as a forum where problems with inter-sectoral co-

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420 It was proposed that the powers of superior courts described in the Criminal Procedure Act apply.

421 See J Sloth-Nielsen 'Juvenile Justice Review 1994 - 1995' (1995) *SACJ* at 331.

422 Inter alia, a department of government, located in, for example, the Department of Welfare or the Department of Justice; a child justice office located outside the relevant departments involved in child justice, such as within the structures of the President's office; an advisory council on child justice which could function independently of government departments, or a Judicial Inspectorate, as provided for in the Correctional Services Act, 1998.

423 These last-mentioned persons can contribute to the development of diversion options, assist with the identification of "appropriate adults" to attend pre-trial investigatory procedures or assessments where needed, and fulfil a developmental role in relation to the implementation of this legislation.

operation could be raised, where problems affecting child justice at a local level could be discussed, and where innovation appropriate to local conditions could take place. The committee would be cost-effective, as existing staff and interest groups would be involved and no new appointments or funds would be required.

12.7 There was substantial support in the responses to the Issue Paper for one or other national monitoring system to be provided for in the child justice legislation. The Commission was especially concerned to ensure that the proposed legislation will be workable in practice, and that future difficulties, inconsistencies and loopholes that might emerge are addressed in a responsible way, based on sound research, with appropriate consultation. Since many respondents had argued that a successful national monitoring system must at least be able to address the line functions of the Departments of Welfare<sup>424</sup> and Justice,<sup>425</sup> the Commission proposed that monitoring of the legislation should be shared equally between the Departments of Welfare and Justice, and that an office (called the Office for Child Justice) should be established with joint representation to give effect to this proposal. Since a key function of the office would be the investigation of the efficacy of the legislation, and analysis and dissemination of information, trends and statistics in child justice in South Africa, the office would have a third “arm”, namely a director of research.<sup>426</sup>

12.8 Other Departments relevant to the implementation of the proposed legislation were not excluded from the proposed monitoring system, as it was suggested in the Discussion Paper that they be represented on the National Child Justice Committee, which would meet no fewer than four times annually. This Committee would review matters related to inter-sectoral co-operation, and would necessarily include (besides Justice and Welfare), the SAPS, the Department of Home Affairs and the

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424 The Department of Welfare is responsible for diversion, for the appointment of probation officers, and for the administration of places of safety and secure care facilities.

425 The Department of Welfare is responsible for the administration of courts, and possibly the selection of magistrates and prosecutors to undertake the specialised role envisaged in the Discussion Paper.

426 The international acclaim that has been accorded the New Zealand legislation is in no small way due to the fact that the office of the Commissioner for Children has from the outset been able to provide both qualitative and quantitative research to demonstrate successes and failings of the 1989 Children, Young Persons and Their Families Act.

Department of Education.<sup>427</sup> Six representatives from Welfare organisations and NGOs relevant to the furtherance of the legislation<sup>428</sup> would enjoy representation on the council.

12.9 No provincial monitoring structure was proposed in an attempt to create a system that was inexpensive, and to avoid the prospect of a multiplicity of meetings. In addition, the notion of an ombud for children (especially those in the residential care system or in prison) was supported, but it was argued that any such post could be created by the Commission's project committee tasked with the review of the Child Care Act, where it is more appropriately located.

## Evaluation of comment and recommendations

### (i) Appeal and review

12.10 Ms F Cassim of UNISA supported both the appeal and review proposals put forward in the Discussion Paper. At the workshop held by the Commission with officials from the Department of Justice, a proposal for an internal review system was put forward. The thinking was that the Office for Child Justice could approach chief magistrates or cluster heads to monitor the conduct of

magistrates.<sup>429</sup> However, in view of the undeveloped nature of this idea, as well as a series of recent cases<sup>430</sup> which poignantly illustrate the value of judicial review, the Commission recommends that all sentences involving a residential requirement, as defined in the draft Bill, or correctional supervision, imposed by any court, should be subject to review by a higher court.<sup>431</sup> In view of the apparent overlap

427 Insofar as reform schools and educational programmes presented for diversion or alternative sentencing fall under the jurisdiction of that Department.

428 For example, organisations providing diversion services.

429 The proposal did not detail the ambit and scope of this form of monitoring, for example whether it would approximate judicial review of sentences, or merely encompass general oversight of the conduct of magistrates.

430 *S v Z en Vier Ander Sake*, *supra*, *S v Khuliliwe Mtshali and Lindiwe Mokgadi* (case no A863/99 WLD) (unreported), and *S v S* 1999(1) SACR 608 (WLD).

431 Clause 102 of Bill B. During the early part of 1999, there were suggestions that the entire system of automatic judicial review was to be abolished, but apparently as a result of opposition from the bench, the

with the well-known appeal procedures spelt out in the Criminal Procedure Act 51 of 1977, the Commission has decided not to retain any references to appeal in this proposed legislation, and the provisions of the Criminal Procedure Act will then apply.

**(ii) Monitoring**

*The proposed National Office for Child Justice*

12.11 The Gauteng Department of Welfare supported the establishment of an office to monitor child justice. The caution was expressed that inter-sectoral committees can only work effectively if all Departments involved are equally committed to child justice. Dr L Glanz, of the Directorate: Crime in the Department of Justice, urged the establishment of the National Office for Child Justice as soon as possible, as the implementation of the new child justice system will require substantial planning, training and oversight, which this Office would have to undertake. The submission from the Office of the Family Advocate, however, appeared to suggest that there may be a duplication in regard to the proposed Office for Child Justice. The assertion is that the Office of the Family Advocate plays a pivotal role "as it is responsible to monitor, establish and co-ordinate Counselling and Support Services consisting of Government Departments and NGOs". Mr M Van Schalkwyk, retired Superintendent of Education responsible for Reform Schools, pleaded for the introduction of a Department of Youth Protection within the Ministry of Justice, to co-ordinate and administer the new legislation.

12.12 By contrast, magistrates who responded to questionnaires sent via the Magistrates Commission on matters contained in the Discussion Paper were unanimous in the view that a dedicated child justice monitoring system is essential. As the Commission is of the view that a dedicated department within the Department of Justice is not a feasible option, and that the Office of the Family Advocate enjoys jurisdiction in civil rather than criminal matters, the Commission proposes that the legislation should establish a National Office for Child Justice in the manner proposed in the Discussion Paper.

12.13 The SAPS Legal Services submission strongly recommended that the National Office for Child Justice should be extended to include a representative of the Ministry of Safety and Security (in addition to representatives from the Departments of Justice and Welfare). The Safety and Security functionary would in their view bear responsibility for:

- \* monitoring of the arrest procedures pertaining to children;
- \* inquiring into and reporting on any matter relating to the Department of Safety and Security;
- \* making recommendations to the Minister of Safety and Security and the National Commissioner of the SAPS about police procedures detailed in the child justice legislation and keeping such procedures under review;
- \* arranging training for police on the new child justice system;
- \* providing the liaison between National and Provincial Commissioners of the SAPS;
- \* assisting the researcher appointed to serve in the Office of Child Justice;
- \* contributing to the Annual Report on Child Justice on matters concerning police procedures and specifically arrests of children;
- \* working with the Department of Welfare on establishing prevention programmes for young people.

As the SAPS submission reflects a desire to be an integral part of the new child justice system, and as it is clear that the SAPS bear major responsibilities for portions of the proposed legislation, the Commission accordingly proposes that a functionary from the SAPS should also be part of the National Office for Child Justice.

12.14 SAPS Legal Services suggested further that the researcher's duties should include reports on the numbers of warrants issued for children and/or their parents for not complying with any aspect of the child justice legislation. These additional duties, which are aimed at ensuring accurate monitoring of the child justice system, are thus reflected in the draft legislation.

12.15 At the workshop held by the Commission for senior personnel from the Department of Justice,

the view was put forward that the National Office for Child Justice should control and set minimum standards for diversion. In view of the recommendations relating to the registration of diversion options in Chapter 7, provision has been made for a power to be exercised by the National Office for Child Justice.

*The proposed local child justice committees*

12.16 The Law Society of the Cape of Good Hope was of the view that in regard to the establishment and regulation of the proposed local child justice committees, representatives of the Law Society of South Africa should attend the meetings of the child justice committee. At the workshop held by the Commission with non-governmental organisations and various commissions (such as the Human Rights Commission), a strong plea was made for compulsory representation by members of civil society on the child justice committees. The fear was expressed that the committees might otherwise consist solely of state employees, who are often uncritical of the shortcomings of government.

12.17 The Commission has considered these submissions. In so far as lawyers in private practice are involved in representing children accused of offences, provision should be made for them to attend meetings of the child justice committee on a voluntary basis. However, where a Public Defender's office exists, or a Legal Aid clinic providing legal representation to children on a regular basis, this attendance should be required. Since it is difficult to imagine how each provincial Law Society, with small permanent staff numbers, could practically attend the large number of child justice committee meetings linked to each magisterial jurisdiction, and spread throughout the provinces, it does not seem useful to impose a duty to attend meetings upon the Law Society.

12.18 As far as compulsory representation by NGOs is concerned, a similar difficulty arises. The Magistrate, Hopetown, expressed doubt as to whether members of civil society will attend meetings and become involved role-players if no remuneration is provided for. By way of example, even lay assessors receive compensation, he noted. Thus, to compel civil society to attend committee meetings on a voluntary basis did not seem, in his opinion, a wise course of action. In addition, the Magistrate,

Pietermaritzburg, while pointing to the merits of local child justice committees, in that they harness community resources at no extra cost to the State, warned at the same time that members should not be able to hold the State to ransom.<sup>432</sup> This might occur if the absence of members of civil society caused the meeting to lack a quorum. The Commission therefore declines to include compulsory representation from civil society on the local child justice committees.

12.19 The submission from SAPS Legal Services made a number of suggestions in regard to the duties of the child justice committees. First, the committee must collect the necessary statistics referred to in Bill B<sup>433</sup> to enable an accurate picture of local child justice issues to be developed. Second, the committee should from time to time issue media statements and promote local public awareness about child justice. Third, the committee should have the function of investigating preventive measures to assist children of the region to avoid becoming involved in crime; and finally, the committee should have the duty to seek alternative care and temporary placement for children in conflict with the law. These useful suggestions have been reflected in the draft legislation.

12.20 One duty of the committee, namely that pertaining to monitoring the position of children detained in police cells, allegedly overlaps with the existing tasks of Community Policing Forums, according to Superintendent Hickman, SAPS, Kimberley. This is indeed to some extent so, but as the monitoring of awaiting-trial detention of children is an important element of the successful management of a child rights-oriented system, it cannot be excluded from the ambit of this legislation.

12.21 The Magistrate, Cape Town, submitted that Bill A indicated who has to attend meetings of the child justice committee, but failed to provide who the members are. An alternative wording<sup>434</sup> to that set out in the Discussion Paper is therefore proposed in order to correct this problem.

12.22 In view of the proposed new provincial monitoring structure (discussed below), the Commission

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432 He therefore proposes that the wording of the legislation should contain a proviso to the effect that the absence of one or more of the members should not invalidate any work done by the Committee.

433 See the explanation regarding the distinction between Bill A and Bill B in para 1.24.

434 Clause 104(2).

now proposes that the reports of local child justice committees should be forwarded to the provincial office, and that this office should report further to the National Office for Child Justice.

*A provincial monitoring structure*

12.23 A number of submissions and workshops revealed strong support for the provision of provincial monitoring structures. The basis for the argument was that some departments involved in delivery of services in the child justice system are budgeted for and implemented through provincial systems, notably police services and welfare services. The submission from the Department of Welfare, Western Cape, suggested that at provincial level there could be an Office for Child Justice,<sup>435</sup> with more or less the same functions and duties as the National Committee on Child Justice. The SAPS Legal Services submission, by contrast, proposed a provincial committee, involving "provincial role-players, and attending to matters concerning provincial strategies". The provincial committee, the submission argued, should report to the National Office for Child Justice.

12.24 The Commission welcomes the proposals from the provinces regarding the importance of a provincial monitoring system, as it indicates provincial commitment to the ideals espoused in the proposed legislation. In addition, as the AFReC study makes clear, functionaries at provincial level are a *sine qua non* if the required data on arrests, children awaiting trial and so forth is to be collected for the purposes of the Annual Report of the National Office for Child Justice. Given the data collection function expected of the provinces, it therefore seems preferable to provide for an Office for Child Justice at provincial level, as proposed by SAPS Legal Services, rather than a committee, as proposed by the Department of Welfare, Western Cape. The Office should be staffed by a member of the provincial SAPS, and the provincial Department of Welfare. The intention is to minimise the number of new appointments that may have to be made, and therefore no further permanent staff from other Departments are required in the legislation. But, in order to promote inter-sectoral co-operation at provincial level, the legislation provides for a duty upon the provincial Office for Child Justice to maintain regular links (or channels of communication) with the regional office of the Department of Justice, with

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435 Rather than a provincial committee.

all chief magistrates and cluster heads in the province, with the Director of Public Prosecutions of the province, and the Provincial Commissioner for Correctional Services.<sup>436</sup>

*The proposed National Child Justice Committee*

12.25 The Inkatha Freedom Party recommended that to increase the independence and credibility of the proposed National Committee for Child Justice, the persons appointed from the ranks of civil society should not be in the employ (full-time or part-time) of the State. The preferred appointment procedure was also the subject of IFP comment, in that the Ministers of Justice and Constitutional Development and Welfare should act jointly in making such appointments, and should consult with relevant stakeholders. This submission has been accepted by the Commission, save for the reference to consultation with relevant stakeholders. Further, the IFP suggested that the interests of accountability would be best served if the National Committee for Child Justice were also required by law to prepare and submit an annual report to Parliament. However, in view of the fact that the National Committee will play a role in assisting the National Office for Child Justice in the preparation of that body's annual report, requiring two annual reports appears to be superfluous. This recommendation has therefore not been accepted. A proposal was received to the effect that the Department of Health should be represented on the National Committee for Child Justice, in view of that Department's involvement in age assessments.<sup>437</sup> However, previous experiences of that Department's involvement with inter-sectoral national committees has shown that age assessment is an undeniably marginal area of concern for Health, and that little benefit is derived (by that Department or by any other role-players) from having the Department of Health in attendance. This suggestion has thus not been followed. The Law Society of the Cape of Good Hope submitted that the Association of Law Societies of South Africa should enjoy representation on the National Committee for Child Justice. This, too, is not supported, although the Commission expects that in considering the appointment of the representatives from sectors other than the State, the relevant Ministers would consider the appointment of an attorney, judge, advocate, or a member of the Association of Law Societies to be a desirable addition to the National Committee.

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<sup>436</sup> Clause 109 of the draft Bill.

<sup>437</sup> However, the submission from the SAPS legal services raises the possibility that the Department of Health is apparently considering doing away with the system of district surgeons.

## **CHAPTER 13: CONFIDENTIALITY AND EXPUNGEMENT OF RECORDS**

### **Overview of the proposals in Discussion Paper 79**

*Confidentiality of proceedings*

13.1 The Issue Paper did not address the issues of confidentiality and expungement of records. However, since the inclusion of provisions on confidentiality and expungement were contemplated after they were raised during the consultation process that followed the release of the Issue Paper, a detailed discussion of the current position in terms of the Criminal Procedure Act was included in the Discussion Paper.<sup>438</sup> The project committee on the Commission's investigation into sentencing identified the expungement of the criminal records of child offenders as an issue that the project committee on juvenile justice should deal with in this investigation.

13.2 In the Discussion Paper, the Commission reviewed two draft provisions that were proposed by the Juvenile Justice Drafting Consultancy<sup>439</sup> concerning the confidentiality of proceedings involving accused persons under the age of 18 years, and prohibiting the publication of information which could reveal the identity of any accused child. The proposed provisions were similar to the applicable sections of the Criminal Procedure Act, which regulates confidentiality and privacy at present. An additional provision stipulated that the prohibition on the publication of information should not be used to prevent people or agencies from seeking access to children in order to offer assistance, or to prevent access to information for the purpose of study or analysis. The additional provision was included because it was contended that the provision in the Criminal Procedure Act had in the past been used to prevent individuals and organisations from obtaining access to information in order to provide para-legal and other assistance to children in detention, and to analyse or conduct research about the situation of children in the criminal justice system.

13.3 Recent amendments to regulations under the Child Care Act 74 of 1983 provide for the introduction of a Child Protection Register in which details must be entered of any child exposed to ill-treatment or deliberate injury of which the Director-General of Welfare and Population Development has been notified.<sup>440</sup> The regulations permit the Director-General to approve the examination or inspection

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<sup>438</sup> See *Discussion Paper 79* at 282 to 293.

<sup>439</sup> *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* Cape Town: Allies Printers 1994 at 48, 55 - 56.

<sup>440</sup> Regulation 39B published in *Government Gazette* 18770 of 31 March 1998.

of the register for official and *bona fide* research purposes,<sup>441</sup> and also to disclose information contained in the register to such persons as he or she may determine with the sole purpose of serving the interests, safety and welfare of any child.<sup>442</sup> This has provided the Commission with a useful precedent concerning access to otherwise confidential information without prejudicing the best interests of the child.

13.4 The Commission proposed in Discussion Paper 79 that the present provisions in the Criminal Procedure Act relating to the protection of the identity of accused persons under the age of 18 years, as well as those pertaining to the privacy of criminal proceedings involving such children, should be incorporated in similar form in the Child Justice Bill. In addition, the Discussion Paper suggested the inclusion of a provision<sup>443</sup> permitting relaxation of the above rules in clearly defined and limited circumstances. This was to ensure that the provisions on confidentiality and privacy were not used in such a way as to prevent people or organisations from gaining access to information pertaining to children accused of offences, if such access would be in the interests of the children concerned or in the interests of the administration of the proposed child justice system.<sup>444</sup>

*Expungement of criminal records*

13.5 Although it is clear that the privacy of the child's identity and the confidentiality of the criminal proceedings should be protected by law, any record of the conviction of a child for an offence committed whilst below the age of 18 years does not enjoy any special status in our present system. In Discussion

<sup>441</sup> Such as the following: collecting of information on the occurrence, distribution and prevalence of cases of ill-treatment of or deliberate injury to children, or of physical, emotional or sexual abuse of children, and collecting of information on cases of ill-treatment of or deliberate injury to children and of the various interventions made in such cases.

<sup>442</sup> Regulation 39B(1)(3) and (4).

<sup>443</sup> Section 66(3) of Bill A.

<sup>444</sup> Cf section 438 of the New Zealand Children, Young Persons and Their Families Act 1989 where the publication of reports on proceedings under the Act which are of a *bona fide* professional or technical nature, or which are intended for circulation among members of the legal, medical or teaching professions, officers of the Public Service, psychologists, counsellors carrying out duties under the Act or social welfare workers, are exempt from the restrictions on the publication of reports. In addition, statistical information relating to proceedings under the Act and the results of any *bona fide* research relating to such proceedings are also exempt. In regard to the protection of privacy, section 103 of the Ugandan Children Statute 1996 provides that a child's right to privacy shall be respected throughout the court proceedings in order to avoid harm being caused to him or her by undue publicity, and that no person shall, in respect of a child charged before a Family and Children Court, publish any information that may lead to the identification of the child except with the permission of court.

Paper 79, the Commission presented a synopsis of the provisions of the Criminal Procedure Act<sup>445</sup> and the relevant case law<sup>446</sup> regarding when, after the expiry of a certain period of time, an accused person's previous convictions fall away. The present position is that under certain circumstances, previous convictions will fall away provided that a period of ten years has elapsed after the date of conviction of the relevant offence. In addition, the relevance of the Promotion of National Unity and Reconciliation Act 34 of 1995 to this area of debate was discussed in Discussion Paper 79.

13.6 A criminal record has serious implications. A convicted person is branded for ever as an untrustworthy member of society; a conviction compromises job opportunities permanently, and convicts are often the subject of suspicion and mistrust. These consequences can be especially serious for young persons who have to attempt to enter the job market with the liability of a criminal record for an offence committed whilst still a child. In the Discussion Paper it was argued that in order to mitigate these negative effects, and to give children a second chance, legislation should be enacted to allow them to resume their lives without the stigma of a conviction.

