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DISCUSSION PAPER 79

Project 106

JUVENILE JUSTICE

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INTRODUCTION

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

The members of the Commission are -

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PREFACE

This Discussion Paper has been prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

For the convenience of the reader a summary of the preliminary recommendations appears on the pages following the pages reflecting the list of sources.

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

Respondents are requested to submit **written** comments, representations or requests to the Commission by 31 March 1999 at the address appearing on the previous page. The researcher, Ms Pat Moodley, will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; if they wish, respondents may indicate that they abide by their previous comments, if that is the case.

The project leader responsible for the project is Ms Ann Skelton of Lawyers for Human Rights in Pietermaritzburg who is also the Chairperson of the project committee appointed to assist the Commission in the investigation. The other members of the project committee are Ms Pat Moodley (member of the secretariat of the Commission), Ms Zubeda Seedat (member of the Commission), Ms Julia Sloth-Nielsen (senior researcher at the University of the Western Cape's Community Law Centre), Mr Tseliso Thipanyane (member of the secretariat of the Human Rights Commission) and Ms Magdalene Tserere (Lawyers for Human Rights in Umtata).

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SUMMARY OF RECOMMENDATIONS

A summary of the recommendations made in this Discussion Paper is reflected below for ease of reference. In essence, the project committee¹ envisages a cohesive child justice system which at all times strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions. The proposed system aims to ensure that children accused of less serious offences will be afforded the opportunity through diversion to be held accountable outside the criminal justice system. Provision is, however, made for the prosecution and sentencing of children who cannot be diverted and for the secure care of children who are accused or convicted of serious violent crimes and are assessed to be a danger to others. It should be noted that recommendations are only made as from Chapter 5 of this document to the end since the first four Chapters cover background material which do not culminate in recommendations.

Chapter 5: Principles and framework

(Chapter 1 of the draft Bill)

The project committee recommends that -

- a long title should be included at the beginning of the legislation which describes the procedures and structures to be established to enable the operation of the new child justice system;
- an objectives clause should be included in the draft Bill to guide all concerned as to the purpose of the law, highlighting the main goals that the legislation seeks to achieve (see clause 2 of the draft Bill in Annexure A to this Discussion Paper);
- a set of general principles, to ensure that the legislation as a whole is interpreted with reference to these principles, be provided for in the draft Bill (clause 3). These principles would also be useful to further understanding of the spirit of the legislation;

1 See par 1.2.

- principles relevant to specific sections be included in the body of the legislation where appropriate (clauses 32 and 81).

Chapter 6: Age and criminal responsibility

(Chapter 2 of the draft Bill)

The project committee recommends -

- the use of the term “child” as opposed to the term “juvenile”, that children should be regarded as those under the age of 18 years (clause 1(iii) of the draft Bill), and that the draft Bill be named the “Child Justice Bill”;
- in view of the requirements set by the international instruments, that a minimum age below which children should not be tried in the criminal justice system should be set by the proposed legislation.

With regard to the setting of a minimum age, the project committee has identified three options regarding the issue of minimum age and criminal capacity:

- The first of these is to retain the current common law rule that a child who is seven years (or ten years) old but has not yet turned fourteen years, is presumed to be *doli incapax*, with additional measures to ensure enhanced protection of such children.
- The second option is to depart entirely from the *doli incapax* presumption, and to set a minimum age of prosecution at twelve (or fourteen) years which is not directly linked to the actual criminal capacity of the child.
- The third option is to set the minimum age of prosecution at twelve (or fourteen) years, but to provide that where a child is charged with a serious offence, specified in clause 4 of the draft Bill, the child may be prosecuted.

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The project committee seeks comment on the viability and appropriateness of each of the options.

With regard to the assessment of age, the project committee recommends that -

- in view of difficulties experienced with the present procedure of age assessment, a probation officer should gather available information and make an assessment of a child's age if such age is in dispute² or uncertain (clause 6) and should record the information on a form which is set out as an annexure (Form D) to the proposed draft Bill;
- the draft Bill should contain a list of evidence relevant to age to be considered by the probation officer in a specified order of cogency (clause 6(2));
- any police officer or probation officer may refer a child to the district surgeon for estimation of age (clause 7(1));
- the magistrate presiding in the proposed preliminary inquiry³ should make an age determination based on the evidence put before him or her by the probation officer and the age so determined should be deemed to be the age of the child until contrary evidence becomes available (clause 8);
- a person appearing in a court other than the proposed child justice court,⁴ who 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 whereafter the assessment of age form should be submitted to the presiding officer of that court for determination of age (clause 9);
- if the age of the person is found to be below 18 years after the trial has commenced, the

2 This would not preclude examination by a District Surgeon to determine age where such determination is considered appropriate.

3 See Chapter 9.

4 See Chapter 10.

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 (clause 9(4)).

Chapter 7: Pre-trial procedures pertaining to police powers and investigation

(Chapter 3 of the draft Bill)

The project committee recommends that -

- in deciding whether or not to effect an arrest, a police officer should be obliged to consider whether an alternative method of securing the appearance of the child at assessment can be employed, or whether an informal caution can be used. (Clause 11(3) of the draft Bill). In respect of petty offences listed in Schedule 1 to the draft Bill, it should be presumed, unless there are sufficient reasons to the contrary, that an arrest should not be effected and that alternatives to arrest should be used (clause 11(4) of the draft Bill);
- the principle embodying the use of minimum force in effecting the arrest of a child 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 (clauses 10 and 13);
- upon arrest, the police should inform the child of his or her rights in language that he or she understands (clause 15);
- the arresting officer should have the duty to inform the probation officer of the arrest of a person under the age of 18 years (clause 16);
- the arresting police officer should have the obligation of locating and notifying the parents of the child (clause 17);

- the involvement of the child's parents be extended to include another appropriate adult who is defined in the legislation (clause 1(i));
- consideration should be given by the police officer to the release of the child from police detention; that a child arrested for an offence referred to in Schedule 1 to the draft Bill may be released, with or without conditions, into the care of his or her parents or another appropriate adult, or on his or her own recognisance; and that, with regard to more serious offences - listed in Schedule 2 - release from police detention by a police officer should still be possible after consultation with the relevant Director of Public Prosecutions (clause 22);
- no admission, confession, identity parade or pointing out should be admitted as evidence unless the child's legal representative, parent, guardian, family member or other suitable adult was present at the time of such procedure (clause 20);
- fingerprinting of children should not be resorted to before the holding of a preliminary inquiry with certain exceptions (clause 20);
- informal cautioning be provided for in the draft Bill, with the details to be set out in regulations to be developed by the Commissioner of Police (clause 19);
- a formal caution be provided for in the draft Bill, to be administered by a police officer of the rank of superintendent or above or a police station commander with or without conditions in the presence of the child's parent or other suitable adult, a record of which should be kept for a period of two years (clause 19);
- detention in a police cell prior to the first appearance of the child at the proposed preliminary inquiry should be a measure of last resort and for a maximum of 48 hours, and children may only be remanded to a police cell for a period of 48 hours and one further period of 48 hours (clause 21);

- when in police detention, the child must be held in appropriate conditions (clause 21);
- a child should be deemed not to be charged until, after the preliminary inquiry, the matter is entered by a prosecutor on the roll of the proposed child justice court or any other court (clause 23).