13.7 In Discussion Paper 79 the Commission proposed that in respect of certain specified convictions, the criminal record of child would never be able to be expunged. These were convictions for serious offences, which were specified as murder, rape, indecent assault involving the infliction of grievous bodily harm, robbery with aggravating circumstances, any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that the value of the dependence-producing substance in question is more than R50000, and any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

13.8 As far as the possible expungement of criminal records for all other offences was concerned, Discussion Paper 79 put forward two possible options for debate and comment. As the first option, the Commission proposed a simple model for the automatic expungement of the records of a child. All that would be required was the lapse of a period of five years following the expiry of the sentence, provided

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<sup>445</sup> See *Discussion Paper 79* at 284 for a discussion of section 303 *ter*, read with Schedule 5 of the repealed Criminal Procedure Act 56 of 1955 and section 271A of the Criminal Procedure Act 51 of 1977.

<sup>446</sup> See *S v Mqwathi* 1985 (4) SA 22 (TPD) and *S v Zondi* 1995 (1) SACR 18 (A).

that during this time the person was not again convicted of any offence during the five-year period.

13.9 The second option sought to distinguish further<sup>447</sup> between convictions for more serious offences and less serious offences. The basis for this distinction was whether a sentence involving a residential requirement had been imposed (ie a reform school or prison sentence). In those cases in which the sentence imposed included a residential requirement, indicating a more serious offence, the record could be expunged ten years after the completion of the sentence, but only upon application to the proposed National Committee for Child Justice. A “clean” record was once again required in the stipulated period following expiry of the sentence. If the National Committee for Child Justice decided to grant the application, it would cause a notice of this decision to be transmitted to the South African Criminal Bureau, together with a direction that the said record be expunged. In cases where the child’s record reflected the imposition of a sentence which did not involve a residential element, expungement could occur five years after completion of the sentence,<sup>448</sup> and it was proposed that this expungement would occur automatically.

13.10 In the Discussion Paper, the Commission set out the advantages of an automatic expungement procedure as opposed to expungement upon application by the person seeking to have the criminal record expunged. Not only is an automatic procedure more expeditious as compared to expungement by application, which would necessarily involve more administrative functions,<sup>449</sup> but automatic expungement could prove to be more equitable. An application procedure leaves scope for widely varying decisions from case to case, and there is also the real possibility that many convicted persons will be unaware of the possibility of expungement, and will therefore not benefit by these provisions. There may also be cost implications for an applicant. By contrast, an application procedure does allow for screening of individual cases, rather than the blanket deletion of records by operation of a computer programme.

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<sup>447</sup> In addition to the offences for which expungement could not be considered, as set out in par 13.7 above.

<sup>448</sup> Provided again that the applicant had not been convicted of an offence in the five year period.

<sup>449</sup> See *Discussion Paper 79* at 293.

13.11 The Commission did not favour the option of “sealing” records of convictions obtained by children. In this instance, the record is not completely destroyed, but an application in specific instances may be made for access to the record. The Discussion Paper also raised the issue of the confidentiality of the record of the child during the period of its retention. The Commission argued that if the purpose of the retention of the record is to assist the court in the imposition of any subsequent sentence by providing a complete profile of the child, then all officials of the court, including presiding officers, prosecutors, probation officers, the police and the staff of residential care facilities, should have access to the record. No provision concerning access to records during the period of retention was proposed, however, as the provisions in the Criminal Procedure Act concerning proof of previous convictions are adequate.

### **Evaluation of comment and recommendations**

#### *Confidentiality*

13.12 The Commission did not receive any comment on its proposals in respect of confidentiality, and retains its recommendations in this regard.

#### *Expungement of criminal records where serious offences committed*

13.13 There was no opposition to the Commission’s recommendation that in certain circumstances the expungement of a child’s record should not be possible. As argued in Discussion Paper 79, it is in the interests of both the child and society as a whole that criminal records be maintained reflecting a profile of the child who has been convicted of a serious or violent offence. Therefore, the Commission has retained the recommendation that expungement should not be possible in respect of certain serious offences.<sup>450</sup>

#### *Convictions which should be considered for expungement*

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<sup>450</sup> Instead of referring to these offences in the text of the applicable section, as was done in *Discussion Paper 79*, however, the relevant section refers to those offences listed in Schedule 3 attached to Bill B.

13.14 The responses to the two options proposed in the Discussion Paper were varied. It appeared from the workshops that there was considerable support for the policy position of introducing legislation to provide for the expungement of the records of child offenders.<sup>451</sup> The children consulted in the NICRO report, too, agreed that expungement should be possible, arguing that a criminal record can prevent travel and inhibit employment prospects. The Commission has therefore included provisions on expungement in Bill B.<sup>452</sup>

13.15 Some of the respondents expressed their support for one of the options proposed in Discussion Paper 79. The Gauteng Provincial Government and Ms Cassim, of UNISA, expressed a preference for option two, which sought to provide different procedures for the expungement of a criminal record, depending upon whether a residential or non-residential sentence had been imposed. The consultation with children revealed that 53% of the respondents preferred option two. The responses of the children included comments that “they felt people had to prove themselves to the community first”, and that “offences differ as to their seriousness”. The written submission of Mr LM Muntingh, Director of Research, NICRO, was critical of the fact that option two gave substantial weight to the sentence that was imposed upon conviction for the offence, that is, whether it involved a sentence with a residential requirement or not. He stated that “it is not clear why the sentence bears on the expungement of the record” and argued that “the offence has substantially more bearing, and is a more consistent variable to apply when decisions are to be made”. The Commission agrees that the nature of the *offence*<sup>453</sup> for which the conviction was obtained must be an important factor in deciding on expungement, and that the nature of the *sentence* is not the ideal way in which to distinguish “expungeable” offences from those that do not merit expungement.

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<sup>451</sup> Superintendent Nilsson, SAPS, Western Cape did not support expungement at all, as he was of the view that the possibility of expungement would advance the possibility of children being used by crime syndicates to commit offences. Since all the options proposed in Discussion Paper 79 envisaged expungement only after a minimum period of five years, and then only on proof of a clean record after conviction, the Commission cannot see how the possibility of expungement would further the use of children in criminal activities. On the contrary, the inducement of expungement could prove to be a useful tool to keep children away from crime.

<sup>452</sup> Clause 115 of Bill B.

<sup>453</sup> This is apart from those specified offences in respect of which expungement may never be considered, as spelt out in par 13.13 above.

13.16 The Association of Law Societies of South Africa and the Inkatha Freedom Party supported option one, which provided for automatic expungement of all records, save convictions for serious specified offences, after a period of five years.<sup>454</sup> The IFP argued that this model for expungement will allow a child to re-enter society after completion of the sentence and will also enable the child to play a valuable role as a normal member of society without fear of prejudice resulting from a permanent criminal record.

13.17 Mr Muntingh was of the opinion that if the intention is to provide for the expungement of criminal records, then this should be effected in such a way as to maximise the benefits thereof to the young person, and to enable such person to enter adult life without the burden of youthful misdemeanours hanging over him or her. He also submitted that the more limitations and obstacles that are placed by legislation upon the process required for expungement of records, the more ineffectual and complicated the application of this apparent benefit will become in practice. The Department of Social Services, Provincial Administration, Western Cape, held the view that each case should be reviewed after five or seven years to consider the question of the expungement of the record. The submission proposed that the following factors should be taken into account in deciding whether expungement ought to be allowed: the commission of any further offence; the life-style of the child or adult concerned; co-operation during diversion or any community programme which formed part of the sentence; and the seriousness of the crime(s).

13.18 The Commission agrees that the process involved in obtaining an expungement should not be complicated or costly, and has for this reason chosen not to pursue the idea of an application to the National Committee for Child Justice,<sup>455</sup> which was the model presented in option two of the Discussion Paper. Clearly, the envisaged system must be administratively possible, and an individual review of each case five to seven years after conviction would entail extensive additional hearings into the sorts of factors proposed by the Department of Social Services, Western Cape. The revised model proposed by the Commission, and elaborated in para 13.23 below, envisages that an order regarding expungement would

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<sup>454</sup> Provided that no further conviction had been recorded against the person.

<sup>455</sup> Or to a court, which was another possibility that was considered.

be made at the time of the initial sentence being passed. This proposal overcomes the necessity of additional hearings on the matter some years after the event, and, in addition, allows for a simple administrative procedure after the conclusion of the “crime-free period”. The conditions of expungement will be endorsed on the SAP 69 form that is sent to the South African Criminal Bureau, and the Bureau will attend administratively to the expungement as it would to the expungement of records of adults in terms of section 271A of the Criminal Procedure Act.<sup>456</sup>

*Period after which expungement can occur*

13.19 Mr Muntingh did not approve of the proposal that a minimum period of five years must expire before expungement of criminal records can occur.<sup>457</sup> He argued that the setting of such a period negates any positive effect that the expungement is intended to have, as those five years will frequently span the very period during which the young adult is attempting to find gainful employment. He gave an example of a 16-year-old child who receives a two-year residential sentence and who, upon expiry of that sentence, may only apply for the expungement of the record ten years later. In effect, this would be at the age of 28 years. Mr Muntingh proposed that the legislative provision be amended to read as follows:

Save for the record of those offences mentioned in subsection (1), the record of a conviction and sentence imposed upon a child must be automatically expunged and the record sealed when the child turns 18 years of age unless a sentence is still in force, in which case the record will be expunged following the completion of the sentence.

13.20 The Department of Social Services, Western Cape, also recommended that the records of children should be preserved, but should not be allowed to be used or adduced in such a way as to influence any punishment received upon conviction as an adult. The Commission has considered the merits inherent in both this submission and that of Mr Muntingh, but is of the view that automatic expungement of criminal records upon attainment of the age of 18 years is not a proposition that can be

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<sup>456</sup> Discussions with personnel at the Bureau have indicated that this is feasible, given existing staff capacity and computer technology available to SAPS.

<sup>457</sup> Option one set this period for all offences other than those for which expungement was excluded, and option two set this period of time in respect of offences for which a sentence that did not involve a residential sentence had been imposed.

supported. First, such an approach does not allow for the consideration of the nature of the harm caused by the commission of the offence. Second, it cannot be realistically suggested that a child who commits an offence a matter of weeks before his or her 18<sup>th</sup> birthday should enjoy the benefit of expungement without having passed the acid test of a “crime- free period” after conviction. Third, this proposal would be inequitable as regards the child who is convicted of an offence close to his or her 18<sup>th</sup> birthday, by comparison to the child who committed a similar offence whilst still very young, but who will then bear the stigma of a criminal record until reaching the age of 18 years. Further, it would be unjustifiable for a child who has offended repeatedly in his or her 17<sup>th</sup> year, and then offended again upon turning 18, to enjoy the benefit of being treated as a first offender. Finally, if, as argued in the submission from the Department of Social Services, Western Cape, the records of convictions of children are not intended to be used to influence punishment should the child be again convicted on becoming an adult, then there would appear to be little justification in retaining the record at all. The proposals that records be automatically expunged upon attainment of the age of 18 are therefore not accepted by the Commission. The Commission’s approach has also been influenced by the fact that the proposed model will give children many opportunities to be diverted. The structure of the system places emphasis on giving children “a chance” in the early phases, thus avoiding both trial and criminal records in a large number of first offences, and even subsequent offences if these are not of a serious nature.

13.21 Mr Muntingh further proposed that a clause be inserted to the effect that where a child<sup>458</sup> is convicted of an offence whilst still under the age of 18 years, he or she must be under no obligation to divulge this information to any person(s) unless ordered to do so by a court. The Commission does not support this proposal, however. There may be legitimate reasons for requiring disclosure of a criminal conviction in the broader interests of society, such as upon application for travel documents, a license to own a gun or to drive a vehicle. It is arguable that employers, too, have a right to know whether a prospective employee has a criminal record. The Commission is thus of the view that the expungement provisions as drafted in the proposed legislation grant sufficient protection to those seeking to escape the permanent taint of a criminal conviction recorded against them for offences committed during their youth.

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<sup>458</sup>

Save for those convicted of the serious offences for which expungement is excluded.

13.22 In the light of all the submissions received, the difficulties related to the process for expungement referred to in para 13.18 above, and the rejection of the view that convictions and criminal records should be automatically expunged upon attainment of a certain age, the Commission proposes that the decision whether expungement of a conviction can take place needs to be made on the individual merits of each case, save where the child has been convicted of a serious offence referred to in Schedule 3 to Bill B. The Commission has identified the sentencing magistrate as the person best placed to make the determination in respect of the expungement, and consequently, the proposed legislation envisages a model in which the judicial officer sentencing the child will simultaneously make an order on expungement. The sentencing officer would have full knowledge<sup>459</sup> of the offence, the child, the victim and the sentence, and in this way the complications and administrative burden that would be inherent in any later application procedure or individualised hearing on expungement (at the expiry of the proposed period after conviction for the original offence) can be avoided. Whilst this model could be regarded as placing too much discretion with the presiding officer, it must be remembered that in the new system the child justice magistrate would be a specially qualified and trained individual, sensitive to the rights of children. In addition, clause 115(3) of Bill B spells out that a decision by a sentencing officer not to allow expungement may be taken on appeal or review.

13.23 In the light of submissions received, the Commission has revised its opinion on prescribing a fixed period of time after which expungement may occur. It is conceded that the five-year period proposed in the Discussion Paper may occur during the very time at which a young person is seeking employment, and that the apparent benefit of expungement could then be lost. The Commission therefore favours an individualised response in respect of the setting of a period of time after which expungement can occur, and it has been provided that a determination most appropriate to the circumstances of that particular child and the offence would have to be made by the sentencing officer. The date may not be less than three months, and may not exceed five years, after imposition of sentence.<sup>460</sup>

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<sup>459</sup> Clause 117(2) empowers the sentencing officer to make an order regarding expungement of a conviction for any offence, save those referred to in Schedule 3, after consideration of the nature and circumstances of the offence, the child's personal circumstances or any other relevant factor.

<sup>460</sup> Clause 115(4) of Bill B.

13.24 The advantage of the above approach is that, once the period of time has been fixed after which expungement may ensue, and if no further convictions are recorded during that period,<sup>461</sup> the actual procedure for expungement can occur automatically at the South African Criminal Bureau.<sup>462</sup> This, the Commission has established, should be able to occur with relative ease in practice.

13.25 The Commission is of the view that the approach to expungement adopted in this Report, as detailed above, gives effect to the best interests of the children who are convicted of offences committed during their youth, as well as the interests of society in ensuring that where recidivists are concerned, such records do not qualify for expungement. In addition, the proposed procedure achieves both the goal of ensuring an individualised approach to each case, as well as the goal of providing a simple administrative process for expungement.

## ANNEXURE A (*Bill B*)

### BILL

**To establish a criminal justice process for children accused of committing offences which aims to protect the rights of children entrenched in the Constitution and provided for in international instruments; to provide for the minimum age of criminal capacity of such children; to delineate the powers and responsibilities of members of the South African Police Service and probation officers in relation to such children; to provide for the detention of such children and their**

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<sup>461</sup> Clause 115(5) requires the setting of a condition that the child concerned must not be convicted of a similar offence between the date of imposition of the sentence and the date of expungement.

<sup>462</sup> Clause 115(6).

**release from detention; to incorporate diversion of cases away from formal court procedures as a central feature of the process; to establish assessment of children and a preliminary inquiry as compulsory procedures in the new process; to create special rules for a child justice court; to extend the sentencing options available in respect of such children; to entrench the notion of restorative justice; to establish appeal and review procedures; to provide for legal representation of children; to create monitoring mechanisms to ensure the effective operation of this legislation; and to provide for matters incidental thereto.**

INTRODUCED BY THE MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows: -

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**CHAPTER 1: GENERAL**

**Definitions**

1. In this Act, unless the context otherwise indicates -

- (i) “an appropriate adult” means a member of a child’s family; a custodian; a guardian who is not a parent or a primary care-giver as defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992);
- (ii) “assessment” means an evaluation by a probation officer of a child for purposes of section 38, and includes an evaluation by an assistant probation officer or a social worker;
- (iii) “child” means any person who is subject to the provisions of this Act in terms of section 2;
- (iv) “child justice court” means the court described in section 71;
- (v) “children’s court” means the court described in section 5 of the Child Care Act, 1983 (Act No. 74 of 1983);
- (vi) “community service” means compulsory work, without payment, for a community organisation or other compulsory work of value to the community, performed by a child;
- (vii) “court” means a child justice court or any other court acting in terms of the provisions of this Act;
- (viii) “correctional supervision” means a form of community correction provided for in Chapter 6 of the Correctional Services Act, 1998 (Act No. 111 of 1998);
- (ix) “detention” means the deprivation of liberty of a child including confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility;
- (x) “Director of Public Prosecutions” means a Director of Public Prosecutions appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) and “National Director of Public Prosecutions” means the person appointed in terms of section 10 of that Act;
- (xi) “diversion” means the referral of cases of children alleged to have committed offences away from formal court procedures with or without conditions;
- (xii) “diversion option” means a plan, programme or prescribed order with a specified content and of specified duration and includes an option which has been approved, in terms of the regulations to this Act, by the Office for Child Justice;
- (xiii) “family group conference” means a gathering convened by a probation officer as a diversion or sentencing option to devise a restorative justice response to the child’s offending;
- (xiv) “independent observer” means a person included in the roster referred to in section 105(i);

- (xv) “inquiry magistrate” means the officer presiding in a preliminary inquiry;
- (xvi) “Legal Aid Board” means the Legal Aid Board established under section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969);
- (xvii) “Legal Aid Clinic” means an institution providing legal representation at State expense under the auspices of the Legal Aid Board;
- (xviii) “One-Stop Child Justice Centre” means a centre established in terms of section 72;
- (xix) “place of safety” means a place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983);
- (xx) “police official” means a member of the South African Police Service or of a municipal police service established in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- (xxi) “preliminary inquiry” means the compulsory procedure described in Chapter 7 which takes place before plea and trial in a court;
- (xxii) “prescribed” means prescribed by regulation to this Act;
- (xxiii) “probation officer” means a person appointed under the Probation Services Act, 1991 (Act No. 116 of 1991), and includes a social worker or other suitably qualified person designated as a probation officer or assistant probation officer for tasks to be carried out in terms of this Act;
- (xxiv) “residential requirement” means compulsory residence in a residential facility or a place other than the child’s home;
- (xxv) “residential facility” means a residential facility established by the Minister of Education or the Minister of Welfare and Population Development which is designated to receive sentenced children;
- (xxvi) “restorative justice” means the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parent, family members, victims and communities;
- (xxvii) “secure care facility” means a secure care facility as defined in the Child Care Act, 1983 (Act No. 74 of 1983);
- (xxviii) “symbolic restitution” means the restitution of an object owned, made or bought by a child

to a specified person, persons, group or institution as compensation for the harm caused by that child;

(xxix) “this Act” includes any regulations made under this Act.

### **Application of this Act**

2. (1) This Act applies to any person in the Republic of South Africa, irrespective of nationality, country of origin or immigration status, who is alleged to have committed an offence and who, at the time of the alleged commission of such offence, is or was under the age of 18 years.

(2) The Director of Public Prosecutions or a designated prosecutor may, in exceptional circumstances, direct that proceedings in respect of an individual person must take place in terms of the provisions of this Act: Provided that such person may not be over the age of 21 years.

(3) The circumstances referred to in subsection (2) include those where -

- (a) there are several co-accused and the majority of such persons are below the age of 18 years;
- (b) the age of a person is not established but there is reason to believe that the person’s age is such that this Act would apply;
- (c) a child commits a further offence while serving a residential sentence imposed in terms of the provisions of this Act, despite the fact that such child may be over the age of 18 years at the time of such further offence.

(4) This Act applies to a person in respect of whom proceedings have been instituted in terms of this Act until conclusion of such proceedings, despite the fact that such person may have reached the age of 18 years during the course of such proceedings.

### **Application of this Act in relation to the Criminal Procedure Act, 1977**

3. (1) Where this Act does not provide for any matter or procedure for which the Criminal Procedure Act, 1977 (Act No. 51 of 1977) provides, the provisions of that Act apply with such

changes as may be required by the context.

(2) Where there is any inconsistency between this Act and the Criminal Procedure Act, the former applies.

## Objectives

4. The objectives of this Act are to -
- (a) protect the rights of children who are subject to the provisions of this Act;
  - (b) promote *ubuntu* in the child justice system through -
    - (i) fostering of children's sense of dignity and worth;
    - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
    - (iii) supporting reconciliation by means of a restorative justice response; and
    - (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of this Act; and
  - (c) promote co-operation between all government departments, other organisations and agencies involved in implementing an effective child justice system.

## Principles

5. Any court or person exercising any power conferred by this Act or by section 20 of the Black Administration Act, 1927 (Act No. 38 of 1927) must be guided by the following principles:

- (a) A child who is subject to procedures in terms of this Act must be given an opportunity to respond before any decision affecting him or her is taken.
- (b) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and allowed to speak in the language of choice through an interpreter, if necessary.

- (c) Children should be treated in a manner which takes into account their cultural values and beliefs.
- (d) All procedures in terms of this Act must be conducted and completed speedily.
- (e) Every child has the right to maintain contact with family, and to have access to social services.
- (f) Parents and families have the right to assist their children in proceedings under this Act and wherever possible to participate in decisions affecting them.
- (g) All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances.
- (h) A child lacking in family support, or educational or employment opportunities must have equal access to available services and every effort must be made to ensure that children receive equal treatment when having committed similar offences.

## **CHAPTER 2: AGE, CRIMINAL CAPACITY AND AGE DETERMINATION**

### **Age and criminal capacity**

**6.** (1) A child who, at the time of the alleged commission of an offence, is below the age of ten years cannot be prosecuted.

(2) A child who, at the time of the alleged commission of an offence is at least ten years of age, but not yet 14 years, is presumed not to have had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation, unless it is subsequently proved, beyond reasonable doubt, that such child at the time of the alleged commission of an offence had such capacity.

(3) If the prosecution of a child referred to in subsection (2) is contemplated, the Director of Public Prosecutions must issue a certificate confirming an intention to prosecute, which certificate must be issued after a preliminary inquiry.

(4) If the certificate referred to in subsection (3) is not issued within 14 days after

the preliminary inquiry, the charges must be withdrawn.

(5) In issuing a certificate referred to in subsection (3) the Director of Public Prosecutions must have regard to -

- (a) the appropriateness of diversion of the child alleged to have committed an offence;
- (b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;
- (c) the nature and gravity of the alleged offence;
- (d) the impact of the alleged offence upon any victim of such offence;
- (e) a probation officer's assessment report; and
- (f) any other relevant information.

(6) The common law pertaining to the criminal capacity of children below the age of 14 years is repealed.

### **Duties of police officials in relation to age estimation**

7. (1) If a police official is uncertain about the age of a person suspected of having committed an offence, but has reason to believe that the age would render that person subject to the provisions of this Act, the official must take such person to a probation officer for estimation of age as soon as is reasonably possible.

(2) Where a police official has reason to believe that a child suspected of having committed an offence is below the age of ten years, he or she may not arrest the child, and must take such child to a probation officer for estimation of age or further action in terms of section 46.

### **Age estimation by probation officer**

8. (1) If the age of a person brought before a probation officer is uncertain, such officer must make an estimation of that person's age.

(2) For such purposes a probation officer must complete a prescribed form and obtain any relevant information as regards the age of the person concerned.

(3) In making such an estimation, information available must be considered in the following order of cogency -

- (a) a previous determination of age by a magistrate under this Act, under the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or by a Children's Court Commissioner under the Child Care Act, 1983 (Act No.74 of 1983);
- (b) statements from a parent, legal guardian, or person likely to have direct knowledge of the age of the child or a statement made by the child or person who alleges that he or she is a child;
- (c) a baptismal certificate, school registration forms, school reports, and other information of a similar nature if relevant to establishing a probable age;
- (d) an estimation of age made by a medical practitioner.

(4) The probation officer must attach any relevant documentation to the form referred to in subsection (2).

(5) Where the probation officer is unable to make an estimation of the age of the alleged offender, or where the age is in dispute, the probation officer may refer the alleged offender to a medical practitioner for estimation of age.

(6) The form referred to in subsection (2) must be available at the child's appearance at a preliminary inquiry for purposes of a determination of the child's age by the inquiry magistrate in terms of section 9.

### **Age determination to be effected by inquiry magistrate**

**9.** (1) The inquiry magistrate must, on all the available evidence and with due regard to the provisions of section 8(3), make a determination of the age of the alleged offender to be entered into the record as the age of the alleged offender, which age must be considered to be the correct age

until any contrary evidence is placed before the inquiry magistrate or a court.

(2) For the purposes of the determination, an inquiry magistrate may require any documentation, evidence or statements relevant to age determination from any person, body or institution to be furnished.

(3) If an inquiry magistrate determines that a person was, at the time of the alleged commission of the offence with which such person is being charged, over the age of 18 years, he or she must close the preliminary inquiry and direct that the matter be transferred to a court other than a child justice court for proceedings under the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(4) Where an inquiry magistrate makes a determination of age that is not supported by a valid birth certificate, identity document or passport, a record of the determination must be forwarded to the Department of Home Affairs for the issue of relevant identification documents.

(5) Where necessary, an inquiry magistrate may subpoena any person to produce the documentation, evidence or statements referred to in subsection (2).

#### **Age assessment and determination by officer presiding in criminal court**

**10.** (1) Where a person appearing in a criminal court other than a child justice court alleges, at any stage before sentence, that he or she was, at the time of the alleged commission of the offence with which he or she is being charged, below the age of 18 years, or where it appears to such court that the person may be below the age of 18 years, that person must be referred to a probation officer for estimation of age in terms of section 8, which age estimation must be submitted to the presiding officer of that court.

(2) A presiding officer referred to in subsection (1) must make a determination of age on the same basis as an inquiry magistrate referred to in section 9.

(3) If the age of the person referred to in subsection (1) is found to be below 18 years and the trial has not yet commenced, the presiding officer concerned must transfer the matter to the inquiry magistrate having jurisdiction for further proceedings under this Act.

(4) If the age of the person referred to in subsection (1) is found to be below the age of 18 years and the trial has commenced, the proceedings must continue to be conducted before the presiding officer, but the remainder of the proceedings must be conducted in terms of the provisions of this Act.

(5) The presiding officer concluding a trial in terms of subsection (4) may, after conviction, refer the matter to the child justice court for sentence if to do so is in the best interests of the child.

(6) Where proceedings have started in terms of the provisions of this Act in respect of a person who is alleged to have been below the age of 18 years at the time of the alleged commission of the offence with which such person is being charged, and evidence is produced proving that such person was 18 years of age or older at such time, the inquiry magistrate or court must -

- (a) if such person is appearing at a preliminary inquiry, close the inquiry and refer the matter to the prosecutor for arrangements to be made for that person to be tried as an adult;
- (b) if a trial has not yet commenced, refer the matter to the prosecutor for arrangements to be made for that person to be tried as an adult; or
- (c) if a trial has commenced, terminate the trial and if such person has been convicted, transfer the matter to an appropriate court for that person to be sentenced as an adult.

## **CHAPTER 3: POLICE POWERS AND DUTIES**

### **Methods of securing attendance of child at preliminary inquiry**

**11.** (1) Irrespective of the provisions of section 38 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the methods of securing the attendance of a child alleged to have committed an

offence at a preliminary inquiry are -

- (a) arrest;
- (b) an alternative to arrest as referred to in subsection (6); and
- (c) summons.

(2) The arrest of a child must be made with due regard to the dignity and well-being of such child, and only if it is clear that a child cannot be arrested without the use of force, may the person effecting the arrest use such force as may be reasonably necessary and proportional in the circumstances to overcome any resistance or to prevent the child from fleeing.

(3) The person arresting or attempting to arrest a child is justified in using force that is intended or is likely to cause death or serious bodily harm to such child, only if there are reasonable grounds for the belief that -

- (a) the force is necessary for the purposes of protecting from imminent death or serious bodily harm the arrestor or any other person; or
- (b) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause serious bodily harm.

(4) In respect of the offences referred to in Schedule 1, a police official may not effect an arrest and must use any alternative to arrest as referred to in subsection (6) unless there are compelling reasons justifying an arrest.

(5) In respect of offences not referred to in Schedule 1, a police official, in deciding whether to effect an arrest, must consider using an alternative to arrest as referred to in subsection (6).

(6) A police official may use any of the following alternatives to arrest in respect of a child alleged to have committed an offence -

- (a) requesting the child in a manner appropriate to the age and intellectual development of the child to accompany the police official immediately to the place where an assessment of the child can

- be effected or, if assessment of the child is for any reason not possible, to a place where the matter can be considered by a prosecutor or an inquiry magistrate;
- (b) giving the child and, if available, the parents or family of that child a written warning in the prescribed manner to appear at a preliminary inquiry at a place and time specified in the written warning;
  - (c) taking the child to such child's home, where a written warning referred to in paragraph (b) must be given to the child and his or her parent or family; and
  - (d) opening a docket for the purposes of consideration by the Director of Public Prosecutions or a prosecutor designated by him or her as to whether the matter should be set down for the holding of a preliminary inquiry.

(7) A child who is alleged to have committed an offence and who was below the age of ten years at the time of the commission of such offence, may be taken to a probation officer for assessment and further action in terms of the provisions of section 46.

(8) Any private person who has effected the arrest of a child must hand such child over to the police as soon as is reasonably possible.

(9) If a summons is used as a method of securing the attendance of a child at a preliminary inquiry, such summons must be in the prescribed form and must be issued upon application by a prosecutor to the clerk of the court having jurisdiction.

### **Cautioning by police**

**12.** (1) The National Commissioner of the South African Police Service may issue a national instruction setting out the circumstances in which a member of the South African Police Service may issue an informal warning to a child instead of arresting such child or using an alternative to arrest.

(2) A member of the South African Police Service may, in accordance with the national instruction contemplated in subsection (1), issue an informal warning to a child instead of

arresting such child or using an alternative to arrest.

### **Warrant of arrest**

**13.** (1) A warrant of arrest issued under section 43 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) in respect of a child, must direct that such child be brought to appear at a preliminary inquiry.

(2) The execution of any warrant of arrest issued in respect of a child may be held over by any inquiry magistrate or court for not more than 14 days.

(3) Where the execution of a warrant of arrest is held over in terms of subsection (2), the inquiry magistrate or court may request the investigating police official to inform the child named in the warrant, if traced, of the issue of the warrant before the expiry of 14 days and the officer required to execute such warrant may, instead of arresting a child, use one of the alternatives to arrest referred to in section 11(6).

### **Duties of police official upon arrest, use of alternative to arrest or issue of summons**

**14.** (1) Where a child is arrested, the police official effecting the arrest must-

- (a) inform the child of the nature of the allegation against him or her;
- (b) inform the child of his or her rights in the prescribed manner; and
- (c) explain to the child the immediate procedures to be followed in terms of this Act.

(2) A police official who has arrested a child must -

- (a) as soon as is possible and in any event not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested, of such arrest in the prescribed manner;
- (b) take the child to the probation officer as soon as possible but not later than 48 hours after the arrest: Provided that if the period of 48 hours expires over a weekend or public holiday, the child

must be taken to such probation officer on the first working day after such weekend or public holiday.

(3) Where an alternative to arrest as referred to in section 11(6) has been used, save for the alternative mentioned in section 11(6)(a), or a summons has been issued in terms of section 11(9), the police official using such alternative or serving such summons must -

- (a) as soon as is possible and in any event not later than 24 hours inform the probation officer in whose area of jurisdiction the use of such alternative has taken place or summons has been issued, of the use of such alternative or the serving of such summons in the prescribed manner;
- (b) explain the rights set out in subsection (1) to the child concerned.

#### **Time limits pursuant to arrest, alternatives to arrest and summons**

**15.** (1) Any child who has been arrested must, whether an assessment of the child has been effected or not, be taken by a police official to appear at a preliminary inquiry within 48 hours after arrest or, if the 48 hours expire outside court hours or on a day which is not a court

day, no later than the end of the first court day after the expiry of the 48 hours.

(2) Where a child has been arrested, the arresting police official must provide an inquiry magistrate with a written report in the prescribed manner within 48 hours after the arrest, giving reasons why alternatives to arrest were not used.

#### **Duty of police to notify parent or appropriate adult**

**16.** (1) Where a child has been arrested, the police official who has effected the arrest must notify the child's parent or an appropriate adult as soon as possible of the arrest, and give the relevant person or persons a written notice in the prescribed manner requiring such person to attend a

preliminary inquiry at a specified time and place.

(2) Where the arresting police official has not given a written notice as referred to in that subsection, the police official investigating the matter must give such notice as soon as possible.

(3) If the child's parent or an appropriate adult is not available or cannot be traced, the arresting police official or investigating police official must request the child to identify another appropriate person, and if such person is identified, the relevant police official must request that person to attend a preliminary inquiry in respect of the child at a specified time and place.

(4) Upon the identification of another appropriate person as referred to in subsection (3), such person must be taken to be an appropriate adult.

(5) If at the time of the preliminary inquiry an appropriate person has not been notified to attend such inquiry, the investigating police official must notify such person or persons as identified by a probation officer to attend the preliminary inquiry at a specified time and place.

(6) Where an alternative method to arrest as referred to in section 11(6) has been used, the police official using such alternative must as soon as possible thereafter notify the child's parent or an appropriate adult of the use of the procedure described in the said section 11(6).

(7) The provisions of subsections (2), (3), (4) and (5) apply, with such changes as may be required by the context, to the provisions of subsection (6).

### **Pre-trial procedures and requirement that parent or an appropriate adult be present**

**17.** (1) Evidence obtained as a result of a confession, admission or pointing out rendered admissible in terms of section 218 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), may only be admissible as evidence in a court if the child's parent, an appropriate adult or legal representative was present when the confession or admission was made or the pointing out took place.

(2) Similarly no evidence relating to an identity parade is admissible in a court without the aforementioned representation on behalf of the child.

(3) Where a child refuses to have a parent or an appropriate adult present at the procedures contemplated in subsections (1) and (2), or where a parent or an appropriate adult is not present or cannot be traced or a legal representative is not available, an independent observer as contemplated in section 105(i) must be present at such procedure, which person may, during the attendance of such procedure, assist the child in relation to the proceedings.

(4) Where an independent observer is to be present at proceedings in terms of subsection (2), the police official investigating the matter must request an observer included in the roster referred to in section 105(i) to assist the child.

## **Fingerprints**

**18.** Further to the provisions of section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the taking of fingerprints of children must not be resorted to before the conclusion of a preliminary inquiry, unless to do so is -

- (a) essential for the investigation of any case;
- (b) required for the purposes of establishing the age of the person in question; or
- (c) necessary to establish the prior convictions of a child for the purposes of making a decision on diversion, release from detention in police custody or placement in a particular place of safety, secure care facility or prison.

## **CHAPTER 4: DETENTION OF CHILDREN AND RELEASE FROM DETENTION**

### **Principles relating to release of children from detention**

**19.** Whenever any decision regarding the release of a detained child is to be made by a police official, the Director of Public Prosecutions or a designated prosecutor, an inquiry magistrate or

officer presiding in a court, when making such decision, must consider the following principles -

- (a) preference must be given to the release of a child into the care of such child's parent or an appropriate adult, with or without the imposition of any conditions;
- (b) if the release of the child into the care of such child's parent or an appropriate adult or the release of the child upon conditions is not feasible, release of the child on bail must be considered;
- (c) if, as a measure of last resort, detention is to be used, the least restrictive form of detention appropriate to the child and the offence must be selected.

### **Treatment and rights of children in detention in police custody**

**20.** (1) Whilst in detention in police custody, a child -

- (a) must be detained separate from adults and boys must be held separate from girls;
- (b) must be detained in conditions which will reduce the risk of harm to that child, including the risk of harm caused by other children;
- (c) has the right -
  - (i) to adequate food and water;
  - (ii) to medical treatment;
  - (iii) of access to reasonable visits by parents, guardians, legal representatives, registered social workers, probation officers, health workers, religious counsellors and members of the Child Justice Committee referred to in section 104(2);
  - (iv) of access to reading material;
  - (v) to adequate exercise; and
  - (vi) to have adequate clothing and sufficient blankets and bedding.

(2) Where a child in detention in police custody complains of an injury sustained during arrest or whilst in detention, the police official to whom such complaint is made must report the complaint to the station commissioner who must take the child to a medical practitioner for examination as soon as is reasonably possible and must include the report of such medical practitioner in the appropriate police docket.

**Duties of police relating to cell register**

**21.** (1) The station commissioner of each police station must keep a cell register, in which details regarding the detention in police cells of all persons under the age of 18 years must be distinctively recorded.

(2) The details in the register may be examined by a parent, guardian, legal representative, magistrate, registered social worker, probation officer, religious counsellor or health worker, member of a Child Justice Committee or a researcher.

**Time limits relating to detention of children in police custody prior to preliminary inquiry**

**22.** No child may be held in detention in police custody for longer than 48 hours prior to appearing before an inquiry magistrate or, if the 48 hours expire outside court hours or on a day which is not a court day, no longer than the end of the first court day after the expiry of the 48 hours.

**Duties of police relating to reporting on detention of children**

**23.** Where a child accused of an offence in Schedule 1 has not been released from detention in police custody as contemplated in section 24(1) prior to appearance at a preliminary inquiry, the investigating police official must provide the inquiry magistrate with a written report in the prescribed manner giving reasons why such child could not be released from such detention.

**Powers of police to release child from detention in police custody prior to preliminary inquiry**

**24.** (1) A police official must release a child who is in detention in police custody and who is accused of an offence referred to in Schedule 1, prior to appearance of such child at a preliminary inquiry, into the care of the child's parent or an appropriate adult unless -

- (a) exceptional circumstances warrant detention;
- (b) the child's parent or an appropriate adult cannot be located or is not available and all reasonable efforts have been made to locate such parent or appropriate adult;
- (c) the police official is satisfied that there is a substantial risk that the child may be a danger to any other person or to self.

(2) A police official may, in consultation with the Director of Public Prosecutions or a designated prosecutor, release a child who -

- (a) is in detention in police custody and who is accused of an offence in Schedule 2; or
- (b) is accused of an offence in Schedule 1 but has not been released in terms of subsection (1) into the care of such child's parent or an appropriate adult, on one or more of the following conditions -
  - (i) to appear at a specified place and time for an assessment or a preliminary inquiry, as the case may be;
  - (ii) not to interfere with witnesses, to tamper with evidence or to associate with a person, persons or group of specified people; and
  - (iii) to reside at a particular address.

### **Power of Director of Public Prosecutions to authorise release of children from detention in police custody**

**25.** The Director of Public Prosecutions or a designated prosecutor may, despite the decision of a police official to the contrary, authorise the release of a child contemplated in section 24(2) from detention in police custody into the care of the child's parent or an appropriate adult upon the conditions referred to in that section, and if such release is authorised, the written notice referred to in section 26(1)(a) must be handed to the child and to the person in whose care the child is released.

### **Duties of police upon release of child and persons into whose care child is released**

**26.** (1) A police official who releases any child from detention in accordance with section 24(1) or (2) or who releases a child upon direction of the Director of Public Prosecutions or a designated

prosecutor in accordance with section 25 and places such child in the care of a parent or an appropriate adult, must -

- (a) at the time of releasing the child, complete and hand to the child and to the person into whose care the child is released, a written notice in the prescribed form on which must be entered the offence in respect of which the child is being accused, any conditions relating to the release of the child and the place and time at which the child must appear for a preliminary inquiry; and
- (b) warn such parent or appropriate adult to bring the child or cause the child to be brought to appear at a preliminary inquiry at a specified place and time and to remain in attendance and, if any conditions has been imposed, to see to it that the child complies with such conditions.