Chapter 8: Assessment and referral

(Chapters 4 and 5 of the draft Bill)

The project committee recommends that -

- diversion of child offenders away from the criminal justice system at any point from arrest to the post-conviction stage where it is appropriate and where the child concerned acknowledges responsibility for his or her wrongdoing, by officials dealing with the child, should be a central objective of the new system (clauses 1(ix) and (x), 32, 33 and 34 of the draft Bill);
- since assessment of the child as soon as possible after arrest (or alternatives to arrest) is a key mechanism to promote diversion and avoid pre-trial detention, a child accused of a crime should, wherever possible, be assessed by a probation officer within 12 hours of the arrest; within 48 hours of the arrest if the child has been released from detention in police custody or within 72 hours if an alternative method of arrest has been employed (clause 27);
- in the case of non-serious offences, probation officers should be given certain limited powers to *decide* on diversion, subject to the review of the proposed child justice committee⁵ (clauses 29 and 30);
- in the case of more serious offences, the probation officer should be able to *recommend* diversion which must be approved by the prosecutor or the proposed preliminary inquiry magistrate (clause 31);

5 See Chapter 12.

- principles be included in the proposed draft Bill to guide the establishment and selection of diversion programmes (clause 32);
- for the purposes of enabling police, probation officers, prosecutors, and presiding officers to take an imaginative, innovative approach to diversion, a multi-level approach should be adopted which will ensure that diversion is considered as the first resort at every stage of the process. Four levels of diversion programmes are recommended, and in selecting options from these levels, the option selected should be proportionate to the circumstances of the child concerned and the nature of the offence (clause 34).

Chapter 9: Preliminary inquiry

(Chapter 6 of the draft Bill)

The project committee recommends -

- the inclusion of a distinct procedure prior to the appearance of a child in the proposed child justice court, referred to as the preliminary inquiry (clauses 1(xiv) and 37 of the draft Bill). The purpose of the inquiry would be to ensure that -
 - * the child has been assessed (unless there are compelling reasons to dispense with assessment);
 - * the possibility of diverting the matter is fully explored;
 - * the possibility of transferring the matter to the children's court is considered;
 - * there is sufficient evidence to sustain a trial;
 - * the release or placement of a child in the pre-trial stage is properly considered if the matter is to proceed to the proposed child justice court;
- that a preliminary inquiry magistrate (at district court level) be designated for each district to preside over the proceedings which should take place in an informal atmosphere and be inquisitorial rather than adversarial in style (clause 38);

- that a preliminary inquiry should be held in a room, office or chamber but not in a court (clause 38);
- that the inquiry magistrate should be apprised of all relevant information to assist with the decision-making, but where he or she is provided with information which may be prejudicial to the child, the inquiry magistrate should recuse himself or herself as presiding officer in any trial which may eventuate (clause 50(3));
- that the preliminary inquiry should only be remanded for 48 hours, and then for a further 48 hours after which the inquiry should be closed (clause 45);
- that a decision of the magistrate presiding at a preliminary inquiry should not be subject to appeal (clause 38(10));⁶
- that where a child is co-accused with an adult, the case of the adult should be separated for the purposes of the preliminary inquiry, and where the child is co-accused with another child or children, the court may hold a joint inquiry (clause 39);
- that where a child is in detention, the inquiry magistrate must establish whether the child may be released, and that preference should be given, where possible, to the release of a child into the care of his or her parent or another appropriate adult (clause 44);
- with regard to detention in a place of safety or secure care facility, that individual assessment should form the basis of a recommendation by the probation officer to which the inquiry magistrate must have due regard (clause 46(3));
- with regard to pre-trial detention in a prison, that strict conditions for such detention be set; that pre-trial detention should be limited to children above the age of 16 (or 14) years

6 The draft Bill provides, however, in clause 38 that a decision to remand a child in detention will be subject to the possibility of an appeal.

charged with serious offences which are listed in the draft Bill and only where there is no vacancy in an available alternative secure residential facility within a reasonable distance from the court or where a substantial risk exists that such a child will cause harm to other persons in an alternative secure residential facility (clause 46(4));

- that a child in detention should be brought before the court every 14 days for the purpose of inquiring whether the detention remains necessary (clause 46(6));
- that detailed provisions should describe action to be taken following failure of the child to attend an assessment or a preliminary inquiry or to comply with diversion conditions (clauses 47, 48 and 49);
- that where the child has not been diverted or is intending to plead not guilty to the charge, the inquiry magistrate should finalise the preliminary inquiry and refer the matter to the prosecutor for the institution of charges in the proposed child justice court or other court (clause 50);
- that transfer of matters involving children to a Children’s Court inquiry under the Child Care Act, where such transfer is considered, should not be mandatory and that other measures in terms of the provisions of the proposed Bill may be considered (clause 51(3));
- that where a child is in need of care, as contemplated by the Child Care Act, he or she may be referred to the Children’s Court immediately after the assessment, or the matter may be converted to a children’s court inquiry at any time during the trial (clauses 29, 30, 31 and 51);
- the introduction of additional criteria⁷ which, in addition to the normal “child in need of care” test, indicate that a child must transferred to the Children’s Court unless substantial reasons exist for not doing so (clause 51(2)).

7 The criteria are as follows: more than one previous offence linked to poverty, the existence of a current order of the children’s court, drug or alcohol abuse or inadequate adult supervision.

Chapter 10: Court procedures

(Chapter 7 of the draft Bill)

The project committee recommends -

- the establishment of a court at district court level with a particular identity: the court should be less formal and less adversarial in style than a standard criminal court, and should involve active participation of all persons involved in the proceedings (clauses 53(7) and 59(3) of the draft Bill);
- that the ‘child justice court’ should be designated as such, and its personnel should be specially selected and trained (clause 53(5));
- that the child justice court should have an increased sentencing jurisdiction, at district court level, of five years imprisonment⁸ in order to enhance specialisation and minimise the referral of children to higher courts (clause 53(8));
- that the child justice court should not have jurisdiction to try cases where the charge is one of treason, murder or rape, or where the child is charged with any other offence and the likely sentence will exceed the jurisdiction of the child justice court, or where there are multiple charges and the court has jurisdiction with regard to one of the charges, or where there is an adult co-accused and an application for joinder of trials has been made (clauses 53 and 54);
- that the protections afforded children in terms of the proposed legislation should also apply to such children after referral to a higher court (clause 54);
- that, in the case of children co-accused with adults, the draft Bill should provide for the compulsory separation of trials, provided that any person involved in the proceedings may

8 On each count.

make an application for a joinder of the trials (clause 61).

Chapter 11: Sentencing

(Chapter 8 of the draft Bill)

The project committee recommends that -

- in the case of all sentences, save for petty offences listed in Schedule 1 to the proposed draft Bill, pre-sentence reports should be compulsory and should not be dispensed with unless a delay prejudicial to the child would be caused (clause 70 of the draft Bill);
- sentencing options available to presiding officers be delineated in much more detail than is the case at present and that the range of sentencing options be increased significantly (clauses 73, 74, 75, 76 and 77);
- evidence of previous diversion may be adduced after conviction, provided that such evidence may not be used in aggravation of sentence (clause 71);
- that the draft Bill should set out a list of sentences which do not involve a residential element, including the following (clause 73):
 - * compensation or restitution to victims where possible, or where no victim can be identified, the payment of a donation to a charity or community organisation, as well as symbolic restitution;
 - * a written or verbal apology to the victim;
 - * a number of orders which the court can make for a specified maximum period of time, namely a good behaviour order, a family time order, a compulsory school attendance order, a positive peer association order and a supervision and guidance order (the terms of these orders are defined by the Annexures to the draft Bill);
 - * a compulsory attendance order at a specified place for a specified vocational or educational purpose, with the maximum periods stipulated;
 - * supervised community service, with the maximum period specified in the draft Bill;

(xxix)

- any of the non-residential sentences may be suspended or postponed either unconditionally or subject to certain specified conditions (clause 74(3));
- the draft Bill should include a list of sentences with a restorative justice component, including victim-offender mediation, a family group conference or other restorative dispute resolution process, provided that decisions or agreements reached at such processes should be referred back to the child justice court for consideration in the setting of an appropriate sentence (clause 75);
- correctional supervision should be included in the sentencing options (clause 76);
- no sentence involving a residential element should be imposed on a child unless the presiding officer is satisfied (clause 77) that -
 - * the seriousness of the offence justifies such a sentence,
 - * the protection of the community requires such a sentence,
 - * the severity of the impact of the offence upon the victim was of such a magnitude that such a sentence is required,
 - * the child has previously failed to respond to non-residential alternatives;
- sentences involving a residential element should include referral to a programme with a periodic residence requirement and referral to a residential facility (a reform school or prison) (clause 77(3));
- a child may be sentenced to imprisonment as a sentence if he or she is 14 (or 16) years of age or above, and there are substantial and compelling reasons to impose such a sentence (clause 78(6));
- children sentenced to imprisonment should not be subjected to life imprisonment, and the total period of imprisonment should not exceed 15 years (clauses 78(9) and 80);

(xxx)

- no monetary penalty payable to the state may be imposed as a sentence on a child, with exceptions regarding restitution or the payment of compensation to victims or donations to charity organisations (clause 79).