(2) Any person in whose care a child is placed under subsection (1) and who fails in terms of a warning under that subsection to bring the child for a preliminary inquiry or to have the child remain in attendance, or who fails to see to it that the child complies with any conditions, is guilty of an offence and liable upon conviction to the penalties set out in subsection (3).

(3) Any court may, if satisfied that a person into whose care a child was released, was warned in terms of subsection (1), and that such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for the arrest of such person and may, when such person is brought before the court, in a summary manner enquire into his or her failure and if it is proved that such person's failure was due to fault on his or her part, sentence him or her to a fine or to imprisonment for a period not exceeding three months.

(4) The provisions of subsection (3) apply, with the changes required by the context and subject to sections 92(2) and 94, to a child who has been released into the care of his or her parent or an appropriate adult and who fails to comply with the directions contained in the written notice referred to in subsection (1)(a) or with any condition imposed in terms of sections 24(2).

### **Detention in place of safety in lieu of detention in police custody**

27. Where a child entitled to be released from detention in police custody as contemplated

in section 24(1) or (2) cannot for any reason be released into the care of a parent or an appropriate adult or cannot be released on bail, such child must, in lieu of detention in police custody, be placed in a place of safety where there is a vacancy and if such place is available within a reasonable distance from the place where the child has to appear for a preliminary inquiry.

### **Police may not release children accused of certain offences**

**28.** (1) A police official may not release a child accused of an offence referred to in Schedule 3 from detention in police custody.

(2) If a place of safety or secure care facility is available within a reasonable distance from the place where a child referred to in subsection (1) will appear for a preliminary inquiry and there is a vacancy, such child must be placed in such place of safety or secure care facility, pending appearance at such preliminary inquiry.

### **Release of children accused of certain offences on bail prior to appearance at preliminary inquiry**

**29.** (1) Irrespective of the provisions of section 59(1)(a) of the Criminal Procedure Act, 1977, a police official may, in consultation with the police official charged with the investigation, if the release of a child accused of an offence referred to in Schedule 1 into the care of such child's parent or an appropriate adult is for any reason not appropriate, authorise the release of such child on bail prior to the appearance of that child at a preliminary inquiry.

(2) In order to determine the amounts that may be set for bail as contemplated in subsection (1), the National Commissioner of the South African Police Service may, after consultation with the National Director of Public Prosecutions, issue a national instruction.

(3) Irrespective of the provisions of section 59A(1) of the Criminal Procedure Act, 1977, the Director of Public Prosecutions or a prosecutor authorised thereto in writing by the Director

of Public Prosecutions may, in consultation with the police official charged with the investigation, if the release of a child accused of an offence referred to in Schedule 2 into the care of such child's parent or an appropriate adult is for any reason not appropriate, authorise the release of such child on bail prior to the appearance of that child at a preliminary inquiry subject to reasonable conditions.

(4) In order to determine the amounts that may be set for bail as contemplated in subsection (3), the National Director of Public Prosecutions may, after consultation with the Minister of Justice and Constitutional Development, issue directives.

(5) Bail granted in terms of this section by a police official or the Director of Public Prosecutions or a designated prosecutor, if applying at the time of the appearance of a child at a preliminary inquiry, subject to the provisions of section 35(3), continues after such appearance in the same manner as bail granted at a preliminary inquiry or by a court.

### **Release of child at preliminary inquiry or by a court into care of parent or an appropriate adult**

**30.** (1) Upon first appearance at a preliminary inquiry, a child, if not released previously from detention in terms of section 24, 25 or 29, must, if the case is not disposed of, be released from detention if it is in the interests of justice to do so.

(2) Where a child is released in terms of subsection (1), such release must be into the care of the child's parent or an appropriate adult, and the inquiry magistrate must warn such parent or adult to bring the child or cause the child to be brought to appear at a specified place and time and, if a condition has been imposed in terms of section 32, to see to it that the child complies with such condition.

(3) The provisions of subsections (1) and (2) apply, with the changes required by the context, to the release of a child by a court upon first appearance of the child in such court pending any further appearance.

(4) The inquiry magistrate must, in making a decision whether or not to release the child as referred to in subsection (1), have regard to the recommendation of the probation officer in respect of release from detention contained in the assessment report, as well as any further information which has been placed before him or her by any person.

**Factors to be considered at preliminary inquiry or by court prior to decision to release or detain a child**

31. In considering whether it would be in the interests of justice to release a child into the care of such child's parent or an appropriate adult as contemplated in section 30(2), or on bail as contemplated in section 35, or to remand such child in detention as contemplated in section 36, the inquiry magistrate or court must have regard to all relevant factors, including -

- (a) the best interests of the child;
- (b) whether the child has or has not been previously convicted of any offence;
- (c) the availability of the child's parent or an appropriate adult;
- (d) the likelihood of the child returning to the preliminary inquiry or court for a further appearance;
- (e) the period for which the child has already been in detention since arrest;
- (f) the probable period of detention of the child until conclusion of the preliminary inquiry or trial;
- (g) the risk that the child may be a danger to any other person or to self;
- (h) the state of health of the child;
- (i) the reason for any delay in the disposal or conclusion of the preliminary inquiry or trial and whether such delay was due to any fault on the part of the State or on the part of the child or his or her legal representative;
- (j) whether detention would prejudice the child in the preparation of the defence case;
- (k) the likelihood that, if the child is convicted of the offence, a substantial sentence of imprisonment will be imposed;
- (l) the fact that the child is between ten and 14 years of age and presumed to lack criminal capacity;  
and
- (m) the receipt of a written confirmation by the Director of Public Prosecutions to the effect that he or she intends to charge the child with an offence in Schedule 3.

**Conditions that may be imposed upon release of child into care of parent or appropriate adult or on bail**

**32.** (1) An inquiry magistrate or court may, in releasing a child into the care of the child's parent or an appropriate adult or on bail, impose upon the child one or more of the following conditions of release -

- (a) to appear at a specified place and time;
- (b) to report periodically to a specified person or place;
- (c) to attend a particular school;
- (d) to reside at a particular address;
- (e) to be placed under the supervision of a specified person; or
- (f) not to interfere with witnesses, to tamper with evidence or to associate with a person, persons, or group of specified people.

(2) The provisions of section 26(2), (3), (4) and (5) regarding compliance with conditions of release by a child, a parent or an appropriate adult apply with such changes as may be required by the context to conditions of release as referred to in subsection (1).

**Non-detained children appearing at preliminary inquiry**

**33.** (1) Where a child who is not in detention appears at a preliminary inquiry and it is decided that the matter is to be transferred to the children's court in terms of section 61(4) or is to be referred by the prosecutor for plea and trial in a court in terms of section 61(5), the inquiry magistrate must warn the child to appear at a specified date and time at such children's court inquiry or court.

(2) An inquiry magistrate who warns a child in terms of subsection (1) may extend or confirm or amend any conditions of release that were in operation by virtue of the provisions of section

24(2) prior to the child's appearance at the preliminary inquiry.

(3) The inquiry magistrate may extend, confirm or amend any order made affecting a child's parent or an appropriate adult into whose care a child has previously been released.

### **Release of child on own recognisance**

**34.** An inquiry magistrate or the officer presiding in a court may release a child on his or her own recognisance after consideration of the factors referred to in section 31, with or without conditions as set out in section 32, and must order such child to appear at a preliminary inquiry or before a court at a specified place and time.

### **Release of child on bail by inquiry magistrate or court**

**35.** (1) An inquiry magistrate or officer presiding in a court may, if the release of a child into the care of such child's parent or an appropriate adult is for any reason not possible, after consideration of the factors referred to in section 31, release such child upon payment of bail and on one or more of the conditions referred to in section 32.

(2) Section 60(4), (5), (6), (7), (8), (9), (10), (11) and (11A) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), does not apply to the release of a child on bail as contemplated in this section.

(3) If bail has been granted previously for a child appearing at a preliminary inquiry or in a court by a police official in terms of section 29(1) or the Director of Public Prosecutions or a designated prosecutor in terms of section 29(3), the inquiry magistrate or court may extend the bail on the same conditions, amend the conditions or add further conditions, or may increase or reduce the amount of bail.

(4) Bail as referred to in subsection (1) has the effect contemplated in section 58 of

the Criminal Procedure Act, 1977, save for the proviso referred to in that section.

(5) Whenever the question arises in a bail application or during bail proceedings whether any child is charged or is to be charged with an offence referred to in Schedule 3, a written confirmation issued by a Director of Public Prosecutions under section 31(m) is, upon mere production, *prima facie* proof of the charge to be brought against that child.

(6) The written confirmation must be handed in at the preliminary inquiry or the court in question by the prosecutor as soon as possible to form part of the record.

### **Detention of child after first appearance**

**36.** (1) If, after a child's first appearance at a preliminary inquiry or in a court, the inquiry magistrate or court has, after consideration of the factors referred to in section 31, decided that such child should not be released into the care of such child's parent or an appropriate adult, or should not be released on bail as contemplated in section 35, such child may -

- (a) in the case of appearance at a preliminary inquiry, if that inquiry is to be remanded, be remanded to a place of safety or a secure care facility if such place or facility is available within a reasonable distance from the place where the preliminary inquiry is held, or, if a place of safety or secure care facility is not available or there is no vacancy, and subject to the provisions of subsection (2), to a police cell pending conclusion of the preliminary inquiry;
- (b) in the case of conclusion of the preliminary inquiry and pending the conclusion of proceedings under this Act, be remanded to a place of safety, secure care facility or, subject to subsection (4), a prison; and
- (c) in the case of appearance at a court, if the proceedings are to be postponed, be remanded to a place of safety, secure care facility or, subject to subsection (4), a prison.

(2) In the case of a remand, the inquiry magistrate may only order the detention of the child for a period of 48 hours and subject to section 65(3), for one further period of 48 hours, or if either of such periods expires outside court hours or on a day which is not a court day, no longer than

the end of the first court day after the expiry of the 48 hours.

(3) In deciding whether the placement of the child should be in a place of safety or a secure care facility as referred to in subsection (1), the inquiry magistrate or officer presiding in a court must have regard to the recommendations of the probation officer in such officer's assessment report.

(4) Where a child is 14 years of age or older, and charged with an offence in Schedule 3 and release or referral of the child to a place of safety or secure care facility is not possible because -

- (a) there is no such facility within a reasonable distance of the preliminary inquiry at which or the court in which the child is appearing;
  - (b) there is such a facility but, according to an official of the Department of Welfare and Population Development, there is no vacancy at the time of making the decision; or
  - (c) the inquiry magistrate or court is satisfied, on evidence adduced, that there is a substantial risk that the child will cause harm to other children in a place of safety or secure care facility,
- the child may be remanded to a prison.

(5) Where a child is remanded to a place of safety, secure care facility or prison in terms of subsections (1) and (4) -

- (a) the child must, if remanded to a place of safety or secure care facility, appear every 60 days, or, if remanded to a prison, appear every 30 days before the court, which court must-
  - (i) inquire whether such detention remains necessary;
  - (ii) if ordering further detention of the child, record the reasons for detention; and
  - (iii) consider the reduction of the amount of bail if not paid;
- (b) the court must be satisfied that the child is being properly treated and kept in suitable conditions;
- (c) the court, if not satisfied that the child is being properly treated and kept in suitable conditions, may inspect and investigate such treatment and conditions and may make an appropriate remedial order;
- (d) the plea and trial must be concluded as speedily as possible.

(6) In making an order that a child be remanded to prison, the inquiry magistrate or court must record the reasons for remanding such child to prison.

### **Application for release from detention**

**37.** (1) Nothing contained in this Act or any other law must be construed as precluding a detained child from applying for release from detention at any stage before the passing of sentence, or when an appeal against a sentence is lodged, before the conclusion of the appeal.

(2) There is a right of appeal against any decision refusing an application for release from detention to the High Court having jurisdiction, which appeal is to be heard as a matter of urgency.

## **CHAPTER 5: ASSESSMENT**

### **Purposes of assessment**

- 38.** The purposes of assessment are to -
- (a) estimate the probable age of the child if the age is uncertain;
  - (b) establish the prospects for diversion of the case;
  - (c) determine whether a child is in need of care as contemplated in section 70(2);
  - (d) formulate recommendations regarding release of the child into the care of a parent or an appropriate adult, or placement in a residential facility; and
  - (e) in the case of children below the age of ten years, establish what measures, if any, need to be taken.

### **Place where assessment is to be conducted**

**39.** (1) A probation must make or authorise an assessment which may take place at a magistrate's court, the offices of the Department of Welfare or any other suitable place identified by the probation officer or authorised person.

(2) In order to protect the privacy of the child to be assessed, the place identified in terms of subsection (1) should be conducive to confidentiality.

### **Persons who must attend assessment**

**40.** The persons who must attend the assessment of a child are -

- (a) the child; and
- (b) the child's parent, if available; or
- (c) an appropriate adult, if available.

### **Persons who may attend assessment**

**41.** (1) Persons who may attend the assessment are -

- (a) the prosecutor in whose magisterial district the assessment is being conducted;
- (b) the legal representative of the child in respect of whom the assessment is being conducted;
- (c) a police official;
- (d) any person whose presence is necessary or desirable for the assessment; and
- (e) any other person permitted by the probation officer to attend, including a researcher.

(2) If considered necessary, the probation officer may exclude any person referred to in subsection (1) or any person referred to in section 40(c) from attending an assessment if the presence of such person is obstructing the completion of the assessment.

(3) If there is any risk that the child who is to be assessed may escape or may endanger the safety of the probation officer, a police official must be present during the assessment.

### **Child to be assessed prior to preliminary inquiry**

**42.** (1) Any child who is to appear at a preliminary inquiry must be assessed by a probation officer in accordance with the provisions of this Chapter when notified by a police official that

the attendance of such child at a preliminary inquiry has been secured in terms of section 11(1).

(2) The assessment must take place as soon as is reasonably possible after the probation officer has been notified in terms of subsection (1) but prior to the appearance of the child at a preliminary inquiry.

(3) The Minister of Welfare and Population Development must provide probation services to give effect to the provisions of subsection (1).

(4) Where a child has been arrested and a probation officer is not immediately available to assess such child, the child may, pending assessment, be detained in a police cell or a place of safety, subject to the provisions of Chapter 4 of this Act.

#### **Parent or appropriate adult to attend assessment**

**43.** (1) A parent or an appropriate adult who has been notified to appear at an assessment of a child in terms of section 44(1)(c), (2)(b) or (3), must attend the assessment unless exempted in terms of subsection (4).

(2) If it appears that a parent or an appropriate adult has not been notified to attend the assessment, the probation officer concerned may at any time before such assessment issue a requisition notice in the prescribed manner to such person, notifying him or her to appear at an assessment, or where the interests of justice so require, the probation officer may orally notify such person to appear at an assessment.

(3) A notice referred to in subsection (2) must be delivered by a police official to the person specified in such notice upon request by the probation officer.

(4) A person who has been notified in terms of subsection (1) or (2) may apply to the probation officer for exemption from the obligation to attend the assessment, and if such probation

officer exempts such person, the exemption must be in writing.

(5) A person notified in terms of subsection (1) or (2) and not exempted in terms of subsection (4) who fails to attend the assessment, is guilty of an offence and liable upon conviction to the penalty in section 117.

### **Powers and duties of probation officer prior to assessment**

**44.** (1) A probation officer may, by issuing a requisition notice in the prescribed manner, require the arresting officer or any other police official to -

- (a) bring a child forthwith to the place where assessment of the child is to be conducted;
- (b) obtain documentation relevant to proof of a child's age from a specified place or a specified person if the age is uncertain;
- (c) notify in the prescribed manner a specified parent or an appropriate adult to appear at an assessment; and
- (d) ensure, as far as is reasonably practicable, the provision of transport in order to secure the attendance at the assessment of a parent of the child or an appropriate adult.

(2) A probation officer may, in accordance with the provisions of the Probation Services Act, 1991 (Act No. 116 of 1991) authorise any person to -

- (a) locate a child's parent or an appropriate adult;
- (b) notify a person referred to in paragraph (a) to attend an assessment or a preliminary inquiry; and
- (c) obtain any documentation required for the completion of assessment of a child.

(3) A probation officer may, for purposes of section 46, issue a requisition notice in the prescribed manner to a child's parent or an appropriate adult notifying such person to attend a conference as contemplated in that section.

(4) The probation officer must make every effort to locate a parent or an appropriate adult for the purposes of concluding the assessment process of a child.

(5) Where all reasonable efforts to locate such person have failed, the probation officer may conclude the assessment in the absence of such person.

(6) The probation officer may contact or consult with any other person who has any information relating to the assessment, and if such additional information is obtained, the child must be informed of such information.

### **Powers and duties of probation officer at assessment**

**45.** (1) The probation officer must -

- (a) explain the purpose of assessment to the child;
- (b) inform the child of his or her rights in the prescribed manner; and
- (c) explain to the child the immediate procedures to be followed in terms of this Act.

(2) If the age of the child is uncertain, the probation officer must obtain information relevant to the age estimation referred to in section 8 and must complete the form referred to in section 8(2).

(3) The probation officer may at any stage during the assessment of a child consult -

- (a) the prosecutor;
  - (b) the police official who arrested the child, used an alternative to arrest or who is responsible for the investigation of the matter;
  - (c) any person who may provide information necessary for the assessment,
- if such person is not at the assessment.

(4) The probation officer may at any stage during the assessment consult individually with any person at the assessment.

(5) Where a child is accused with another child, the probation officer may conduct the assessment of such children simultaneously.

(6) The probation officer must encourage the participation of the child during the assessment process.

(7) Unless the child is below the age of ten years, the probation officer must complete an assessment report in the prescribed manner with recommendations as to -

- (a) the prospects of diversion;
- (b) the possible release of the child into the care of a parent or an appropriate adult;
- (c) the placement, where applicable, of a child in a particular place of safety, secure care facility or prison; or
- (d) the transfer of the matter to a children's court inquiry, stating reasons for such recommendation, including reasons as referred to in section 70(3).

(8) The report referred to in subsection (7) must as soon as possible be submitted to the prosecutor to decide whether or not to withdraw charges pending against the child or to open a preliminary inquiry.

(9) If it appears to the probation officer that the child does not intend to accept responsibility for the alleged offence, this must be indicated in the assessment report.

(10) Where a child is not in detention and no written warning to appear at a preliminary inquiry has been issued, the probation officer, upon completion of the assessment, must issue a written warning to the child and the parent or an appropriate adult to appear at a preliminary inquiry at a specified place and time and to remain in attendance.

(11) A warning issued by a probation officer in terms of subsection (10) is to be regarded as one issued by a police official in terms of section 11(6)(b) and remains in force until the appearance of the child at a preliminary inquiry.

### **Powers of probation officer in relation to child below the age of ten years**

**46.** (1) After assessment of a child below the age of ten years, the probation officer concerned may -

- (a) refer the child to the children's court on grounds set out in section 70(2);
- (b) refer the child or the family of the child for counselling or therapy;
- (c) arrange for support services to the child or family of the child;
- (d) arrange a conference, which must be attended by the child, his or her parent or an appropriate adult, and which may be attended by the alleged victim, a police official and any other person likely to be able to provide information for the purposes of the conference; or
- (e) decide to take no action.

(2) The purposes of the conference convened by a probation officer in terms of paragraph (d) of subsection (1) are to -

- (a) assist such probation officer to establish more fully the circumstances surrounding the allegations against the child; and
- (b) formulate a written plan appropriate to the child and relevant to the circumstances.

(3) The written plan referred to in subsection 2(b) must -

- (a) specify the objectives to be achieved for the child and the period within which they should be achieved;
- (b) contain details of the services and assistance to be provided for the child and for the parent or appropriate adult;
- (c) specify the persons or organisations to provide such services and assistance;
- (d) state the responsibilities of the child and of the parent or appropriate adult;
- (e) state personal objectives for the child and for the parent or an appropriate adult; and
- (f) contain such other relevant matters relating to the education, employment, recreation and welfare of the child.

(4) The probation officer must record, with reasons, the outcome of the assessment and the decision made in terms of subsection (1).

(5) The record referred to in subsection (4) must be submitted within a month of the decision to the Child Justice Committee referred to in section 104 for consideration.

### **Failure of child below the age of ten years to attend assessment or to comply with obligations**

47. Where a child is below the age of ten years and such child or the parent or appropriate adult fails to attend an assessment or fails to comply with any obligation imposed upon such child or upon the parent or appropriate adult by a probation officer in terms of section 46, the probation officer may request the children's court having jurisdiction to open an inquiry.

## **CHAPTER 6: DIVERSION**

### **Purposes of diversion**

48. The purposes of diversion in terms of this Act are to -
- (a) encourage the child to be accountable for the harm caused;
  - (b) meet the particular needs of the individual child;
  - (c) promote the reintegration of the child into the family and community;
  - (d) provide an opportunity to those affected by the harm to express their views on its impact on them;
  - (e) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
  - (f) promote reconciliation between the child and the person or persons or community affected by the harm caused;
  - (g) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
  - (h) prevent the child from having a criminal record.

### **Minimum standards applicable to diversion and diversion options**

49. (1) No child may be excluded from a diversion programme due to an inability to pay any fee required for such programme.

(2) A child of the age of ten years and over may be required to perform community service as an element of diversion, with due consideration to the child's age and development.

(3) Diversion options must -

- (a) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society;
- (b) not be exploitative, harmful or hazardous to a child's physical or mental health;
- (c) be appropriate to the age and maturity of the child; and
- (d) not interfere with a child's schooling.

(4) Diversion options must, where reasonably possible -

- (a) impart useful skills;
- (b) include a restorative justice element which aims to heal relationships, including the relationship with the victim;
- (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution; and
- (d) be presented in a location reasonably accessible to children; and children who cannot afford transport in order to attend a selected diversion programme should, as far as is reasonably possible, be provided with the means to do so.

(5) Any diversion option that has a predetermined content and duration and either involves a service to groups of children or offers a service to individual children on a regular basis, which service is presented by a government department or a non-governmental organisation, must be registered in terms of the regulations to this Act.

#### **Availability of diversion options and the keeping of records**

**50.** (1) The Minister of Welfare and Population Development is responsible for the development of suitable diversion options as contemplated in this Chapter.

(2) The provisions of subsection (1) must not be construed as precluding any government department or non-governmental organisation from developing suitable diversion options for children who are alleged to have committed offences.

(3) For purposes of sections 63(1) and 110(5)(b)(iv), a register of children who have been diverted is to be kept by the Minister of Welfare and Population Development.

### **Diversion only to occur in certain circumstances**

**51.** (1) A child suspected of having committed an offence may only be considered for diversion if -

- (a) such child voluntarily acknowledges responsibility for the alleged offence;
- (b) the child understands his or her right to remain silent and has not been unduly influenced in acknowledging responsibility;
- (c) there is sufficient evidence to prosecute; and
- (d) such child and his or her parent or an appropriate adult, if such person is available, consent to diversion and the diversion option.

(2) Where circumstances as referred to in subsection (1) exist, diversion must be considered.

### **Diversion options**

**52.** (1) In selecting a specific diversion option for a particular child at a preliminary inquiry or in a court, consideration must be given to -

- (a) the selection of a diversion option from an appropriate level in terms of this section;
- (b) a child's cultural, religious and linguistic background;

- (c) the child's educational level, cognitive ability, domestic and environmental circumstances;
- (d) the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence, and the interests of society; and
- (e) the child's age and developmental needs.

(2) For purposes of this Act a range of diversion options are set out in three levels for children aged ten years or older and subject to the provisions of this Act, with level one comprising the least onerous and level three the most onerous options.

(3) Level one diversion options are -

- (a) an oral or written apology to a specified person or persons or institution;
- (b) a formal caution in the prescribed manner with or without conditions;
- (c) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three months;
- (d) placement under a reporting order in the prescribed manner;
- (e) the issue of a compulsory school attendance order in the prescribed manner for a period not exceeding three months;
- (f) the issue of a family time order in the prescribed manner for a period not exceeding three months;
- (g) the issue of a positive peer association order in the prescribed manner in respect of a specified person or persons or a specified place for a period not exceeding three months;
- (h) the issue of a good behaviour order in the prescribed manner;
- (i) the issue of an order prohibiting the child from visiting, frequenting or appearing at a specified place in the prescribed manner;
- (j) referral to counselling or therapy for a period not exceeding three months;
- (k) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding five hours each week, for a maximum of three months;
- (l) symbolic restitution to a specified person, persons, group or institution; and
- (m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored.

(4) Level two diversion options are -

- (a) any of the options under subsection (3): Provided that where a maximum period has been imposed in terms of subsection (3)(c), (d), (e), (f), (g), (h), (i), and (j), the maximum period must not exceed six months;
- (b) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding eight hours each week, for a maximum of six months;
- (c) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by the probation officer effecting the assessment or by the Child Justice Committee referred to in section 104 for a maximum period of 50 hours, and to be completed within a maximum period of six months;
- (d) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;
- (e) payment of compensation to a maximum of R500 to a specified person, persons, group or institution where the child or his or her family is able to afford this;
- (f) where there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of compensation to a community organisation, charity or welfare organisation;
- (g) referral to appear at a family group conference, a victim-offender mediation or other restorative justice process approved by the Child Justice Committee referred to in section 104 at a specified place and time; and
- (h) any two of the options listed used in combination.

(5) Level three diversion options may only be applied in the case of a child of the age of 14 years or older if there is reason to believe that a court, upon conviction of the child, would impose a sentence involving detention of the child for a period exceeding six months, and are -

- (a) referral to a programme with a residential element, where the duration of the programme does not exceed six months, and no portion of the residence requirement exceeds 21 consecutive nights with a maximum of 35 nights during the operation of the programme;
- (b) performance without remuneration of some service for the benefit of the community under the

supervision and control of an organisation or institution, or a specified person or group identified by the probation officer effecting the assessment or by the Child Justice Committee referred to in section 104 for a maximum period of 250 hours, to be completed within a maximum period of 12 months;

- (c) where a child is over the age of compulsory school attendance as referred to in the South African Schools Act, 1996 (Act No. 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a maximum period of no more than 35 hours per week, to be completed within a maximum period of six months;
- (d) referral to counselling or therapeutic intervention in conjunction with any of the options listed in this subsection.

(6) For purposes of subsection (3) -

- (a) “a supervision and guidance order” means an order placing a child under the supervision and guidance of a mentor or peer role model in order to monitor and guide the child’s behaviour;
- (b) “a reporting order” means an order requiring a child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child’s behaviour;
- (c) “a compulsory school attendance order” means an order requiring a child to attend school every day for a specified period of time, which attendance is to be monitored by a specified person;
- (d) “a family time order” means an order requiring a child to spend a specified number of hours with his or her family;
- (e) “a positive peer association order” means an order requiring a child to associate with persons who can contribute to the child’s positive behaviour; and
- (f) “a good behaviour order” means an order requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour.

(7) Upon the selection of a diversion option as contemplated in this section, the inquiry magistrate or court must identify a probation officer or other suitable person to monitor the child’s compliance with the conditions of the selected diversion option, and such officer or person must, in the event of the child’s failure to comply with any conditions, notify the inquiry magistrate or court in writing

of such failure.

### **Family group conference**

**53.** (1) Whenever a child has been referred at a preliminary inquiry or by a court to appear at a family group conference, the probation officer concerned must forthwith be notified in writing of such referral in the prescribed manner by the inquiry magistrate or court responsible for the referral of the child.

(2) Upon receipt of the notice the probation officer must convene a conference within 14 days, but not later than 21 days, after such receipt by -

- (a) setting the time and place of the conference; and
- (b) taking steps to ensure that all persons entitled to attend the conference in terms of subsection (4) are notified within a reasonable time, of the time and place of the conference.

(3) No notice contemplated in subsection (2)(b) need be given to any person whose whereabouts, after reasonable enquiries, are unknown and failure to notify any person in accordance with that subsection does not affect the validity of the proceedings of a family group conference unless such failure is likely to affect the outcome of the conference materially.

(4) Where a family group conference fails to take place, the probation officer must arrange for an alternative date and notify the persons referred to in subsection (5).

(5) The persons entitled to attend a family group conference are -

- (a) the child involved and a parent or an appropriate adult;
- (b) any other person requested by the child;
- (c) the probation officer;
- (d) the prosecutor;
- (e) the arresting official or other police official;
- (f) the victim of the alleged offence and, if such victim is under the age of 18 years, his or her parent

or an appropriate adult;

- (g) the legal representative of the child;
- (h) a member of the community in which the child is normally resident; and
- (i) any person authorised by the probation officer to attend the conference.

(6) It is for the family group conference to regulate its procedure and make such plan as it deems fit.

(7) The plan referred to in subsection (6) may include -

- (a) the application of any option contained in section 52(3) and (4); or
- (b) any other resolution appropriate to the child, his or her family and to local circumstances which is consistent with the principles contained in this Act.

(8) Any plan must -

- (a) specify the objectives for the child and the period within which they are to be achieved;
- (b) contain details of the services and assistance to be provided for the child and for a parent or an appropriate adult;
- (c) specify the persons or organisations to provide such services and assistance;
- (d) state the responsibilities of the child and of the child's parent or an appropriate adult;
- (e) state personal objectives for the child and for the child's parent or an appropriate adult; and
- (f) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant.

(9) The probation officer must record, with reasons, any plan formulated at a family group conference, and must furnish a copy of such record to the child and to the person referred to in section 52(7).

(10) If no agreement on the plan can be reached, the conference must be closed and the probation officer must forthwith refer the matter back to the inquiry magistrate or the court for further consideration.

(11) Where a child fails to comply with a plan made by a family group conference, the provisions of sections 68 and 82(9) apply.

(12) Where a family group conference has been held pursuant to sections 82 or 88, the record referred to in subsection (9) must be submitted by the probation officer within seven days after completion to the inquiry magistrate or the court and within one month after completion to the Child Justice Committee referred to in section 104.

(13) The proceedings of a family group conference are confidential and statements made by anyone may not be used as evidence in any subsequent court proceedings.

### **Victim-offender mediation or other restorative justice process**

**54.** (1) Where an inquiry magistrate or presiding officer in a court refers a child to a victim-offender mediation or other restorative justice process, the provisions of section 53(1), (2), (3), (4), (7), (8), (9), (10) and (13) apply with such changes as the context requires.

(2) A probation officer must convene a victim-offender mediation or other restorative justice process and may regulate its procedure as he or she deems fit.

### **Powers of prosecution**

**55.** (1) The probation officer must submit the assessment report containing recommendations in respect of the child to the prosecutor of the district court having jurisdiction.

(2) Upon consideration of the recommendations of the probation officer, the prosecutor may withdraw the charges against the child or arrange for a preliminary inquiry.

(3) Where an assessment has not been made, the prosecutor must arrange for an assessment or, if this is not possible, arrange for a preliminary inquiry.

## CHAPTER 7: PRELIMINARY INQUIRY

### Nature and objectives of preliminary inquiry

**56.** (1) A preliminary inquiry must be held in respect of every child subject to this Act prior to plea.

(2) The chief magistrate of each magisterial district must designate a district court magistrate as the inquiry magistrate of that district unless a One-Stop Child Justice Centre has been established for a particular area in terms of section 72, in which case the provisions of that section apply.

(3) The place where a child must appear for purposes of the holding of the preliminary inquiry, must be determined in accordance with section 90 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) except where a One-Stop Child Justice Centre has been established, in which case section 72 of this Act applies.

(4) The objectives of a preliminary inquiry are to -

- (a) ascertain whether a probation officer has assessed the child and, if not, whether compelling reasons exist for not making an assessment;
- (b) establish whether the matter can be diverted before plea;
- (c) identify a suitable diversion option where applicable;
- (d) establish whether the matter should be transferred to a children's court for an inquiry to be held in terms of the provisions of the Child Care Act, 1983 (Act No. 74 of 1983);
- (e) provide an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial;
- (f) ensure that all available information relevant to the child, his or her circumstances and the offence is considered in order to make a decision on diversion and placement of the child;
- (g) to ensure that the views of all persons present are considered before a decision is taken;
- (h) encourage the participation of the child and his or her parent or an appropriate adult in decisions concerning the child; and

- (i) determine the release or placement of the child pending -
  - (i) conclusion of the preliminary inquiry;
  - (ii) appearance of the child in a court; or
  - (iii) transfer of the matter to the children's court.

(5) A preliminary inquiry may be held at any place but may not be held in a court, unless no suitable place other than a court room is available.

(6) The inquiry magistrate is to conduct the proceedings in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information.

### **Persons who must attend preliminary inquiry**

- 57.** (1) Persons who must attend the preliminary inquiry are -
- (a) the inquiry magistrate;
  - (b) the prosecutor;
  - (c) the child;
  - (d) the child's parent, if available;
  - (e) an appropriate adult, in the absence of the child's parent;
  - (f) the probation officer; and
  - (g) any other person served with a subpoena or requested to attend the preliminary inquiry in terms of section 60(1)(a) or (b).

(2) In exceptional circumstances a preliminary inquiry may proceed in the absence of the persons referred to in subsection (1)(d), (e) and (f).

(3) Where a preliminary inquiry proceeds in the absence of a probation officer, such officer's assessment report must be available at the preliminary inquiry, unless assessment has been dispensed with in terms of section 60(3).

(4) The inquiry magistrate may, if necessary, exclude any person referred to in subsection 1(d) and (e) from attending the preliminary inquiry.

### **Persons who may attend preliminary inquiry**

**58.** Persons who may attend the preliminary inquiry are -

- (a) the child's legal representative if one has been appointed;
- (b) the arresting police official, the investigating police official or any other police official;
- (c) any other person permitted to attend the preliminary inquiry as referred to in section 60(1)(b), including researchers.

### **Procedure relating to holding of preliminary inquiry**

**59.** (1) At the start of the preliminary inquiry, the inquiry magistrate must -

- (a) explain the purposes of the preliminary inquiry to the child;
- (b) inform the child of the nature of the allegation or allegations;
- (c) inform the child of his or her rights in the prescribed manner; and
- (d) explain to the child the immediate procedures to be followed in terms of this Act.

(2) At the start of the preliminary inquiry, the prosecutor or the probation officer must ensure that the inquiry magistrate has the probation officer's assessment report and an age assessment form referred to in section 8(2) with any documents attached.

(3) Where a child does not acknowledge responsibility for the offence with which he or she is being charged, no further questions regarding such offence may be put to the child and the prosecutor may set the matter down for plea and trial in a court.

(4) A record must be kept of the proceedings of the preliminary inquiry.

(5) No decision taken at a preliminary inquiry is subject to appeal, save for a

decision by the inquiry magistrate to remand a child in detention.

### **General powers and duties of inquiry magistrate**

- 60.** (1) The inquiry magistrate may -
- (a) cause a subpoena to be served on any person whose presence is necessary for the conclusion of the preliminary inquiry;
  - (b) request or permit the attendance of any other person, who may be able to contribute to the proceedings;
  - (c) request any further documentation or information to supplement that referred to in section 59(2), which is relevant or necessary to the proceedings;
  - (d) make a determination of age in terms of section 9;
  - (e) after consideration of the information contained in the assessment report, elicit any information from the persons attending the inquiry to supplement or clarify the information in the assessment report; and
  - (f) take such steps as are necessary to establish the truth of any statement or the correctness of any submission.
- (2) The inquiry magistrate may, where the conduct of the proceedings of the preliminary inquiry or any aspect is in dispute, rule on the conduct of the proceedings in a manner consistent with the provisions of this Act.
- (3) If it is ascertained that the child had not yet been assessed, the inquiry magistrate may remand the preliminary inquiry in terms of section 65(1)(f) pending assessment of the child, or may dispense with assessment if it is in the best interests of the child to do so.
- (4) The inquiry magistrate must ensure that the persons present at the inquiry know of the recommendations in the probation officer's assessment report.
- (5) Where the probation officer is present at a preliminary inquiry, the inquiry

magistrate may request the probation officer to explain, elaborate upon or justify any recommendation or statement made in the assessment report, or to provide additional information.

(6) The correctness of any statement made in the probation officer's assessment report may be challenged by any person present at the preliminary inquiry.

(7) The inquiry magistrate must ensure that the persons present at a preliminary inquiry are informed of diversion options available in the district or area of his or her jurisdiction as well as of their aims and content.

(8) The inquiry magistrate must consider the reports regarding arrest of the child and detention in police custody provided by the arresting police official and if the inquiry magistrate considers that an arrest or detention in a police cell was unnecessary, the Child Justice Committee of the district referred to in section 104 must be notified.

### **Decisions regarding diversion, prosecution or transfer to a children's court**

**61.** (1) After consideration of -

- (a) the assessment report, unless assessment has been dispensed with in section 60(3);
- (b) the views of the persons at the preliminary inquiry;
- (c) any further information provided by any person present;
- (d) any further information requested or elicited in terms of section 60(1)(c); and
- (e) the willingness of the child to accept responsibility for the offence,

the inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted.

(2) Where the prosecutor indicates that the matter can be diverted, the inquiry magistrate must make an order regarding an appropriate diversion option or options.

(3) In addition to the diversion options set out in section 52, the inquiry magistrate may, after consultation with the persons present at the preliminary inquiry, develop an individual diversion

option which meets the purposes of and standards applicable to diversion set out in sections 48 and 49.

(4) Where the inquiry magistrate has reason to believe that the child is in need of care in terms of section 70(2), the magistrate may order that the preliminary inquiry be closed and the matter be transferred to the children's court as contemplated in that section.

(5) Where the prosecutor decides to proceed with the prosecution of the child, the matter may be set down for plea and trial in a court.

### **Release or placement of child by inquiry magistrate**

**62.** (1) The inquiry magistrate must make an order regarding release or placement of the child pending the further appearance of the child at a preliminary inquiry or court, where -

- (a) the preliminary inquiry is remanded in terms of section 65 or 66;
- (b) the matter is to be transferred to the children's court in terms of section 61(4); and
- (c) the matter is to be set down for plea and trial in a court.

(2) When considering the placement of the child, the inquiry magistrate must, if such child is in detention, apply the provisions of Chapter 4 of this Act regarding detention and release from detention.

(3) Where the matter is to be set down for plea and trial in a court or is to be transferred to the children's court, the preliminary inquiry must be closed.

(4) Where it is decided that the matter must be diverted, the prosecutor must withdraw the charges against the child conditionally or unconditionally, and the preliminary inquiry must be closed.

### **Evidentiary matters**

**63.** (1) Information regarding a previous diversion or previous conviction may be furnished at the preliminary inquiry by any person.

(2) No information furnished at a preliminary inquiry by any person is admissible in any subsequent court proceedings.

### **Separation and joinder of proceedings of preliminary inquiry**

**64.** (1) If the child in respect of whom the preliminary inquiry is held, is a co-accused with an adult, the case of the adult must, save where this would not be in the interests of justice, be separated from that of the child.

(2) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is a co-accused with one or more other children, a joint preliminary inquiry may be held.

(3) Where a joint preliminary inquiry is held, different decisions may be made in respect of each child.

### **Remanding of preliminary inquiry**

**65.** (1) The inquiry magistrate may only remand the preliminary inquiry and then for a period of no longer than 48 hours, for the purposes of -

- (a) securing the attendance of a person necessary for the conclusion of the inquiry;
- (b) obtaining information necessary for the conclusion of the inquiry;
- (c) establishing the attitude of the victim to diversion;
- (d) planning a diversion option;
- (e) finding alternatives to pre-trial residential detention; or
- (f) assessing the child, where no assessment has previously been undertaken and it is found that an assessment should not be dispensed with.