Chapter 12: Review, appeal and monitoring systems

(Chapters 10 and 11 of the draft Bill)

The project committee recommends that -

- the conventional channels of appeal should apply in respect of convictions and sentences of the child justice court (clause 85 of the draft Bill);
- all sentences of the child justice court involving a residential component should be subject to an automatic review procedure (clause 86);
- the review procedure in so far as it relates to irregular proceedings and bias should be re-enacted in respect of proceedings of the child justice court (clause 87);
- provision be made for the creation of a child justice committee to be formed for each magisterial district with specific functions and duties (clause 91);
- monitoring of the legislation should be shared equally between the Departments of Justice and Welfare and Population Development and that an office, called the Office for Child Justice, should be established with joint representation to give effect to this proposal (clause 96);
- that a national committee for child justice be established at a national level with representatives from the Departments of Education, South African Police Services, Home Affairs and Correctional Services together with the Office for Child Justice so as to encompass all departments relevant to the monitoring of the implementation the proposed legislation (clause 99).

Chapter 13: Legal representation

(Chapter 9 of the draft Bill)

The project committee recommends that -

- children should be advised of their right to legal representation in language which they understand at the time of arrest or an alternative to arrest having been employed, by the probation officer at the time of the assessment, by an inquiry magistrate and by a child justice court magistrate (clause 82(2) of the draft Bill);
- if the child and his or her parent, guardian, family member or other suitable adult are willing and able to pay for such services, a legal representative of own choice may be employed (clause 82(3));
- after the finalisation of the preliminary inquiry, the child must be provided with legal representation under the auspices of the Legal Aid Board if the child is to be remanded in detention, or if charges are to be instituted in the child justice court (clause 82(9));
- a child should not be able to waive the right to legal representation in the situations mentioned in the paragraph above, except where the offence is an offence listed in Schedule 1 to the draft Bill, or where the child is in detention. In other situations, if the child refuses legal representation, a lawyer should still be appointed to attend the trial, address the court on the merits of the case and to note an appeal should this be necessary (clause 83);
- in order to maintain standards, provision should be made for a system of accreditation in terms of which lawyers may be accredited and placed on a “roster” by the Legal Aid Board (clause 84);
- principles to guide effective and appropriate legal representation should be embodied in the draft Bill (clause 81).

Chapter 14: Confidentiality and expungement of records

(Chapters 7 and 12 of the draft Bill)

The project committee recommends 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 and the privacy of criminal proceedings involving children be incorporated in similar form in the proposed draft Bill. (clause 66 of the draft Bill);
- an exception should be made in regard to access and publication of information pertaining to children accused of offences where it is sought by persons or organisations for bona fide research purposes (clause 66(3));
- as a general provision, previous convictions of the following offences may not be expunged (clause 101):
 - * 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 R50 000,
 - * any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

As far as the expungement of previous convictions other than convictions for the offences mentioned above is concerned, the project committee puts forward the following two options for consideration:

(xxxiii)

- A record of a conviction and sentence imposed upon a child could be automatically expunged after the expiration of a period of five years following the completion of the sentence, provided that person is not again convicted of any offence during the five year period.
- In cases where a sentence not involving a residential element has been imposed, the record of such sentence could be expunged after the expiration of a period of five years following the completion of the sentence, and in cases where a residential sentence has been imposed, the record could be expunged upon application⁹ after the expiration of a period of ten years after completion of the sentence. This option should also be subject to the requirement that the person is not again convicted during the relevant period.

9 The application should be made to the proposed national committee for child justice. If the committee decides to expunge the record, notice of such decision should be given to the South African Criminal Bureau so that the record can be expunged.

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 justice¹⁰ must be understood. By ratifying the Convention, South Africa is now obliged, in terms of article 40(3) thereof, to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. The Convention requires, in article 40(1), that "State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law, to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

1.2 A steering committee co-ordinated by the Deputy President's office 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 has 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 child 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 Paper¹¹ 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. A number of aspects were highlighted in the Issue Paper

10 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 "child justice system".

11 *Issue Paper 9.*

for discussion:

- * The inclusion of international principles on child justice in the body of the proposed legislation.
- * The possible adjustment of the minimum age at which a child may be prosecuted in the criminal justice system.
- * The provision of effective legal representation to children charged with offences.
- * Possible alternatives to arrest, and the involvement of families from the earliest moment after arrest.
- * Pre-trial release and alternatives.
- * Diversion options and restorative justice components, as well as decision-making about these options.
- * The structure of child justice courts - specialisation within the current structure, or a separate structure altogether.
- * Monitoring of a new child justice system.

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 questionnaire in plain terms which was distributed at the workshops and completed by the participants. In November 1997 the Commission hosted a well attended and vibrant international drafting conference in Gordon's Bay. 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 addition to the large number of completed questionnaires, a total of 25 written comments on the proposals and options put forward in the Issue Paper were received from individuals and organisations. The Commission wishes to express its gratitude towards all concerned who participated in the consultation process, and especially to the United Nations Crime Prevention and Criminal Justice Division, the United Nations Development Programme and UNICEF for their financial and technical support.

1.6 The project committee is of the view that, apart from the function of regulating the legal structure of the child justice system proposed in this Discussion Paper, the successful consultation process has demonstrated the necessity of emphasising the educative value of comprehensive legislation, which will be accessible not only to justice staff, but also to all those involved in the implementation of a new child justice system. The need for a coherent document, in which values and principles as well as the respective roles and functions of police, social workers and youth workers, correctional officials and justice staff are reflected, has informed the scope of the proposed legislation. The proposed draft Bill is reflected in Annexure A.

1.7 In compiling the Discussion Paper, the project committee had due regard to the views expressed by and comment received from a diversity of respondents.

General comments

1.8 Certain general comments were raised about the Issue Paper by some respondents. It is considered that these observations can best be dealt with at the outset.

Selection of foreign jurisdictions

1.9 Although the Issue Paper was not intended to contain a detailed comparative survey of the laws of international jurisdictions, certain references to other countries were made. One respondent, however, remarked that “to draw comparisons between our situation and those in countries such as Sweden, Uganda and Ghana etc are, with respect, unrealistic and irrelevant”. In targeting countries for purposes of a comparative survey in the Discussion Paper, the project committee - with due regard to criticism such as this - decided to focus upon New Zealand, Uganda and Scotland. Apart from the fact that all three countries have ratified the CRC, New Zealand and Scotland in particular have developed divergent child justice models which have both received praise internationally. The New Zealand model focuses to a large extent on criminal justice principles, whereas the Scottish approach is based exclusively on welfare principles. The two models thus offer a wealth of practical experience and an interesting perspective on the way in which the whole question of child justice may best be approached. In selecting Uganda the Commission, wanting to draw on examples in Africa, regards that country as having developed a child justice system that is both progressive and economical in terms of the country's infrastructural support system. Reforms in Uganda are also the most recent in Africa. Further substantiation of the Commission's reasoning in selecting the three relevant countries appears in Chapter 4.

A vision for the new child justice system

1.10 A number of responses to the Issue Paper indicated that there was a lack of vision or cohesiveness in the approach to children accused of crimes. The reason for an apparent lack of an over-arching vision was that the project committee presented the issues in an unbiased manner, encouraging the widest possible debate. This indeed is the Commission's usual style in the presentation of issue papers. The Discussion Paper, however, allows the project committee to present a vision, shaped by the responses to the original Issue Paper as well as by in depth and comparative research. The vision of the project committee is one of 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.