(2) Where the preliminary inquiry is remanded for purpose of noting a confession, admission or a pointing-out, or the holding of an identity parade, the inquiry magistrate must inform the child of the right to have a parent, an appropriate adult or legal representative present during such proceedings.

(3) The preliminary inquiry may be remanded for a further period of 48 hours if there is reason for believing that such remand will increase the prospects of diversion, after which the preliminary inquiry, if it has not been concluded upon the expiry of the further period of 48 hours must, subject to section 66, be closed and the matter referred to the prosecutor to set the matter down for plea and trial in a court.

(4) The provisions of section 26 apply to failure of the child and his or her parent or an appropriate adult to comply with any conditions of release of the child pursuant to a remand of the preliminary inquiry in terms of this section and section 66.

### **Remanding of preliminary inquiry for detailed assessment**

**66.** (1) Any person may request the inquiry magistrate to remand the inquiry for purposes of detailed assessment of the child.

(2) The inquiry magistrate may, if satisfied that there are exceptional circumstances warranting a further assessment of the child and that such circumstances relate to -

- (a) the possibility that the child may be a danger to others or to self;
- (b) the fact that the child has a history of repeatedly committing offences or abscondment;
- (c) the social welfare history of the child;
- (d) the possible admission of the child to a sexual offenders' programme, substance abuse programme or other intensive treatment programme;
- (e) the possibility that the child may be a victim of sexual or other abuse,

remand the preliminary inquiry for a period of 14 days to enable a detailed assessment to be conducted.

(3) Any detailed assessment ought to be conducted in the home of the child, unless there are circumstances causing assessment in the home not to be in the best interests of the child or to be impossible, in which case assessment may be conducted at any residential facility.

(4) Upon consideration of the probation officer's report following a detailed assessment of the child as contemplated in this section, any decision referred to in section 61 may be made, after which the preliminary inquiry must be closed.

### **Failure to appear at preliminary inquiry**

**67.** (1) Where a child and his or her parent or an appropriate adult has been warned to appear at a preliminary inquiry by a police official in terms of section 26(1) or by a probation officer in terms of section 45(10) and such child or person fails to appear at such inquiry, the provisions of section 26(3), (4) and (5) apply, with the changes required by the context, to such failure.

### **Failure to comply with diversion orders**

**68.** (1) Where a child has been diverted at a preliminary inquiry and fails to comply with any order relating to diversion, the inquiry magistrate may, upon being notified in writing by the person referred to in section 52(7) of such failure, issue a warrant of arrest or written notice to appear in respect of the child.

(2) When a child appears before an inquiry magistrate after a warrant of arrest or written notice to appear has been issued in terms of subsection (1), the inquiry magistrate must inquire as to the reasons for the child's failure to comply with the diversion order.

(3) The inquiry magistrate may, after consideration of the views of any person present at the inquiry referred to in subsection (2), decide to -

- (a) apply the same option with altered conditions;
- (b) apply any other diversion option as described in section 52; or

(c) make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied.

(4) Despite the provisions of subsection (3), the prosecutor may decide to proceed with the prosecution, in which case the matter must be set down for plea and trial in a court.

(5) The execution of a warrant of arrest referred to in this Chapter may be suspended by the inquiry magistrate, and the police official required to execute such warrant may, instead of arresting a child, employ one of the alternatives to arrest referred to in section 11(6).

### **Procedure upon referral of matter to court**

**69.** (1) If the matter has not been diverted or transferred to a children's court inquiry upon conclusion of the preliminary inquiry, the prosecutor must inform the inquiry magistrate of the place and time when the child must appear for plea and trial in a court.

(2) On being thus informed, the inquiry magistrate must -

- (a) where the child is not legally represented, explain to the child and the parent or an appropriate adult the provisions of Chapter 10 relating to legal representation;
- (b) where the child indicates an intention to apply for legal representation at State expense in terms of section 98 and is in detention, assist the child, as far as is reasonably possible, to make such application to a Legal Aid Officer;
- (c) where the child is in detention, inform the child of the place and time of the next appearance in court and warn the child's parent or an appropriate adult to attend such proceedings at a specified place and time; and
- (d) where the child is not in detention,
  - (i) alter or extend any condition imposed in terms of section 24(2) or section 32; and
  - (ii) warn the child, his or her parent or an appropriate adult to appear in court at a specified place and time.

(3) Where an inquiry magistrate has presided over a preliminary inquiry and has heard any information prejudicial to the impartial determination of the matter, such magistrate may not preside over any subsequent trial emanating from that inquiry.

### **Referral to a children's court inquiry**

**70.** (1) If it appears during proceedings at a preliminary inquiry or a court that a child is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act No. 74 of 1983), and that it is desirable to deal with that child in terms of sections 13, 14 and 15 of that Act, the inquiry magistrate or court may stop the proceedings and order that the matter be referred to the children's court referred to in section 5 of that Act.

(2) Referral of a matter to the children's court must be considered by -

- (a) a probation officer when making a recommendation in terms of section 45(7)(d);
- (b) an inquiry magistrate when acting in terms of section 61(4);
- (c) a court,

if it becomes evident that a child -

- (i) has previously been assessed on more than one occasion in regard to minor offences committed to meet the child's basic need for food and warmth and is on this occasion again alleged to have committed or proved to have committed such an offence;
- (ii) is the subject of a current order of the children's court;
- (iii) is abusing dependence-producing substances; or
- (iv) does not live at home or in appropriate substitute care and is alleged to have committed a minor offence, the purpose of which was to meet the child's basic need for food and warmth,

or is a child as described in section 14 of the Child Care Act, 1983.

(3) Where the referral of a matter to the children's court has been considered and it appears that such referral is not in the best interests of the child or does not serve the interests of justice, the other measures in terms of this Act must be considered.

(4) Where a decision is made in terms of subsection (3) not to refer the matter to the children's court, the reasons must be noted on the assessment report, in the case of a person referred to in subsection (2)(a), and entered on the written record of the proceedings, in the case of a person referred to in subsection (2)(b) or (c).

(5) In the event of the referral of a matter to a children's court inquiry after conviction of the child, any finding of guilt must be considered not to have been made.

## **CHAPTER 8: CHILD JUSTICE COURT**

### **Designation and jurisdiction of child justice court**

**71.** (1) A child justice court is a court at district court level which must adjudicate on all cases referred to such court in terms of the provisions of this Act, subject to the provisions of subsection (3).

(2) In deciding whether cases should be heard in a child justice court, a Regional Court or a High Court, preference must be given to referral to the child justice court, subject to the provisions of subsection (3) and sections 73 and 80.

(3) The child justice court has jurisdiction to adjudicate in respect of all offences except treason, murder and rape in accordance with the provisions of section 89 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(4) The child justice court in which a child must appear, must be determined in accordance with section 90 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and where a One-Stop Child Justice Centre has been established for a particular area, the geographical jurisdiction of the child justice court at such centre must be determined in accordance with section 72 of this Act.

(5) The child justice court and the officer presiding in such court must be designated

by the Chief Magistrate of each magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel.

(6) The court room, where practicable, should be located and designed in a way conducive to the dignity and well-being of children, the informality of the proceedings and the participation of all persons involved in the proceedings.

(7) The child justice court has the same sentencing jurisdiction as a district court.

### **Establishment and jurisdiction of One-Stop Child Justice Centres**

72. (1) The Minister of Justice and Constitutional Development, in consultation with the Ministers of Safety and Security, Welfare and Population Development and Correctional Services, may establish centralised services for child justice to be known as One-Stop Child Justice Centres which may be situated at a place other than the local magistrate's court or police station.

(2) At a One-Stop Child Justice Centre there must be -

- (a) offices to be utilised by members of the South African Police Service;
- (b) facilities to accommodate children temporarily pending the conclusion of a preliminary inquiry;
- (c) an office or offices to be utilised by members of probation services; and
- (d) a child justice court.

(3) A One-Stop Child Justice Centre may provide for -

- (a) offices for persons who provide legal assistance to children alleged to have committed offences;
- (b) offices for persons who are able to provide diversion and prevention services;
- (c) offices for persons authorised to trace the families of children alleged to have committed offences;
- (d) a children's court in terms of the Child Care Act, 1983 (Act No. 74 of 1983); and
- (e) a court of regional jurisdiction.

(4) Each government department headed by the Ministers referred to in subsection (1) is severally responsible for the provision of such resources and services as may be required to enable the efficient functioning of a One-Stop Child Justice Centre contemplated in this section.

(5) The Minister of Justice and Constitutional Development may determine, by notice in the *Gazette*, the boundaries of jurisdiction of One-Stop Child Justice Centres that need not correspond to the boundaries of existing magisterial districts.

(6) Where a One-Stop Child Justice Centre has concurrent jurisdiction with a magistrate's court due to the fact that the geographical area of jurisdiction of such magistrate's court or part thereof falls within the boundaries of geographical jurisdiction of such One-Stop Child Justice Centre, as determined in terms of subsection (5), the jurisdiction of such One-Stop Child Justice Centre in relation to the hearing of cases in terms of the provisions of this Act takes precedence.

### **Proceedings in terms of this Act by a court other than a child justice court**

**73.** (1) Any court other than a child justice court that hears the case of a child accused of committing an offence, must apply the provisions of this Act and has the powers conferred upon a child justice court by this Act.

(2) A Regional Court has jurisdiction to hear the case of an accused child where such child is charged with -

- (a) murder or rape; and
- (b) any other offence, save for treason, and irrespective of the provisions of section 89 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), only if -
  - (i) in the opinion of the Director of Public Prosecutions or a designated prosecutor the sentence is likely to exceed the jurisdiction of the child justice court;
  - (ii) there are multiple charges and the Regional Court has jurisdiction in respect of one or more of them in terms of this section; or
  - (iii) a decision has been made in terms of section 80 that there will be a joinder of trials and

the adult co-accused is to be tried in the Regional Court.

(3) Where the Director of Public Prosecutions or a designated prosecutor is satisfied that circumstances referred to in subsection (2)(b)(i) or (ii) exist, the matter may, prior to the commencement of the trial, be referred to the Regional Court for plea and trial.

(4) A district court other than a child justice court has jurisdiction in respect of matters in which a child justice court has jurisdiction if a child is co-accused with an adult and a successful application for joinder of trials has been made in terms of section 80.

(5) If a child justice court has convicted a child and is of the view that exceptional circumstances exist which indicate that the appropriate sentence is likely to exceed the sentencing jurisdiction of such court, that court may refer the matter to the Regional Court or the High Court for sentencing.

(6) Where a matter has been referred to the Regional Court or the High Court for sentencing in terms of subsection (5), such court must sentence the child in terms of the provisions of this Act.

### **Child to plead on instructions of Director of Public Prosecutions**

**74.** Further to the provisions of section 119 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) relating to plea in a magistrate's court on instructions of the Director of Public Prosecutions, a charge may only be put to a child if such child is assisted by a legal representative.

### **Parent or an appropriate adult to attend proceedings**

**75.** (1) Any parent of a child or an appropriate adult who has been warned by an

inquiry magistrate to attend proceedings in terms of section 69(2)(c), must attend such proceedings unless exempted in terms of subsection (3).

(2) If such person has not been warned to attend, the court may at any time during the proceedings direct any police official to warn a person referred to in subsection (1) to attend.

(3) A person warned in terms of subsection (1) or (2) may apply to the court in which the child is to appear for exemption from the obligation to attend the proceedings in question, and if the court grants exemption, it must be in writing.

(4) A person warned in terms of subsection (1) or (2) who has not been exempted from attending the relevant proceedings in terms of subsection (3), and a person who is present at criminal proceedings and who is warned by the court to remain in attendance, must comply, unless excused by the court before which such proceedings are pending.

(5) A person warned in terms of subsection (1) or (2) who fails to attend the proceedings or fails to remain in attendance at such proceedings in accordance with the provisions of subsection (4), is guilty of an offence and liable upon conviction to the penalty set out in section 117.

### **Parental assistance**

**76.** (1) A child must be assisted by a parent or an appropriate adult at criminal proceedings under this Act: Provided that this requirement may be dispensed with where all reasonable efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child.

(2) Where a child is not assisted by a parent or an appropriate adult, and such child requests assistance, an independent observer nominated by a Child Justice Committee referred to in section 105(i) may, if such observer is available, assist a child in circumstances referred to in subsection

(1) of this section.

### **Conduct of proceedings in court**

- 77.** (1) At the start of proceedings in a court, the presiding officer must -
- (a) inform the child of the nature of the allegations against him or her;
  - (b) inform the child of his or her rights in the prescribed manner;
  - (c) explain to the child the further procedures to be followed in terms of this Act and the Criminal Procedure Act, 1977 (Act No. 51 of 1977); and
  - (d) in the case of a child who is at least ten years of age but not yet 14 years, question the child to ascertain that the child has the capacity to understand the plea proceedings in terms of section 77 of the Criminal Procedure Act, 1977.

(2) Irrespective of the provisions of section 93 *ter* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a court may not summon lay assessors to such court's assistance.

(3) The court may, if it would be in the best interests of the child, participate in eliciting evidence from any person involved in the proceedings.

(4) The proceedings of the court must, with due regard to the child's procedural rights, be conducted in an informal manner to encourage the maximum participation of the child, his or her parent or an appropriate adult.

(5) The court must protect an accused child from hostile cross-examination where such cross-examination is regarded by the court as being prejudicial to the well-being of the child or the fairness of the proceedings.

### **Children in detention at court**

**78.** (1) No child may be subjected to the wearing of leg-irons when appearing in any

court, and handcuffs may only be used in court if there are exceptional circumstances warranting their use.

(2) A child held in a cell in or at the court or who is being transported to court must be kept separate from adults and be treated in a manner and kept in conditions which take account of his or her age.

(3) Further to the provisions of subsection (2) a female child must be kept separate from any male child and must be under the care of an adult woman.

(4) The National Commissioner of the South African Police Service must issue a national instruction on the treatment and conditions of children while in detention at court.

### **Establishment of criminal capacity**

**79.** (1) The criminal capacity of a child who is at least ten years of age but not yet 14 years must be proved by the State beyond a reasonable doubt.

(2) The prosecutor or the child's legal representative may request the court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the court proceedings and give evidence and, if called, must be remunerated by the State according to a

prescribed tariff.

### **Separation and joinder of trials involving children and adults**

**80.** (1) Where a child and an adult are alleged to have committed the same offence, they are to be tried separately unless there are compelling reasons for joinder of the trials.

(2) An application for such joinder must be directed to the court after notice to the child, the adult and their legal representatives.

(3) If the court grants an application for joinder of trials, the matter must be transferred to the court in which the adult is to appear.

(4) The court to which the matter has been transferred must afford the child concerned all such benefits conferred upon such child by this Act as are reasonably consistent with the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

### **Time limits relating to the conclusion of trials**

**81.** (1) A court must conclude all trials of accused children as speedily as possible and must ensure that remands are limited in number and in duration.

(2) A court acting in terms of the provisions of this Act, other than a child justice court, must ensure that trials of accused children receive priority on the roll.

(3) Where the child has been remanded to a place of safety, secure care facility or a prison, the court must ensure that the requirements set out in section 36 regarding remands to places of safety, secure care facilities or prisons are complied with.

(4) Where a child remains in detention in a place of safety, secure care facility or

prison pending trial in a court and the trial of the child is not concluded within a period of six months from the date upon which the child has pleaded to the charge, the child must be released from detention, unless charged with an offence listed under Items 1, 2 or 3 in Schedule 3.

### **Court may divert matter**

**82.** (1) If at any time before the conclusion of the case for the prosecution it comes to the attention of a court that a child acknowledges or intends to acknowledge responsibility for an alleged offence, the court may, subject to section 51, with the consent of the prosecutor, refer the child to any diversion option as referred to in section 52 and may postpone the matter to enable the child to comply with the diversion conditions.

(2) Where a court acts in terms of subsection (1), the acknowledgement of responsibility must be recorded as an admission as contemplated in section 220 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(3) Where a court has referred a child to a diversion option in terms of subsection (1), the presiding officer must forthwith notify the probation officer concerned in writing of such referral in the prescribed manner.

(4) Where a child has been referred to a diversion option by a court, the court must, upon receipt of a report from a probation officer that the child has successfully complied with the diversion conditions, acquit such child, which acquittal may be made in the absence of such child.

(5) Where a child has been referred to a diversion option by a court and such child fails to comply with the diversion conditions, the probation officer must notify the Director of Public Prosecutions or a designated prosecutor as soon as possible of such failure.

(6) The Director of Public Prosecutions or a designated prosecutor may, upon receipt of a notice by a probation officer in terms of subsection (5), have the matter placed on the roll

of the court that referred the child concerned to a diversion option and if the matter is so placed, must issue a summons in respect of such child in order to proceed with the trial.

(7) Where the court acts in terms of subsection (1) and the diversion option selected is a family group conference, victim-offender mediation or other restorative justice process, the probation officer must, after such conference, mediation or process, furnish the court with the written recommendations emanating from such conference, mediation or process within the time periods referred to in section 53(12).

(8) Upon receipt of the written recommendations referred to in subsection (7), the court may -

- (a) confirm the recommendations by making them an order of the court;
- (b) substitute or amend the recommendations and make an appropriate order; or
- (c) reject the recommendations and request the prosecutor to proceed with the trial.

(9) Where an order in terms of subsection (8)(a) or (b) is made, the provisions of subsections (3), (4), (5) and (6) apply with regard to compliance with or failure to comply with such order.

### **Privacy and confidentiality**

**83.** (1) Where a child appears before a court, no person may be present other than a person whose presence is necessary in connection with such proceedings or is authorised by the court on good cause shown.

(2) No person may publish any information which reveals or may reveal the identity of a child under the age of 18 years who is accused of an offence or of a witness under the age of 18 years appearing at any proceedings referred to in this Act.

(3) Subject to the provisions of subsection (4), no prohibition under this section

precludes -

- (a) access to information pertaining to a child or children governed by this Act if such access would be in the interests, safety or welfare of any such child or of children in general;
- (b) the publication, in the form of a law report, of -
  - (i) information for the purpose of reporting any question of law relating to the proceedings in question; or
  - (ii) any decision or ruling given by any court on such question,
- (c) the publication, in the form of any report of a professional or technical nature, of research results and statistical data pertaining to a child or children governed by this Act if such publication would be in the interests, safety or welfare of any such child or of children in general; and
- (d) the lodging of the record referred to in section 46(5) with the Child Justice Committee referred to in section 104.

(4) The reports or record referred to in subsection 3(b), (c) and (d) may not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and may not mention the place where the offence in question was alleged to have been committed.

(5) Any person contravening the provisions of this section is guilty of an offence and liable on conviction to the penalties mentioned in section 117.

## **CHAPTER 9: SENTENCING**

### **Convicted children to be sentenced in terms of this Chapter**

**84.** A court must, after convicting a child, impose a sentence in accordance with the provisions of this Chapter.

**Pre-sentence reports required**

**85.** (1) A court imposing a sentence in terms of this Act, must request a pre-sentence report prepared by a probation officer or any other suitable person prior to the imposition of sentence.

(2) A court may dispense with a pre-sentence report where the conviction is for an offence listed in Schedule 1, or where requiring such report would cause undue delay in the conclusion of the case, to the prejudice of the child: Provided that no court sentencing a child in terms of this Act may impose a sentence with a residential requirement, unless a pre-sentence report has been placed before such court.

(3) A sentence with a residential requirement includes a sentence where the residential requirement of the sentence is suspended.

(4) The officer presiding in a court who imposes any sentence involving detention in a residential facility, must certify on the warrant of detention that a pre-sentence report has been placed before the court prior to imposition of sentence.

(5) Where the certification referred to in subsection (4) does not appear on a warrant of detention issued in terms of the provisions of this Act, the persons admitting a child to the residential facility in question must refer the matter back to court.