1.11 The court system proposed is not an entirely separate structure but rests instead on the notion of specialisation and training of personnel. An extended sentencing jurisdiction for this district level court aims to keep the majority of children within the ambit of a more specialised court, although transfer to higher courts is possible where it is necessary.

1.12 It is proposed that legal representation should be compulsory in matters where children are remanded in custody awaiting trial, and in all pleas or trials of a defined level of seriousness. 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.

1.13 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 criminal justice 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. A fuller account of the Commission’s vision is reflected in Chapter 3.

Prevention

1.14 Respondents commenting on the Issue Paper raised questions as to why the matter of prevention of crime was not fully canvassed. The project committee is of the view that prevention of crime, when dealing with children, is of particular importance. This is, however, a difficult issue to provide for in legislation, and the project committee was unable to find comparable concrete examples of child justice legislation which cover prevention in any detail. Understanding that poverty, the breakdown of family life, urbanisation and migrant labour have all been and continue to be key determinants in leading children into crime, it soon becomes clear that redress of these

problems is a broader objective with a wider target group than can possibly be reached by a piece of legislation dealing with the administration of child justice. There have been many policy documents which commit government to reprioritising the issue of crime prevention: the Redistribution and Development Programme, the National Crime Prevention Strategy, the Welfare White Paper, the Justice Vision 2000 document and the Interim Policy Recommendations of the Inter-Ministerial Committee on Young People at Risk are some examples. If government performs in terms of its own commitments in these documents, we should see a shift in practice over the next ten years towards prevention measures, with more resources - both human and financial - being spent in this area.

1.15 What the proposed legislation can and will do is to place great emphasis on early intervention measures. This means that once children have come to the attention of the authorities, they will be dealt with in a way which prevents them from going deeper into the system, and which will prevent them from committing crimes again. This is sometimes referred to as secondary prevention. Diversion is an early intervention measure, and the new child justice system will have several mechanisms built in to ensure that diversion is a measure of first resort. If a child acknowledges responsibility for the actions, he or she is likely to be diverted unless conditions exist which make this an inappropriate response - such as a very serious, violent offence or where the child has been diverted on more than one previous occasion and this way of dealing with him or her appears to have been ineffective. In fact the system will not rule out diversion as a possibility in any type of case, leaving the final decision in the discretion of the magistrate.

The rights of victims

1.16 Some respondents raised the criticism that the Issue Paper over-emphasised the rights of the offender at the expense of the rights of victims. In order to reflect more clearly the important role of the victim, the Issue Paper, the video referred to above, this Discussion Paper and the draft Bill make reference to restorative justice - a conceptualisation of justice which attempts to make the victim more centrally involved in the justice process. In the envisaged child justice system, one of the reasons why a court might postpone the decision to divert a child in a more serious case would be to find out what the victim's attitude would be to diversion. This is an important

acknowledgment of the role of the victim. The Discussion Paper does make the point, however, that refusal on the part of the victim to agree to diversion cannot be the final arbiter of whether or not a child should be diverted. The reason for this is that the system must be reasonably predictable and must be equally applicable to all children. Therefore, although the victim's views will be seriously considered in deciding whether or not to divert the more serious cases, the victim's anger cannot be a bar to the child receiving the opportunity of diversion, if the court is of the opinion that all other circumstances of the case indicate that the child would be a suitable candidate for diversion. What needs to be acknowledged is that different people respond very differently when they are victims of crime. The acuteness of their response, however, does not or should not deepen the gravity of the offence committed by the accused, unless the offender was aware of a particular vulnerability of the victim at the time of the crime - such as the fact that the victim was very young or very old.

1.17 It is in the diversion options themselves that the possibility of bringing the victim to the centre of the justice process really emerges. One of the diversion options listed is "referral to a family group conference or other restorative justice dispute resolution process."¹² In the cases of these options, victim agreement will be necessary. Victim participation is an important aspect of family group conferencing. This process, based on the New Zealand model and already being piloted in South Africa,¹³ is a decision-making forum in which the child offender (supported by his or her family) is brought face to face with the victim (who may also bring along a support person or persons). The victim is given an opportunity to talk about the impact of the crime on him or her, with the child and family then having to devise a plan to put things right. The plan can be of varying content, but often includes an apology, restitution to the victim, and restitution to the community such as community service. The plan should also include measures to prevent re-offending. New Zealand has shown higher victim satisfaction rates with family group conferencing than occurs with the mainstream criminal justice system. The impact on the child is often very powerful, as it forces him or her to face up to how the offending behaviour has affected others. Children are made to face up to the consequences and to participate in making decisions about how to make amends and stay out of trouble.

12 See par 8.43.

13 See par 2.21 for more detail.

1.18 The list of diversion options is flexible enough to allow victims who do not wish to have a face to face meeting with the child, to be able, nevertheless, to receive restitution from the child where this is possible and appropriate. The only exception to the rule is where the child is earning money from ordinary work or employment which could be paid in compensation to the victim for loss caused by his or her actions.

1.19 As regards sentencing, the concerns of victims are once again highlighted. Although the proposed draft Bill abolishes a fine as a sentencing option, it nevertheless retains the possibility of the child being able to pay compensation to the victim. The aim, once again, is to foster a sense of responsibility and respect for the rights of others.

The girl child

1.20 Comments were received to the effect that the girl child was not specifically mentioned in the Issue Paper. Very little research has been undertaken in South Africa with regard to the girl child as the accused in the criminal justice system. Figures obtained from the Durban Arrest, Reception and Referral Centre showed that only 300 out of 2 712 children charged with crimes in the period June 1996 to June 1997 were girls, and the majority of these were charged with theft. Cases where girls need to be held in secure accommodation either awaiting trial or as a sentence are extremely rare. The three reform schools for girls in South Africa have been receiving fewer and fewer girls from the criminal justice system in recent years, with the result that plans are under way for one of them, Ngwelezana Reform School in Kwa-Zulu Natal, to be converted into a place of safety for both sexes. Although these are positive factors in many ways, it does mean that when a girl is accused of a serious or violent crime and is assessed as needing to be held in a secure facility, the options will be limited, and in some provinces non-existent. This may result in girls under these albeit unusual circumstances being placed far away from home. Thus, although the law itself will not differentiate between male and female children accused of crimes, the infra-structural planning needed to underpin the system must take the needs of the girl child into consideration.

Traditional courts

1.21 The Discussion Paper does not tackle the issue of traditional courts. However, it is recognised that there are many children in South Africa who are dealt with through existing traditional courts. It is also recognised that the system does allow some flexibility, particularly with regard to diversion, where the referral of matters to alternative dispute resolution forums is made possible. Nevertheless, it is impossible and probably inadvisable to formalise such structures at this point. What the legislation proposed in this Discussion Paper does envisage, is that all children who pass through the traditional courts system should be dealt with in accordance with the principles set out in the beginning of the proposed draft Bill, and where children are diverted out of the system, they should be referred to relevant diversion programmes.

1.22 There is a need though, in the not too distant future, for a study into how this system could be harmonised with the child justice system being advocated in this Discussion Paper. Meanwhile, some training on children's rights for people involved in the operation of the traditional court system should be considered.

Format of Discussion Paper

1.23 After receiving feedback from stakeholders from various sectors, including magistrates, prosecutors and Attorneys-General, welfare officials, and Commissioners in the Children's Court system, the project committee has found it necessary to re-evaluate the order in which topics were raised in the Issue Paper, and to approach the system through which children accused of crimes will in future be dealt with from a more process-oriented stance. The adoption of this integrated approach, which looks at the various processes through which a child will be taken, and the role players who will be tasked with responsibilities in respect of each step, addresses concerns that were noted with regard to separating into different chapters matters such as release policy, diversion, and the role of courts. This former division, which was evident from the way in which chapters in the Issue Paper were arranged, separated questions on the pre-trial phase that can actually be linked, and did not provide a clear framework in which safety and security, welfare and justice staff who deal with children in conflict with the law would interact and be empowered to use diversion options to the maximum extent possible. Also, it tended to split up processes which

form part of a continuum in practice, and did not spell out a clear role for the Children's Court,¹⁴ which has (through research and practice)¹⁵ emerged as a key welfare structure necessary to underpin an effective children's justice model.

1.24 Therefore, the project committee has combined parts of the Issue Paper which deal with the process after arrest, in order to provide a comprehensive integrated framework for a new children's justice system.

1.25 Although it is considered to be more accessible, in dealing with a comparative survey of laws, to disperse such survey throughout the body of the Discussion Paper and to draw from the experience in other countries within relevant discussions, the Commission, as pointed out above, had particular reference to three main models of child justice - namely New Zealand, Uganda and Scotland. Dispersing the discussion of these models to correspond with the various comparable procedures and steps identified by the project committee and dealt with in this Discussion Paper, would, however, have the effect of making it difficult to retain a holistic view of each model in isolation. The project committee has therefore decided to devote a separate chapter to a comparative survey of laws, giving a rather comprehensive overview of the operation of each of the mentioned international child justice models. In the chapters that follow, reference to the three countries - and also to other systems as may be relevant - is made at appropriate places. The comparative survey is contained in Chapter 4.

14 Submission from Mr D Rothman, Children's Court Commissioner, Durban.

15 See Inter-Ministerial Committee on Young People at Risk *Report on the Durban Assessment, Reception and Referral Centre* 1997.

2. SITUATION ANALYSIS

History

2.1 During the 1970s and 1980s thousands of young people were detained in terms of the emergency regulations for political offences, causing a national and international outcry. At the time, political organisations, human rights lawyers and detainee support groups rallied to the assistance of many of these children. Their efforts centred on children involved in political activism, but during this period there were equally large numbers of children awaiting trial on crimes which were non political in nature but which could invariably be traced to the prevailing socio-economic ills caused by apartheid. There was no strategy to ensure that these youngsters were treated humanely and with adherence to just principles.¹ By the end of the 1980s the number of political detentions waned but the country's police cells and prisons continued to be occupied by large numbers of children caught up in the criminal justice system. The 1989 Harare International Children's Conference provided a springboard for the development of the child rights movement in South Africa.²

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

2.3 In 1992 the campaign "Justice for the Children: No Child Should be Caged" initiated by the Community Law Centre, Lawyers for Human Rights and NICRO, raised national and international awareness about young people in trouble with the law. The report called for the creation of a comprehensive juvenile justice system, for humane treatment of young people in conflict with the law, for diversion of minor offences away from the criminal justice system and for systems that

1 Juvenile Justice Drafting Consultancy *Juvenile Justice for South Africa - Proposals for Policy and Legislative Change* Cape Town: Allies Printers 1994, hereafter "*Juvenile Justice for South Africa*".

2 The conference resulted in the establishment of the National Commission on the Rights of the Child (hereafter referred to as "the NCRC").

humanised rather than brutalised young offenders.³

2.4 In 1992, a further initiative was launched by NICRO which was an important milestone in child justice history. NICRO decided to offer courts alternative diversion and sentencing options that aimed to promote the emerging restorative justice concepts specifically focussed on youth. With no enabling legislation in place, the diversion programmes and alternative sentencing options now offered by NICRO are widely accepted, are the subject of various Attorneys-General circulars and have been implemented in practice in most urban areas of the country. Muntingh, however, cautions that in the absence of clear guidelines concerning diversion and alternative sentencing, there are substantial inconsistencies and contradictions regarding the cases that are considered.⁴

2.5 In October 1992, thirteen year-old Neville Snyman was killed by his cell-mates in a Robertson police cell whilst awaiting trial on charges of housebreaking. He had allegedly broken into a store to steal sweets, cooldrinks and cigarettes. Neville's tragic death forced the realisation that effective and humane methods of dealing with children in the criminal justice system were imperative.⁵

2.6 In August of that year the television programme Agenda had highlighted the plight of young people awaiting trial in detention. The National Working Committee on Children in Detention was formed.⁶ The Lawyers for Human Rights 'Free a child for Christmas' campaign continued to put pressure on state departments and local "children in detention committees" to find effective ways to manage young people in trouble with the law. In 1993, at the International Seminar on 'Children in trouble with the law',⁷ a paper was presented⁸ which called for a comprehensive juvenile justice

3 *Juvenile Justice for South Africa* *op cit* at 3. In regard to policy change and transformation, see also S Robinson and L Biersteker (eds) *First Call: The South African Children's Budget* IDASA 1997 at 159 *et seq.*

4 Community Law Centre *Law, Practice and Policy: South African Juvenile Justice Today* University of the Western Cape 1995 at 64.

5 *Ibid* at 4.

6 By the Department of Welfare, chaired by Deputy Minister Glen Carelse.

7 Held by the Community Law Centre of the University of Western Cape in Cape Town from 15-17 October 1993.

8 By Ann Skelton entitled 'Raising ideas for a Juvenile Justice System'.

system. A drafting committee was set up following the conference, which led to the publication of *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* in 1994. The new vision needed to encompass the charging, arresting, diverting, trying and sentencing of young offenders in a system that would affirm the child's sense of dignity and worth and clearly define the role and responsibility of the police, prosecutors, probation officers and judicial officers with due regard to the rights of victims. In short, it needed to be innovative, inexpensive and creative.⁹ The proposals that were forwarded by the Drafting Consultancy suggest a system that would -

- * protect the rights of the young person and the victim, with direct restitution to the victim being a particular feature,
- * emphasise accountability, encouraging young persons to acknowledge and take responsibility for their offending behaviour,
- * encourage restorative justice and the resolution of conflict,
- * provide alternatives for every stage of the process - at arrest, pre-trial and at sentencing so that diversion becomes a central part of the proceedings.

Democratically elected government comes to power

2.7 South Africa's first democratic elections in April 1994 led to the instalment of the new government under the presidency of President Mandela. In many early speeches he highlighted the rights of children and in an address to parliament he said that "the government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we must proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders".

Constitutional developments

2.8 The birth of the new political era for South Africa brought constitutional guarantees for

⁹ *Juvenile Justice for South Africa op cit* at 5.

children in trouble with the law.¹⁰ The Constitution provides that children are not to be detained except as a measure of last resort in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be -

- (i) kept separately from detained persons over the age of 18 years; and
- (ii) treated in a manner and kept in conditions that take account of the child's age.¹¹

2.9 The Constitutional Court has also taken up the protection of child rights in the case of *S v Williams*¹² in which it held that whipping as a sentencing option was unconstitutional. The Beijing Rules¹³ were referred to in the papers before the Court.

2.10 South Africa's commitment to alleviate the plight of children within the criminal justice system was further endorsed by the ratification of the CRC on 16 June 1995. 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 - which is the reason for the establishment of the present project committee.

2.11 A clear shift in thinking has emerged over the past few years in the manner in which children are treated within the confines of the existing laws. There appears to be a clear recognition in some quarters that children do require special treatment. Various initiatives by both the NGO sector as well as certain government departments have already begun a loosely woven "alternative system" that aims to promote the child's sense of dignity and worth.

10 J Sloth-Nielsen 'The contribution of children's rights towards the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) *International Journal of Children's Rights* at 323 to 344.

11 Section 28(1)(g) of the Constitution of the Republic of South Africa 1996.

12 1995 (3) SA 632 (CC).

13 Discussed in Chapter 5.

New law on the detention of children awaiting trial

A ban on the detention of children awaiting trial

2.12 Campaigns by the NGO sector to advocate for the release of children from pre-trial detention culminated in the adoption of the Correctional Services Amendment Act 17 of 1994 to attempt to regulate the continued use of imprisonment for the pre-trial detention of children. In May 1995 the government acted on the President's earlier promise to 'empty the prisons of children'. The amendment to section 29 of the Correctional Services Act was put into operation. This amendment prevented the holding in police cells or prisons of children under 18 years for longer than 24 hours after arrest, with the proviso that children over 14 and under 18 charged with serious offences (which were listed in a schedule to the Act) could be held for a total of 48 hours after arrest. The aim of the legislation was that children should be sent home to await their trials no matter what the charge. Where this was not possible the Act provided that children should be accommodated at places of safety. Places of safety in South Africa are designed and run for the accommodation of children who are in need of care and protection. They are therefore not 'lock-ups' and the staff working in them were not trained to deal with children needing intensive management or containment.