(6) Where a court sentencing a person in terms of this Act requests a pre-sentence report, such report must be completed as soon as possible but no later than one calendar month following the date upon which such report was requested.

(7) Where a court imposes a sentence other than that recommended in the pre-sentence report, reasons for this must be recorded.

### **Purposes of sentencing**

- 86.** The purposes of sentencing in terms of this Act are to -
- (a) encourage the child to understand the implications of and be accountable for the harm caused;
  - (b) promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence;
  - (c) promote the reintegration of the child into the family and community;
  - (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence can assist the child in the process of reintegration.

### **Community-based sentences**

- 87.** (1) Sentences which allow a child to remain in the open community and which may be imposed in terms of this Act are -
- (a) any of the options referred to in section 52(4)(a), (b), (d), (e), (f) and (h);
  - (b) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three years;
  - (c) in cases which warrant such specialised intervention, referral to counselling or therapy in conjunction with any of the options listed in this section for such period of time as the court deems fit;
  - (d) where a child is over the age of compulsory school attendance as referred to in the South African Schools Act, 1996 (Act No. 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for no more than 35 hours per week, to be completed within a maximum period of 12 months;
  - (e) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the court, or by the probation officer of the district in which the court is situated, or by the Child Justice Committee referred to in section 104, for a maximum period of 250 hours and to be completed within twelve months;

(f) any other sentence, subject to section 94, which is appropriate to the circumstances of the child and in keeping with the principles of this Act: Provided that if such sentence includes a time period, such period may not exceed 12 months in duration.

(2) Where a child receives a sentence in terms of subsection (1)(e), and such child is below the age of 14 years, due consideration must be given to the child's age and development in determining the type of community service, the number of hours that the child may be required to perform such service and the extent of the child's duties.

### **Restorative justice sentences**

**88.** (1) A court may, after convicting a child of an offence, refer the matter to a family group conference, victim-offender mediation or other restorative justice process referred to in subsection (2).

(2) The provisions of section 53 apply where a court has referred a matter to a family group conference, and the provisions of section 54 apply where a court has referred a matter to a victim-offender mediation or other restorative justice process.

(3) Upon receipt of the written recommendations from a family group conference in terms of section 53 or a victim-offender mediation or other restorative justice process in terms of section 54 by a court, such court may -

- (a) confirm the recommendations by making them an order of the court; or
- (b) substitute or amend the recommendations and make an appropriate order.

(4) Where the officer presiding in a court passing sentence in terms of this Act does not agree with the terms of the plan made at a family group conference, victim-offender mediation or other restorative justice process referred to in subsection (1) and imposes a sentence which differs in a material respect from that agreed to or decided upon, the reasons for deviating from the plan must be noted on the record of the proceedings.

(5) Where a child has been sentenced in accordance with an order arising from a family group conference, victim-offender mediation or other restorative justice process, and fails to comply with that order, the probation officer must notify the court issuing the order of such failure as soon as possible, upon which notification the court must issue a summons in respect of such child to appear before such court in order to impose an appropriate sentence.

### **Sentences involving correctional supervision**

**89.** (1) Correctional supervision referred to in section 276(1)(h) and 276A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) for a maximum period of three years may, for the purposes of this Act, be imposed as a sentence on a child who is 14 years or older.

(2) The whole or any part of a sentence referred to in subsection (1) may be postponed or suspended with or without conditions in terms of section 93(2), on condition that the child be placed under the supervision of a probation officer or a correctional official, and on the further condition that the child attend a specified centre for any purpose specified by the court, or on the condition that the child performs a service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the court.

### **Sentences with a compulsory residential requirement**

**90.** (1) No sentence involving a compulsory residential requirement may be imposed upon a child unless the presiding officer is satisfied that such a sentence is justified by -

- (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon the victim; or
- (b) the previous failure of the child to respond to non-residential alternatives.

(2) A presiding officer imposing any sentence involving a compulsory residential requirement on a child must note the reasons for the sentence on the record and explain them to the child in language that he or she can understand.

- (3) A sentence involving a compulsory residential requirement includes referral to
- a -
- (a) programme with a periodic residence requirement where the duration of the programme does not exceed 12 months, and no portion of the residence requirement exceeds 21 consecutive nights, with a maximum of 60 nights for the duration of the programme;
  - (b) residential facility, subject to the provisions of section 91; and
  - (c) prison, subject to the provisions of section 92.

### **Referral to a residential facility**

**91.** (1) A sentence to a residential facility may be imposed for a period not less than six months and, subject to subsection (2), a period not exceeding two years.

(2) A sentence referred to in subsection (1) may be imposed for longer than two years where the child is below the age of 14 years and such child, were it not for the provisions of section 92(1)(a) which prohibit sentences of imprisonment in respect of children below the age of 14 years, would otherwise have been sentenced to imprisonment due to the seriousness of the offence: Provided that such child may not be required to reside in a residential facility beyond the age of 18 years.

(3) Any child who has received a sentence as referred to in subsection (1) may not be required to reside in a residential facility beyond expiry of such sentence, which sentence may not be extended by administrative action.

(4) Upon completion of a sentence referred to in subsection (1) or upon attainment of the age of 18 years in the case of a child referred to in subsection (2), such child or person may request permission in writing in the prescribed manner from the head of the residential facility to continue to reside at such residential facility for the purposes of completing his or her education, and such permission may be granted if accommodation is available.

**Referral to a prison**

- 92.** (1) A sentence of imprisonment may not be imposed unless -
- (a) the child is 14 years of age or above at the time of commission of the offence; and
  - (b) substantial and compelling reasons exist for imposing a sentence of imprisonment because the child has been convicted of an offence which is serious or violent or because the child has previously failed to respond to alternative sentences, including available sentences with a residential element other than imprisonment.
- (2) No sentence of imprisonment may be imposed on a child in respect of an offence listed in Schedule 1.
- (3) No sentence of imprisonment may be imposed on a child in terms of this Act as an alternative to any other sentence specified in this Act.
- (4) Where a child fails to comply with any condition imposed in relation to any sentence, such child may be brought before the court which imposed the original sentence for reconsideration of an appropriate sentence, which may, subject to subsections (1) and (2), include a sentence of imprisonment.
- (5) If a term of imprisonment is to be imposed on a child as a sentence, such term must be announced in open court and the coming into effect of the term of imprisonment must be antedated by the number of days that the child concerned has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced.
- (6) Nothing contained in this Act must be construed as precluding the Commissioner of Correctional Services from placing a child who is serving a sentence of imprisonment under correctional supervision as referred to in section 276(1)(i) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

### **Postponement or suspension**

**93.** (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to in subsection (3), for a period not less than three months but not exceeding three years.

(2) The whole or any part of any sentence may be suspended, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding five years.

(3) The conditions of postponement referred to in subsection (1) or suspension referred to in subsection (2) may include -

- (a) restitution, compensation or symbolic restitution;
- (b) an apology;
- (c) the obligation not to commit a further offence of a similar nature;
- (d) good behaviour;
- (e) regular school attendance for a specified period;
- (f) attendance at a specified time and place for victim-offender mediation, a family group conference or other restorative dispute-resolution process;
- (g) placement under the supervision of a probation officer or correctional official;
- (h) a requirement that the child or any other person designated by the court must again appear before that court on a date or dates to be determined by such court for a periodic progress report;
- (i) referral to any diversion option referred to in section 52(3)(d), (e), (f), (g), (h), (i), (j) and (k);
- (j) any other condition appropriate to the circumstances of the child and in keeping with the principles of this Act, which promotes the child's reintegration into society.

(4) Where a court has postponed the passing of sentence in terms of subsection (1) for a specified period and the court is after expiry of that period satisfied that any conditions imposed have been complied with, the conviction is rescinded and must be expunged from any record.

(5) Where a court has postponed the passing of sentence in terms of subsection (1), the court may request the probation officer concerned for regular progress reports indicating the child's compliance with conditions as referred to in this section.

## **Fines**

**94.** (1) No fine payable to the State may be imposed as a sentence by a court.

(2) Where a penalty involving a fine and imprisonment in the alternative is prescribed for an offence, the presiding officer may impose -

- (a) symbolic restitution to a specified person, persons, group or institution;
- (b) payment of compensation with a maximum of R500 to a specified person, persons, group or institution where the child or his or her family is able to afford this;
- (c) where there is no identifiable person or persons to whom restitution or compensation could be made, an obligation on the child to provide some service or benefit or payment of compensation to a community organisation, charity or welfare organisation identified by the child concerned or by the court; or
- (d) any other competent sentence, but not imprisonment.

## **Prohibition on certain forms of punishment**

**95.** (1) No sentence of life imprisonment may be imposed on a child who, at the time of commission of the offence, was under the age of 18 years.

(2) A child who has been sentenced to attend a residential facility may not be detained in a prison or in police custody pending designation of the place where the sentence is to be served.

## **CHAPTER 10: LEGAL REPRESENTATION**

**Requirements to be complied with by legal representatives**

- 96.** (1) A legal representative representing a child in terms of this Act must -
- (a) allow the child, as far as he or she is capable of doing so, to give independent instructions concerning the case;
  - (b) explain the child's rights and responsibilities in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;
  - (c) promote diversion where appropriate, whilst ensuring that the child is not unduly influenced to acknowledge responsibility;
  - (d) ensure that all trials are concluded speedily.

(2) A legal representative representing a child in terms of this Act must be admitted as an attorney or an advocate.

(3) An attorney referred to in subsection (2) may delegate the power to represent a child to any candidate attorney under his or her supervision who has 12 months experience as a candidate attorney.

**Access to legal representation**

**97.** (1) A child has the right to give instructions to a legal representative in the language of his or her choice, with the assistance of an interpreter where necessary.

(2) The child, the parent or an appropriate adult may appoint a legal representative of own choice.

- (3) Where a legal representative is appointed in terms of subsection (2) -
- (a) liability for the payment of fees for legal representation rests with the parent or adult;
  - (b) such representative need not be accredited as provided for in section 101.

**Child to be provided with legal representation at State expense in certain instances**

**98.** (1) Where a child is subject to proceedings under this Act, legal representation must, upon conclusion of the preliminary inquiry and subject to the provisions of the Legal Aid Act, 1969 (Act No. 22 of 1969), be provided at State expense, if -

- (a) the child is remanded in detention pending plea and trial in a court;
- (b) the matter is remanded for plea and trial in a court in respect of any offence, and it is likely that a sentence involving a residential requirement may be imposed; or
- (c) the child is at least ten years but not yet 14 years of age and a certificate has been issued in terms of section 6(3) in respect of such child,

and no representative was appointed by the child, the parent or an appropriate adult in terms of section 97(2).

(2) The prosecutor must, prior to plea and trial in a court, indicate to the court whether, in his or her opinion, the matter is a matter contemplated in subsection (1)(b), and if so, the plea may not be taken until a legal representative has been appointed.

(3) The Legal Aid Board may designate an attorney or candidate attorney employed at a Legal Aid Clinic to represent children charged under this Act in a particular magisterial district.

(4) If the parent or guardian of a child who is granted legal representation at State expense under this Act would be ineligible for entitlement to legal representation at State expense due to the fact that such parent or guardian's income exceeds the means test applied by the Legal Aid Board, the Legal Aid Board may recover from such parent or guardian the costs of the legal representation afforded such child.

**Means of securing legal representation at State expense**

**99.** (1) Where a child requires legal representation at State expense, a request for such legal representation must be made to the Legal Aid Officer concerned as soon as is reasonably possible.

(2) Where a child requests legal representation in terms of subsection (1), the police official, probation officer or prosecutor to whom the child communicates such request must forthwith, or if such communication is made after office hours or over a weekend, as soon as the Legal Aid Officer is available, request the Legal Aid Officer to appoint a legal representative to represent the child.

(3) Where a child is remanded in detention as referred to in section 98(1)(a), the legal representative employed at a Legal Aid Clinic, who has been appointed to provide legal representation in terms of the provisions of this Act must, before the next court date, consult with the child at the place where he or she is being detained: Provided that such place is within a reasonable distance from the court in which the child is appearing.

#### **Child may not waive legal representation in some circumstances**

**100.** (1) A child in need of legal representation in terms of the provisions of section 98(1) may not waive the right to legal representation.

(2) Where a child referred to in section 98(1) declines to give instructions to the legal representative, this factor must be brought to the attention of the inquiry magistrate or the court, whereupon such magistrate or court must question the child to ascertain the reasons for the child so declining and note such reasons on the record of the proceedings.

(3) If, after questioning the child in terms of subsection (2), the inquiry magistrate or court is of the opinion that such application would be appropriate, the child may be given the opportunity to make a further application to the Legal Aid Board for the appointment of a substitute legal representative, if such person is available.

(4) If the questioning in terms of subsection (2) reveals that the child does not wish

to have a legal representative, the inquiry magistrate or court must instruct a legal representative employed at a Legal Aid Clinic or a legal representative appointed in terms of section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969), to assist the child.

(5) A person assisting a child in terms of subsection (4) must -

- (a) attend all hearings pertaining to the case;
- (b) address the court on the merits of the case;
- (c) note an appeal regarding conviction or sentence if, at the conclusion of the trial, an appeal is considered by such person to be necessary; and
- (d) have access to the affidavits and statements filed in the police docket pertaining to the case.

(6) A person assisting a child in terms of subsection (4) may -

- (a) cross-examine any State witness with the object of discrediting the evidence of such witness;
- (b) raise reasonable doubt about the admissibility of evidence led by the State; and
- (c) raise objections to the introduction of evidence by the State.

### **Accreditation of legal representatives**

**101.** (1) A legal representative who is appointed by the Legal Aid Board in terms of section 98 must be accredited by the National Office for Child Justice in the prescribed manner.

(2) In order to be accredited in terms of subsection (1), a legal representative must apply to the National Office for Child Justice to be registered in a specialised roster.

## **CHAPTER 11: AUTOMATIC REVIEW OF CERTAIN CONVICTIONS AND SENTENCES**

### **Automatic review in certain cases decided by a court**

**102.** (1) Any sentence with a residential requirement imposed in terms of section 90 and any sentence involving correctional supervision imposed in terms of section 89, must be subject to review in terms of section 302 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(2) Any sentence involving a residential requirement which is wholly or partially suspended, is subject to review in terms of subsection (1).

(3) Proceedings which fall within the ambit of this section for the purposes of review must be reviewed whether or not the accused was legally represented at any stage of the proceedings.

### **Suspension of execution of sentence**

**103.** (1) On suspension of a sentence pending an appeal or review, a child is to be released on the conditions referred to in section 32, and in the case of a sentence without a residential requirement, the operation of such sentence is to be suspended pending an appeal or review.

(2) Where execution of a sentence has been suspended in terms of subsection (1), it may be a further condition, where appropriate, that the convicted child must report at a specified place and time and upon service, in the manner prescribed by the rules of court, of a written order upon him or her in order that effect may be given to any sentence in respect of the proceedings in question.

## **CHAPTER 12: MONITORING OF CHILD JUSTICE**

### **Establishment and regulation of Child Justice Committees at district level**

**104.** (1) The inquiry magistrate appointed in respect of each magisterial district as provided for in this Act must convene a Child Justice Committee in such district which must meet not less than four times annually.

(2) The members of the Child Justice Committee established under subsection (1) who are required to attend the meetings of that committee are -

- (a) an inquiry magistrate;
- (b) an officer presiding in a child justice court;
- (c) the prosecutor or prosecutors of the district having responsibility for child justice;
- (d) the probation officer or probation officers of the district having responsibility for child justice or a probation officer who represents that office;
- (e) a representative from the South African Police Service;
- (f) a representative from the Department of Correctional Services and
- (g) a person nominated by the Regional Court President of the region, unless such person is exempted from attendance by the National Office for Child Justice in respect of a particular magisterial district.

(3) The following persons, organisations or institutions may attend the meetings of the Child Justice Committee -

- (a) those providing diversion services;
- (b) those providing assistance in non-custodial placements for children who are awaiting trial;
- (c) those providing assistance in the prevention of child-offending or providing services to children who are at risk;
- (d) those involved in the management or monitoring of places of safety, secure places of safety, or other State institutions relevant to the administration of child justice;
- (e) representatives from organisations providing services aimed at the improvement of the community;
- (f) representatives from the Legal Aid Board, or persons concerned with the legal representation of children in terms of this Act;
- (g) representatives of a legal professional controlling body; and
- (h) any other person who, in the opinion of the committee, can play a role in furthering or supporting child justice development, including staff attached to the family court, judges of the High Court, and researchers.

## **Duties and role of Child Justice Committees**

**105.** The Child Justice Committee must -

- (a) monitor the extent to which police officials use alternatives to arrest;
- (b) monitor the extent to which procedures relating to release from police custody before assessment are used;
- (c) receive and consider information from the police concerning the extent to which parents or appropriate adults were successfully notified by the police prior to assessment;
- (d) monitor the situation of children in police custody pending the conclusion of the preliminary inquiry, including the conditions under which children are held in police custody, and the length of time that children spend in police custody prior to being brought for assessment;
- (e) receive and consider the reports from probation officers in relation to children below the age of ten years;
- (f) receive and consider reports from probation officers on the holding of family group conferences where such conferences were held as a diversion option;
- (g) receive and consider reports from probation officers on the extent to which recommendations for diversion have been made and the extent to which they were accepted by a court;
- (h) support the development of diversion options appropriate to the district, and ensure the continued development of diversion and alternative sentencing opportunities;
- (i) identify persons, representatives from communities or organisations, or community police fora who are not in the full-time employ of the State, who can act as independent observers during proceedings in terms of this Act and maintain a roster of such persons;
- (j) receive and consider reports from child justice magistrates on the extent to which children appearing in a court were legally represented;
- (k) receive and consider the statistics referred to in section 110(5)(b) that are applicable to that particular magisterial district and facilitate the collection of such statistics;
- (l) promote local public awareness regarding the application of this Act and issues involving children in conflict with the law in any manner that is feasible, including the issuing of media statements;
- (m) investigate and promote measures to reduce the involvement of children in criminal activities;

and

- (n) identify persons and places suitable for the temporary placement of children in conflict with the law as alternatives to detention.

### **Powers of Child Justice Committees**

**106.** (1) A Child Justice Committee may receive complaints concerning matters relating to this Act from any person or organisation involved in or affected by the administration of child justice within its area of jurisdiction, and must attempt to resolve such complaints.

(2) A Child Justice Committee may, when appropriate, refer a matter, complaint or question to the National Office for Child Justice referred to in section 110 for assistance.

(3) Any member of a Child Justice Committee may notify the local or provincial division of the High Court having jurisdiction or any judge of such court that the proceedings in which a sentence was imposed by a court were not in accordance with justice as referred to in section 304(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

### **Report to Provincial Office for Child Justice**

**107.** The Child Justice Committee must elect a chairperson on an annual basis, who must submit an annual report of the functioning of the child justice system in the district to the Provincial Office for Child Justice referred to in section 109.

### **Remuneration**

**108.** No remuneration is payable for attending meetings or for the performance of services for the Child Justice Committee, save for a person acting on behalf of or at the request of the committee as an independent observer who may be entitled to payment of witness fees as referred to in section 191(1) and (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

### **Establishment of Provincial Office for Child Justice**

**109.** (1) A Provincial Office for Child Justice must be established for each province.

(2) The Member of the Executive Council for Safety and Security of a province and the Member of the Executive Council for Welfare and Population Development of a province must appoint to the Provincial Office for Child Justice an official from each of the respective provincial departments under their control, whose function it is to -

- (a) collect statistical information on
  - (i) the number of children arrested annually;
  - (ii) the number of children in respect of whom alternatives to arrest were used;
  - (iii) the number of children diverted, and to which programmes;
  - (iv) the number of children assessed;
  - (v) the number of children in respect of whom a preliminary inquiry has been held;
  - (vi) the number of children diverted at a preliminary inquiry;
  - (vii) the extent of legal representation of children subject to the provisions of this Act;
  - (viii) convictions and sentences;
  - (ix) the number of warrants of arrest issued for children and their parents for not complying with this Act; and
  - (x) the number of children awaiting trial;
- (b) receive the minutes of the meetings of district Child Justice Committees for purposes of reporting to the National Office for Child Justice;
- (c) attend to matters concerning provincial strategies relating to child justice;
- (d) maintain channels of communication with officials of the Department of Justice in the province, the Director of Public Prosecutions of the province and the Provincial Commissioner of Correctional Services in the province in respect of children who are subject to the provisions of this Act;
- (e) facilitate the establishment of One-Stop Child Justice Centres as contemplated in section 72;
- (f) assist with the implementation of training of personnel charged with the administration of child justice and police officials concerned with the application of the provisions of this Act; and
- (g) receive and consider the annual reports of child justice committees referred to in section 107.