Lack of inter-sectoral planning leads to crisis

2.13 Little had been done to develop the infrastructure needed to underpin this legislation, such as extra or differentiated places to hold children who could not go home, training and preparation of staff and other mechanisms to deal with the coming change. A crisis ensued in both places of safety and in the courts, as released children failed to return for trial. The situation was exacerbated by media reports of children running wild and attacking staff at places of safety. All this took place against a backdrop of spiralling public concern about the crime rate and intolerance of young offenders began to take the place of the sympathy which the public had previously shown.

2.14 Government acknowledged that an absence of inter-sectoral planning had led to the problems with the amendment. In response they set up an Inter-Ministerial Committee on Young

People at Risk which was to become an important location of policy development in the field of child justice in South Africa and which will be referred to later.

Revision of the ban on the detention of awaiting trial children

2.15 Pressure from the public as well as from criminal justice personnel forced government to revisit the amendment to section 29 of the Correctional Services Act. On 10 May 1996 the new amendment was published. The aim of the new section 29 was to allow for the holding of children over 14 and under 18 charged with serious offences to be held in prisons during the awaiting trial period. The temporary legislation (Act 14 of 1996) allowed for children between 14 and 18 years accused of murder, rape, robbery where the wielding of a firearm or any other dangerous weapon or the infliction of grievous bodily harm or when a dangerous wound was inflicted, assault of a sexual nature, kidnapping, any offence under any law relating to the illicit conveyance or supply of dependence producing drugs, and/or any conspiracy, incitement or attempt to commit any offence referred to in the schedule, to be held in prison on remand for a period not more than 14 days and only after oral evidence had been led to justify the detention in custody.

2.16 A serious loophole in the section is that the possibility of being detained is not confined to cases involving these scheduled offences. The Act provides that magistrates may detain a young person over 14 years if he or she has committed an offence referred to in the schedule *or any other offence of such a serious nature as to warrant the detention.*

2.17 The Correctional Services Amendment Act had a savings clause which states that the Act shall cease to have effect after a year or two years if Parliament extended its operation. Parliament did extend its operation. Due to a flaw in the savings clause section 29 did not fall away in May 1998 as expected. The necessary infrastructure was still not in place to provide places for children currently held in prison awaiting trial.

The Inter-Ministerial Committee on Young People at Risk

2.18 The crisis over the 1994 amendment to section 29 led to the establishment of the Inter-Ministerial Committee on Young People at Risk. The Inter-Ministerial Committee on Young People at Risk (hereafter “the IMC”) was established at the initiative of the Minister for Welfare and Population Development (then Deputy Minister) to manage the process of crisis intervention and transformation of the Child and Youth Care System over a limited time period. The Committee consisted of the Ministries of Welfare, Justice, Correctional Services, Safety and Security, Education, Health and the Reconstruction and Development Programme, as well as a number of national non-governmental organisations.

2.19 The IMC has since June 1996 set up seven pilot projects aimed at testing, in a practical way, key facets of both child justice models and transformation of aspects of the child and youth care system.¹⁴

2.20 Three of these projects are directly related to child justice and will be briefly discussed:

Family Group Conferencing

2.21 One of the key principles of the new paradigm shift endorsed by the IMC is that of restorative justice which proposes that “the approach to young people in trouble with the law should include: resolution of conflict, family and community involvement in decision making, diversion and community based interventions”. This project aimed to test family group conferences as an additional diversion process for children in trouble with the law. Family group conferences are based on the notion that traditionally families and communities dealt with offenders. Victims too need to have their story heard, and the wrong they feel needs to be acknowledged.

14 The seven projects are the following: The One-Stop Centre in Port Elizabeth; Family Group Conferences in Pretoria; Arrest, Reception and Referral Centre in Durban; the Family Preservation Project in Inanda; Alternatives in Residential Care in King Williams Town; Professional Foster Care in Northern Cape and the Hendrina Secure Care Programme in Mpumalanga.

The Arrest, Reception and Referral Centre

2.22 This centre was set up at the Durban Magistrates Court and aimed to provide social work assessment and intervention for every child under 18 years arrested in the Durban area. As the project is the longest running, initial statistics have already been collated that can be of assistance with future planning. It has emerged, for example, that:

- * only 12% of the children seen are under 14 years of age, whereas 52% are 16 or 17 years;
- * 88% of the children seen are boys;
- * of the just under 300 girls seen 83% were arrested for shoplifting;
- * 59% of the children seen were attending school, which indicates some stability in their backgrounds;
- * 53% of the children were arrested alone;
- * 30% of the children were arrested more than once.

2.23 The report indicates that certain problems exist in respect of:

- * lack of co-operation from the SAPS,
- * age assessment,
- * the lack of sufficient diversion programmes,
- * the lack of follow-up services after assessment.

2.24 The pilot phase of the project ended on 16 June 1997, but it was agreed with the Department of Welfare that the services should continue under the auspices of that Department.

The One Stop Youth Justice Centre

2.25 The centre realises the ideal scenario where all the services essential to the functioning of an efficient child justice system are housed in close proximity to each other. It houses a charge office, a juvenile court, as well as a probation section. Upon arrest the child is taken to the centre

where the assessment is conducted by a probation officer, the prosecutor consulted and the diversion plan formalised. An achievement was that the Minister of Justice proclaimed a court at the centre. This meant that children's cases could be dealt with away from ordinary criminal courts. The staff at the centre, recognising that the principles of restorative justice necessitate the involvement of the community, has drawn the community into the project. The probation officers, who were unable to themselves carry out the task of aftercare services as a result of the high case loads, have trained family finders to perform this essential service.

IMC Policy Development

2.26 The IMC has developed Interim Policy Recommendations setting out a framework for the transformation of the child and youth care system (including youth justice). This focuses on four levels at which transformation should be taking place. The first level is on prevention, which looks at community based programmes to prevent children from entering into the system. The second level is early intervention which stresses the importance of reception, assessment referral and diversion. The third level is the court statutory process where recommendations are made regarding both the children's court, the "juvenile court" and alternative sentencing measures. The fourth level is that of the continuum of care, which promotes the idea of children being placed in the least restrictive, most empowering option possible. Although the policy recommendations were "interim" in order to allow for information arising from the pilot project to be able to be written into the final policy, the Minister of Welfare has made it clear that the Interim Policy Recommendations are to be put into operation as far as is possible.

Promotion of an inter-sectoral approach

2.27 The IMC has played a crucial role in promoting an understanding of the importance of an inter-sectoral approach to children accused of crimes. What has emerged clearly is the importance of Welfare as a vital partner in the process of child justice - both because that Department runs the alternative facilities in which children can be accommodated and because of the role of probation officers, who are employed by the Department of Welfare.

Development of the role of the probation officer in the child justice system

2.28 Previously the role of the probation officer was generally relegated in practice to a pre-sentence report called for by the court after a child had been found guilty. In early experiments with assessment centres in the Western Cape the probation officers became central figures much sooner after arrest, assessing the child and making recommendations regarding diversion and placement of children. The IMC Policy developed the role of the probation officer and sparked a new movement for the training of existing probation officers and the appointment of additional ones. The IMC pilot projects relating to child justice reflected this increased role, earlier in the process, for the probation officer.

Alternatives residential facilities for children

2.29 The catalyst for the setting up of the IMC had been the problems which had occurred when, without proper inter-sectoral planning, children were suddenly no longer able to be held in prisons or police cells after their first appearance in court, and were required by law to be held in a place of safety if they could not go home. The linkages between the “juvenile justice system” and the residential care system had been little understood up to this time. The Department of Welfare is the department responsible for the administration of places of safety and children’s homes. Places of safety exist in terms of the Child Care Act and were always primarily aimed at the temporary accommodation of children in need of care (due to abuse or neglect). However, it had always been possible for these facilities to hold awaiting trial children and some of them specialised in this and were designated as “places of detention”. Places of safety are intended to accommodate children on a temporary basis only and cannot be a permanent placement option. Children’s homes are a placement option for children in need of care. Schools of industry and reform schools are administered by the Department of Education.¹⁵ A school of industry is a placement option arising from a Children’s Court inquiry for children who have been found to be in need of care. It is not a sentencing option. A reform school is a sentencing option for children and young people under the age of 21. However, reform schools are often a destination for children in the care system as

15 Except in KwaZulu/Natal where they are administered by the Department of Welfare and, in the case of Newcastle School of Industries, jointly administered by the Departments of Welfare and Education.

they can be referred to a reform school from another care placement through an administrative process in terms of the Child Care Act.¹⁶

2.30 In 1996 the IMC were requested by parliament to investigate the availability and suitability of places of safety, schools of industry and reform schools for the accommodation of children awaiting trial. The Committee found that although there were beds available in most of the facilities, they were unevenly spread throughout the provinces (for example six of the nine reform schools were found to be in the Western Cape). In addition the Committee uncovered serious human rights abuses including widespread use of isolation and physical punishment of children. In their report, the IMC declared the facilities to be unsuitable for the accommodation of awaiting trial children.

2.31 Prior to this investigation, the IMC had already identified “secure care facilities” as a new alternative to imprisonment for children requiring physical containment. A plan was developed with appropriate funding to provide for one secure care facility per province. These facilities fall under the Department of Welfare. The process of establishing the facilities is in place. At the time of the writing of this Discussion Paper, two secure care facilities have opened¹⁷ and the remaining seven are under way, all of which are planned to open during 1998 or 1999.

2.32 A difficulty which has yet to be effectively addressed with regard to the provision of secure care placements is the issue of geographical spread. One secure care facility per province, whilst certainly providing important infrastructure for the surrounding areas, will not solve the problem for magisterial districts which are far away from the secure care facility. For instance, the planned secure care facility in Port Elizabeth is 600 kilometres from the magisterial district of Kokstad. If a child is to be detained at such a facility, he or she will be very far away from his or her family. If he or she has a lawyer, consultation will be very difficult. For the police service in particular the distances will create substantial difficulties. The investigation may be hampered by this distance and if a child is required to come back to court for a remand, the police service will have to make

16 Section 34. This practice has been criticised by the IMC in its report entitled *In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* at 20, and in SA Law Commission ‘Review of the Child Care Act’ *Issue Paper 13*.

17 The Walter Sisulu Centre in Soweto and Excelsior in Pinetown near Durban.

available a vehicle and a police officer for a full day, as well as paying for the transportation costs. The long-term answer to these problems is probably to diversify existing facilities so that portions of such facilities can be upgraded and staff specially trained to care for children requiring secure care.

Project Go

2.33 During late 1997 and early 1998 the IMC spearheaded *Project Go* which aimed to assess all children in the residential care system, to ensure appropriate placements and to prepare for the movement of children from prisons into alternative facilities.

Other policy and practice developments relating to child justice issues

2.34 The *White Paper for Social Welfare*¹⁸ contains an in depth article with specific recommendations regarding child and juvenile offenders¹⁹ and echoes the provisions of the Constitution and the international instruments that children may only be held in custody as a last resort.²⁰

2.35 The *National Crime Prevention Strategy* is a further national policy document that recognises that children do not belong in the criminal justice system and details a programme for the diversion of minor offenders that will rehabilitate and re-integrate them back into society.²¹ The document requires the programme team to review diversion policy, draw up clear guidelines for diversion, conduct an audit of all existing diversion programmes, propose standardised procedures for referral and develop a mechanism for monitoring of diversion on a national basis.²²

18 *Government Gazette* 18166 of 8 August 1997.

19 Article 159 at 86.

20 *Ibid.* Article 161 at 87.

21 *National Crime Prevention Strategy* at 60.

22 *Ibid* at 61.

2.36 *Justice Vision 2000*, a policy and planning document of the Department of Justice, identifies juvenile justice as a premier project, the purpose of which is to create “a justice system that is sensitive and responsive to the needs of children whilst being effective. The idea is to ensure that, as far as possible, children are insulated from the mainstream justice system”.²³ A second premier project identified by *Justice Vision 2000* is that of juvenile diversion whose aim it is to divert cases of petty crimes and non-violent offences committed by juveniles away from the formal court system.²⁴ The document also sets out an action plan to review constitutional provisions with a view to establishing the extent to which they can accommodate inquisitorial proceedings in certain cases, especially petty crimes and crimes committed by juveniles.²⁵

Correctional Services

2.37 Correctional Services have been steadfast in their view that they would prefer not to house awaiting trial children. They have played an important role in the past few years by regularly providing statistics on children in prison.

2.38 With regard to sentenced children, however, the Department seems to be less clear about its role and vision with regard to child prisoners. In a recent study²⁶ conditions for children serving sentences in prison were revealed to fall short of international and national standards. The majority of children serving sentences in prison are receiving no education and few useful programmes exist. The Department has embarked on the construction of a series of Youth Correctional Facilities. These facilities aim at centralising large numbers of young people and providing education and skills training. However, initial indications are that these facilities are housing persons older than 21 years of age. A child cannot be sentenced directly to one of these facilities. Once sentenced to a sentence of imprisonment a child can be transferred to a Youth Correctional Facility by Correctional Services officials through an administrative process and this is an impediment to

23 *Justice Vision 2000 : And Justice for All* at 155.

24 *Ibid* at 156.

25 *Ibid* at 48.

26 Community Law Centre *Report on Children in Prison in South Africa: A Situational Analysis* UWC 1998.

effective use of these facilities.

The South African Law Commission

2.39 The Commission has already begun to work on various projects that give substance to the *Justice Vision 2000* document. The commitment of the Commission to the children of our country is demonstrated by the fact that there are currently three investigations relating specifically to child rights, as well as other investigations that impact on children who find themselves in trouble with the law. The three investigations that deal directly with issues involving children are:

- * Project 107 - Sexual offences against children;
- * Project 106 - Juvenile justice
- * Project 110 - Revision of the Child Care Act

2.40 The work of the committees of projects 106 and 110 are inter-related and each will have to keep abreast with reforms suggested by the other.

2.41 Another project that will have an impact on children in trouble with the law is:

- * Project 94 - Arbitration. The investigation into the establishment of community courts will give impetus to the restorative justice principle of including community participation in resolving cases where the accused is a child.

2.42 Other projects that are aimed at improving the social and economic status of women will invariably impact on the lives of children as greater numbers of children are from single parent households. These include:

- * Project 100 - Family law and the law of persons which includes investigations into domestic violence and maintenance;
- * Project 85 - Aspects of the law relating to AIDS.
- * Project 82 - Sentencing

2.43 Therefore this Discussion Paper (including the proposed legislation) starts from the recognition of the need for a “system”, embodies a cohesive approach and vision, gives life to policy proposals and builds on successful practices identified by the various pilot projects, and endorses and enacts common law provisions developed by the courts.

Current South African legislation

2.44 In past decades, there was no real “system” to manage young people in trouble with the law.²⁷ Children were absorbed into the mainstream criminal justice system by the operation of four different pieces of legislation, namely, the Criminal Procedure Act 51 of 1977, the Correctional Services Act 8 of 1959, the Child Care Act 74 of 1983 and the Probation Services Act 116 of 1991.

The Criminal Procedure Act 51 of 1977

2.45 There are various provisions of this Act that impact on the manner in which children are treated in the criminal justice system. There are also provisions that, although seldom used, allow the state officials the latitude to operate within the framework of the CRC when dealing with children accused of crimes.