### **Establishment of the National Office for Child Justice**

**110.** (1) A National Office for Child Justice must be established.

(2) The Minister of Justice and Constitutional Development must appoint to the National Office for Child Justice a member of staff from the Department of Justice, who must-

- (a) monitor and assess the policies and practices of the Department of Justice regarding the implementation of this Act;
- (b) inquire into, and report on, any matter, including any law or enactment or any procedure regarding child justice;
- (c) keep under review and make recommendations on the operation of this Act;
- (d) assist with the implementation of training of personnel charged with the administration of child justice and police officials concerned with the application of the provisions of this Act;
- (e) increase public awareness of matters relating to the administration of child justice;
- (f) encourage the development within the Department of Justice of policies and services designed to ensure the effective application of this Act;
- (g) on own initiative or at the request of the Minister, advise the Minister on any matter relating to the administration of this Act; and
- (h) contribute to the annual report referred to in subsection (6).

(3) The Minister of Welfare and Population Development must appoint to the National Office for Child Justice a member of staff from the Department of Welfare and Population Development, who must -

- (a) monitor and assess the policies and practices of the Department of Welfare and Population Development regarding the implementation of this Act, and in particular, in relation to the development of probation services, diversion, and alternative sentencing programmes;
- (b) inquire into, and report on, any matter in which the Department of Welfare and Population Development may have an interest, including any procedure regarding child justice;
- (c) keep under review and make recommendations on the operation of this Act, particularly in relation to the development of diversion, victim satisfaction with the operation of this Act,

- restorative justice and the development of probation services;
- (d) increase public awareness of matters relating to the administration of child justice;
  - (e) encourage the development within the national Department of Welfare and Population Development and provincial Departments of Welfare of policies and services designed to ensure the effective application of this Act;
  - (f) on own initiative or at the request of the Minister of Welfare and Population Development, advise the Minister on any matter relating to the administration of this Act; and
  - (g) contribute to the annual report referred to in subsection (6).

(4) The Minister of Safety and Security must appoint to the National Office for Child Justice a police official from the Department of Safety and Security, who must -

- (a) monitor and assess the policies and practices of the Department of Safety and Security regarding the implementation of this Act, and in particular, in relation to the arrest procedure for children;
- (b) inquire into and report on any matter in which the Department of Safety and Security may have an interest, including any procedure regarding child justice;
- (c) make recommendations to the National Commissioner of the South African Police Service regarding police procedures as contemplated in this Act, and the training of police officials on aspects of this Act and the Child Care Act, 1983 (Act No. 74 of 1983);
- (d) on own initiative or at the request of the Minister of Safety and Security, liaise with the National and Provincial Commissioners of Police in respect of any police procedures as contemplated in this Act;
- (e) visit police cells and promote the improvement of such cells where necessary to ensure the appropriate accommodation of children in police custody;
- (f) on own initiative or at the request of the Minister of Safety and Security, advise the Minister and the National Commissioner of Police on any matter relating to the administration of this Act;
- (g) contribute to the annual report referred to in subsection (6) on matters concerning police procedures, including the arrest procedure; and
- (h) collaborate with any relevant government department or non-governmental organisation to promote the prevention of crime or to develop preventative programmes.

(5) The Minister of Justice and Constitutional Development must appoint to the National Office for Child Justice a researcher from the Department of Justice whose functions must include -

- (a) undertaking, commissioning or promoting research into any matter related to the administration of this Act; and
- (b) promoting the collection of adequate statistical information, including -
  - (i) offences committed by children who are below the age of ten years as contemplated in section 6(1);
  - (ii) the number of warrants of arrest issued for children and their parents for not complying with any of the provisions of this Act;
  - (iii) offences committed by children between the ages of ten and 14 years as contemplated in section 6(2) in respect of whom a certificate by the Director of Public Prosecutions as referred to in section 6(3) has not been issued;
  - (iv) the number of children diverted, and to which programmes;
  - (v) the number of children assessed;
  - (vi) the number of children in respect of whom a preliminary inquiry has been held;
  - (vii) the number of children diverted at a preliminary inquiry; and
  - (viii) the extent of legal representation of children subject to the provisions of this Act;
  - (ix) convictions and sentences.

(6) The National Office for Child Justice must produce an annual report on the operation of this Act, including qualitative and statistical information necessary for reviewing the progress made in implementation of the child justice system.

### **Other functions conferred on National Office for Child Justice**

**111.** (1) The National Office for Child Justice has such other functions as are conferred on the Office by this Act or by the Minister of Justice and Constitutional Development and the Minister of Welfare and Population Development.

(2) Nothing in this Act authorises the National Office for Child Justice to reverse or act contrary to any decision made by a court.

(3) The National Office for Child Justice must register and, if it is deemed appropriate, rescind the registration of any diversion option pursuant to the provisions of section 49(5).

(4) The National Office for Child Justice must create and maintain the roster for legal representatives referred to in section 101 and may invite applications for accreditation.

(5) The National Office for Child Justice, together with the professional associations, training institutions, universities and any other bodies or persons considered by such Office to be appropriate, must ensure -

- (a) that relevant information relating to child justice law and practice is conveyed regularly to the accredited legal representatives; and
- (b) the development and publication of minimum standards and practice guidelines for legal representatives acting under the provisions of this Act.

(6) The National Office for Child Justice may -

- (a) limit the number of legal representatives to be included in the roster referred to in subsection (4) to a number sufficient for legal representation of children, in order to further the development of specialised legal representation of children; and
- (b) remove any accredited legal representative from the roster in consultation with the Legal Aid Board and the corresponding professional controlling body if good reasons for such removal exist.

(7) The National Office for Child Justice, in consultation with the Legal Aid Board, must ensure reasonable regional and provincial access to specialised legal representation in terms of this Act.

(8) The National Office for Child Justice must be provided with such support staff

as are necessary to fulfil its functions.

### **Submission of annual report**

**112.** The National Office for Child Justice must submit the annual report referred to in section 110(6) to the Minister of Justice and Constitutional Development, the Minister of Welfare and Population Development and the Minister of Safety and Security as well as to the Parliamentary Portfolio Committees on Justice, Welfare and Population Development and Safety and Security.

### **Establishment of National Committee for Child Justice**

**113.** (1) A National Committee for Child Justice must be established.

(2) The following persons are to be members of the National Committee for Child Justice -

- (a) those referred to in section 110(2), (3), (4) and (5);
- (b) representatives from the Departments of Education, Home Affairs and Correctional Services; and
- (c) six other persons who are not in the full-time or part-time employ of the State, and who have an interest in and expertise related to the development of child justice, the development of diversion programmes, or other issues relevant to the furtherance of this Act.

(3) The persons referred to in subsection (2)(c) are to be appointed by the Minister of Justice and Constitutional Development and the Minister of Welfare and Population Development acting jointly.

(4) The term of office of the persons referred to in subsection (1) must be two years.

(5) Persons serving on the National Committee for the purposes of subsection (1) are not to be remunerated, save for a fee to be determined by the Minister of Justice and Constitutional

Development for attendance at meetings, and reasonable expenses incurred for the purposes of attendance at meetings.

(6) The National Committee must meet at least four times annually.

(7) The National Committee must elect a chairperson, and keep minutes of meetings.

(8) The Minister of Justice and Constitutional Development must provide such resources as may be required to enable the National Committee for Child Justice to perform its functions.

### **Functions of National Committee for Child Justice**

**114.** (1) The National Committee for Child Justice must -

- (a) receive and consider reports from the persons referred to in section 110(2), (3), (4) and (5); and
- (b) consider the annual report of the National Office for Child Justice referred to in section 110(6) before it is presented.

(2) The National Committee for Child Justice may -

- (a) receive a report or complaint from any other body, institution, organisation or individual concerning the implementation of the provisions of this Act;
- (b) require any person or representative who is a member of the committee to investigate, provide further information or take steps to resolve any complaint, difficulty or problem affecting the implementation of this Act;
- (c) provide information concerning the implementation of this Act to the National Office for Child Justice;
- (d) assist the National Office for Child Justice in developing recommendations concerning any review of the provisions of this Act;

- (e) on request or on its own initiative, provide advice to any relevant Minister concerning the implementation of this Act;
- (f) refer any complaint, difficulty or matter that has been brought to the attention of the committee, to the Child Justice Committee which has jurisdiction.

## **CHAPTER 13: RECORDS OF CONVICTION AND SENTENCE**

### **Expungement of records**

**115.** (1) The record of any conviction and sentence imposed upon a child convicted of any offence included in Schedule 3 may not be expunged.

(2) In respect of offences other than those referred to in Schedule 3, the presiding officer in a court must, at the time of sentencing a child in respect of such offence and after consideration of -

- (a) the nature and circumstances of the offence; and
- (b) the child's personal circumstances or any other relevant factor,

make an order regarding the expungement of the record of the child's conviction and sentence and must note the reasons for the decision as to whether such record may be expunged or not.

(3) Where a presiding officer decides that a record referred to in subsection (2) may not be expunged, such decision is subject to review or appeal upon application by or on behalf of the child.

(4) If an order has been made in terms of subsection (2) that the record of the conviction and sentence of a child may be expunged, the officer presiding in the court must set a date upon which the record of conviction and sentence must be expunged, which date may not be less than three months and may not exceed five years from the date of the imposition of the sentence.

(5) Where a date for expungement of the record of the conviction and sentence has

been set in terms of subsection (4), the presiding officer must impose, as a condition of expungement, a requirement that the child concerned must not be convicted of a similar or more serious offence between the date of imposition of the sentence and the date of expungement.

(6) The order contemplated in subsection (2) and the condition referred to in subsection (5) must be noted on the record of the conviction and sentence of the child and must be submitted to the South African Criminal Bureau as soon as is reasonably practicable, and that Bureau must, upon the date set for expungement, cause such record of conviction and sentence to be expunged: Provided that no other conviction of a similar or more serious offence has been recorded during the period of time referred to in subsection (5).

(7) Whenever a court makes a decision regarding the expungement of the record of a conviction and sentence of a child as contemplated in this section, the court must explain such decision and its reasons, as well as any conditions relating to expungement of such record, to the child.

## **CHAPTER 14: GENERAL PROVISIONS**

### **Liability for patrimonial loss arising from performance of community service**

**116.** (1) If patrimonial loss may be recovered from a child on the ground of a delict committed by him or her in the performance of community service in terms of Chapter 6 or Chapter 9, that loss may, subject to subsection (3), be recovered from the State.

(2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability in terms of subsection (1) by means of insurance or otherwise.

(3) The patrimonial loss which may be recovered from the State in terms of subsection (1) must be reduced by the amount from any other source to which the injured person is entitled.

(4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the child concerned must pass to the State.

(5) If any person as a result of the performance of community service in terms of Chapter 6 or Chapter 9 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General of Justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.

### **Offences and penalties**

- 117.** (1) Any person who -
- (a) hinders an authorised person in the performance of his or her functions or the carrying out of his or her duties under the provisions of this Act, or hinders the execution of any of the processes established under this Act;
  - (b) fails to -
    - (i) attend an assessment in terms of section 43(5);
    - (ii) comply with a warning to attend proceedings as referred to in section 75(5);
  - (c) publishes information or reveals the identity of persons in contravention of section 83;
- is guilty of an offence.

(2) Any person convicted of an offence referred to in subsection (1), is liable to a fine or to imprisonment for a period not exceeding three months.

(3) Any adult who incites, persuades, induces or encourages a child to commit an offence is, in addition to any other offence for which such adult may be charged, guilty of an offence and is liable upon conviction to a fine or to imprisonment not exceeding two years.

### **Repeal**

**118.** Sections 50(4) and (5), 71, 72(1)(b), 72(2)(b), 74, 153(4), 254, 290 and 291 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), are hereby repealed.

### **Regulations**

**119.** (1) The Minister of Justice and Constitutional Development, in consultation with the Ministers of Welfare and Population Development, Correctional Services and Safety and Security may make regulations on -

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the monitoring of this Act and the establishment of the Office for Child Justice;
- (c) any other matter which may be necessary for the application of this Act; and
- (d) the establishment of One-Stop Child Justice Centres as referred to in section 72.

(2) The Minister of Justice may from time to time adjust any of the amounts prescribed in Schedules 1, 2 and 3 by notice in the *Gazette*.

### **Short title and commencement**

**120.** (1) This Act is the Child Justice Act, 20.., which takes effect on a date fixed by the President by notice in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act or in respect of different magisterial districts.

**Schedule 1**

(Sections 11(5), 23, 24, 29(1), 85(2), 92(2))

1. Assault where grievous bodily harm has not been inflicted.
2. Malicious injury to property where the damage does not exceed R500.
3. Trespass.
4. Any offence under any law relating to the illicit possession of dependence producing drugs

where the quantity involved does not exceed R500 in value.

5. Theft, where the value of the property involved does not exceed R500.
6. Any statutory offence where the maximum penalty determined by that statute is a fine of less than R1 500 or three months imprisonment.
7. Conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

### **Schedule 2**

(Sections 24(2), 29(3))

1. Public violence.
2. Culpable homicide.
3. Assault, including assault involving the infliction of grievous bodily harm.
4. Arson.
5. Any offence referred to in section 1 of 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).
6. Housebreaking, whether under common law or a statutory provision, with intent to commit an offence, if the amount involved in the offence does not exceed R20 000.
7. Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000.
8. Theft, where the amount involved does not exceed R20 000.
9. Any offence under any law relating to the illicit possession of dependence producing drugs.
10. Forgery, uttering or fraud, where the amount concerned does not exceed R20 000.
11. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.
12. Any statutory offence where the penalty concerned does not exceed R20 000.

### **Schedule 3**

(Sections 28, 31(m), 35(5), 36(4), 81(4), 115)

1. Murder.
2. Rape.
3. Robbery -

- (a) where there are aggravating circumstances; or
  - (b) involving the taking of a motor-vehicle.
4. Indecent assault involving the infliction of grievous bodily harm.
5. Indecent assault on a child under the age of 16 years.
6. Any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992) if it is alleged that -
  - (a) the value of the dependence producing substance in question is more than R50 000; or
  - (b) the value of the dependence producing substance in question is more than R10 000 and that the offence was committed by a person, group of persons, syndicate or any other enterprise acting in the execution or furtherance of a common purpose or conspiracy.
7. Any offence relating to -
  - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or
  - (b) the possession of an automatic or semi-automatic firearm, explosives or armament.
8. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft-
  - (a) involving amounts of more than R50 000; or
  - (b) involving amounts of more than R10 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
9. Any conspiracy or incitement to commit any offence referred to in this Schedule or an attempt to commit any of the offences referred to in Items 1, 2 or 3 of the Schedule.

## **ANNEXURE B**

### **LIST OF RESPONDENTS WHO COMMENTED ON ISSUE PAPER 9**

1. Tshwaranang Legal Advocacy Centre
2. Society of Advocates, Natal
3. National Institute for Public Interest Law and Research
4. Office of the Attorney-General, Grahamstown

5. Natal Law Society
6. Department of Welfare and Population Development
  - Ms HA Lekota
  - Ms Gerda Brown
  - Ms C Wagner
7. Family and Community Service, Catholic Women's League
8. Association of Law Societies of South Africa
9. Ms AS Louw and Prof FFW van Oosten, University of Pretoria
10. Prof JH Prinsloo, Institute for Criminological Sciences, UNISA
11. National Council of Women of South Africa
12. Centre for Criminal Justice, UND, Pietermaritzburg
13. ZM Mkize, Department of Social Work, University of Zululand
14. Karen Meyer, Social Worker
15. South African National Council for Child and Family Welfare
16. FJ Stassen, Chief Magistrate, Johannesburg
17. Superintendent Nilsson, Provincial Commissioner, Western Cape
18. Prof Davel, University of Pretoria
19. Vicky Bell student- Midrand Campus
20. The Law Society of the Cape of Good Hope
21. Peggy Maisel, The Campus Law Clinic, UND, Durban
22. Dr Beenhakker, National Council of Women of South Africa
23. Philip van Zyl, Institute of Criminology, UCT
24. Mr Rothman, Children's Court Commissioner, Durban Magistrates Court
25. Mr AP McMahon, Johannesburg Magistrate's Court

**Participants in the International Conference on Drafting Juvenile Justice Legislation hosted by the Commission and UNDP at Gordon's Bay in November 1997**

1. Gopalan Balagopal, UNICEF, Bangladesh
2. Patrick Kakama, Ministry of Gender and Community Development, Uganda

3. Estelle Appiah, Ministry of Justice, Ghana
4. Micheal Corriero, Judge of the New York State Court of Claims
5. Geraldine van Bueren, Director of the Programme on the International Rights of the Child, Queen Mary & Westfield College, London
6. Allison Morris, Institute of Criminology, Victoria University of Wellington
7. Daniel van Ness, Prison Fellowship International, Washington
8. Bernadine Dorhn, Children and Family Justice Center, Chicago
9. Mary-Ann Kirvan, Senior Counsel, National Crime Prevention Secretariat, Ottawa
10. Renate Winter, Judge of the Family Court, Vienna and consultant to the UN Centre for International Crime Prevention

## **ANNEXURE C**

### **LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 79**

1. Inkatha Freedom Party
2. Magistrates Commission

Magistrate JA Venter, Ladysmith  
 Magistrate S Collins, Pietermaritzburg  
 Magistrate J Coetzee, Kimberley  
 Magistrate TP Mudau, Johannesburg  
 Magistrate C Maritz, Johannesburg  
 Magistrate P Louwrens, Johannesburg  
 Magistrate A Gradner, Johannesburg  
 Magistrate HJ Venter, Cape Town  
 Magistrate R van Rooyen, Bloemfontein  
 Magistrate RE Laue, Durban  
 Magistrate J van Renen, Wynberg  
 The Magistrate, Nqutu  
 The Magistrate, Nongoma  
 The Magistrate, Vulindlela

3. Senior Superintendent JB Hickman, South African Police Services, Kimberley
4. Superintendent N Nilsson, South African Police Services: Provincial Child and Youth Desk, Western Cape
5. Dr T Geldenhuys, South African Police Services: Legal Services
6. Department of Welfare and Population Development: Gauteng Provincial Government, Subdirector: Crime Prevention through Development and Restorative Justice
7. Department of Welfare and Population Development: Gauteng Provincial Government
8. Department of Social Welfare: Free State Province
9. Provincial Administration Western Cape: Education Department
10. Provincial Inter-Sectoral Committee on Youth in Conflict with the Law: Gauteng Province
11. SA National Council for Child Welfare
12. The Law Society of the Cape of Good Hope
13. Dr P du Plessis, RP Clinic, Totiusdal
14. Dr L Glanz, Department of Justice: Directorate: Crime
15. Department of Foreign Affairs
16. Legal Aid Board

17. Department of Justice: Directorate: Secondary Legislation
18. Ms F Cassim, University of South Africa: Department of Criminal and Procedural Law
19. Director of Public Prosecutions, Richmond
20. Ms ML Kloppers, Public Prosecutor, Richmond
21. Stepping Stones Youth Justice Centre
22. Ms B Hechter, Chief Family Advocate
23. Ms J van Niekerk, Director: Childline, Durban
24. Department of Welfare, Benoni Office
25. Mr LM Muntingh, Director of Research: NICRO
26. Mr M van Schalkwyk, Pretoria