2.46 In terms of section 50(5), the police have to notify a probation officer when a child is arrested.²⁸ The inconsistency of the Act in respect of exactly whose responsibility it is to notify the parents or guardian of the arrest of a person under eighteen has resulted in this function being totally neglected. Section 50(4) places the responsibility of notifying the parent or guardian with the *investigating* officer whilst section 74(2) requires the *arresting* officer to inform the parent or guardian of the time, date and court where the accused is to appear. In practice, the investigating officer and the arresting officer rely on each other to carry out this task with the result that very often children have to be detained because the police have failed to notify the parents or guardian

27 A Skelton ‘Juvenile justice system for South Africa’; P Singh ‘Some considerations for the future of Juvenile Justice in South Africa’ in Community Law Centre *Report of the International Seminar on “Children in Trouble with the Law”* 1993 at 41 *et seq* and 81 *et seq*.

28 In the absence of a probation officer an available correctional official must be notified.

of the child's first appearance in court.

2.47 The Act does not contain provisions which specifically relate to the arrest of children. The Act provides the police with alternative methods of securing the attendance of children in court. Section 54 makes provision for the use of a summons and section 56 for the issue of a written notice to appear in court.

2.48 The Act also provides, in section 73(2), for the assistance of an accused under 18 years by his or her parent or guardian in criminal proceedings. In addition section 73(1) provides for the entitlement to a legal representative. Section 153(4) of the Act guarantees that where any accused in criminal proceedings is under the age of 18 years, such proceedings shall be held in camera.

2.49 The Act provides for a range of sentences²⁹ which may be imposed upon children (or those who, at the time of the commission of the offence, were below the age of 18). These options are discussed in Chapter 11 (Sentencing).

2.50 Section 254 of the Act makes provision for a trial court to convert the proceedings to a Children's Court inquiry if it appears to the court that the child is a child referred to in terms of section 14(4) of the Child Care Act 1983. Even after conviction a court may upon the same reasoning refer the matter to the Children's Court, in which case the verdict of the court referring the matter shall be deemed not to have been returned.

2.51 Section 337 of the Act grants the presiding officer the authority to estimate the age of the child if in any criminal proceedings the age of that person is a relevant fact of which no or insufficient evidence is available.

The Child Care Act 74 of 1983

2.52 The Children's Court is a creation of the Child Care Act and as such does not form part of the criminal justice system. There are however a number of overlaps with the criminal justice

29 Sections 297, 276 and 290.

process - for example, every magistrate is automatically a Commissioner of Child Welfare in terms of section 6 of the Child Care Act.

2.53 Section 11 of the Act provides that if it appears to a magistrate during the course of proceedings or on the grounds of any information given under oath that the child does not have a parent or guardian or that it would be in the interest of the safety or welfare of the child to be taken to a place of safety, the magistrate may order that the child be taken to a place of safety and brought as soon as possible before a Children's Court.

2.54 After holding an inquiry in terms of section 13, the court may order a range of outcomes which include:

- * return of the child to a parent or guardian under the supervision of a social worker;
- * placement of the child in a foster home;
- * sending the child to a school of industries;
- * placement in a children's home.³⁰

2.55 Once a child has been ordered to a place of safety, children's home or place of care, the Child Care Act determines issues around the child's maintenance,³¹ medical treatment of the child,³² custody of the child,³³ leave of absence from the institution,³⁴ and the abscondment of the child.³⁵

The Correctional Services Act 8 of 1959

2.56 The present Correctional Services Act defines a juvenile as a person under the age of 21 years. Within departmental practice, however, the category "child" has now been recognised as

30 Section 15.
 31 Section 41.
 32 Section 39.
 33 Section 33.
 34 Section 35.
 35 Section 38.

distinct from “juvenile” and children are those under the age of 18. In the new Correctional Services Bill 65 of 1998 a definition of child has been incorporated and the age limit of 18 is used. No definition of juvenile or youth has been included. Section 29 of the Act has been the centre of much controversy and debate since 1994 as discussed above.

2.57 Despite the fact that our law does not have a separate child justice system, children have always been treated differently from adults. South African common law has special provisions in respect of the criminal capacity of children. Children under the age of 7 years are said to be *doli incapax*. This is an irrebuttable legal presumption which declares that no child under the age of 7 years is capable of forming the intention to commit a crime. A child over the age of 7 years but under the age of 14 is presumed to lack criminal capacity until the contrary is proved. In other words the child between 7 and 14 is also presumed to be *doli incapax* but here the presumption can be rebutted by the State.³⁶ A further indicator that children warranted special treatment can be seen from the rule that the youthful age of an offender is an important mitigating factor to be considered in passing sentence. There is a clear policy being developed that sentencing options other than imprisonment should be considered for children under 18 years. South African courts have also begun a trend of requesting a mandatory pre-sentence report before a custodial sentence can be imposed.³⁷

36 A Skelton *Children in trouble with the Law: A Practical Guide* Lawyers for Human Rights 1993 at 4 - 5.

37 *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).

CHAPTER 3: OVERVIEW OF PROPOSED CHILD JUSTICE SYSTEM

3.1 The vision for the child justice system proposed in this Discussion Paper is derived from five interlocking concerns and ideas, which are described here in order to give an overall understanding of the proposed child justice system.

(i) Commitment to international human rights and constitutional principles

3.2 The first important feature of the proposals of the project committee is derived from a commitment to international human rights and constitutional principles and especially those applicable to the field of child justice. Therefore, as proposed in the Issue Paper, and with widespread support from respondents, the draft Bill proposed by the project committee contains a comprehensive body of principles, both general principles and principles applicable to specific powers and duties, to regulate and guide those who will be tasked with the implementation of this legislation in the future. Of special note is the emphasis at all stages of the child justice process on diversion, linked with accountability, and on restorative justice principles. Also, a framework for the provision of options and opportunities for the development of restorative justice practices is envisaged. The proposed Bill emphasises the protection of a child's due process rights.

(ii) Duties and responsibilities

3.3 In the proposed Bill, the project committee has conceptualised a model of child justice in which duties and responsibilities of those who will implement the system are clearly spelt out, in plain language, and which addresses difficulties caused in the past by the fragmentation of legislation affecting children in trouble with the law. The fact that officials and service providers from a range of disciplines and government departments are affected by the proposed legislation has led the project committee to propose a draft Bill in respect of which the police, prosecutors, probation officers, magistrates and those who offer diversion programmes can identify the powers, duties, role and envisaged expectations for that particular sector or group of state officials within the legislation itself. In addition, as far as possible, the duties and powers in respect of each of the above-mentioned role players have been dealt with as comprehensively as possible in one place in

the proposed legislation. This has been done in an attempt to facilitate training of those concerned with its eventual implementation, and for ease of reference for decision-makers who are not legally trained. Further, instead of opting for detailed regulations to the legislation in order to guide those involved in decision-making, the project committee has proposed a far more practicable system centred around the actual forms that have to be completed in respect of a particular duty, referral or setting of a particular condition. The use of forms is well known to police and welfare officials,¹ and forms have the advantage of being an inexpensive vehicle with which to implement legislation. This can promote uniformity and proper standards in the implementation of child justice, and is more accessible than regulations.

(iii) Specialisation

3.4 The project committee has proposed a system which aims to encourage a substantial degree of specialisation in child justice practice. In so doing, the project committee is giving effect to a long standing call from service providers and non-governmental organisations for a distinct and unique system of criminal justice that treats children differently, in a manner appropriate to their age and level of maturity, and which develops institutions and systems designed to achieve that goal.

3.5 Thus the project committee proposes a specialised child justice court at the district court level, with increased sentencing jurisdiction so as to draw cases within its ambit that would otherwise be scattered amongst higher courts. Further, specialisation in relation to the role of the probation officer builds on practical developments in the field of child justice since 1994. Assessment centres have been established, probation officers appointed and trained in many provinces, and different models of intervention tested. It has become increasingly clear that probation officers will be vital to the future child justice system, and this notion accords with views expressed by policy-makers as well as with the views of probation workers concerning their own conceptualisation of their duties in a future child justice system.

3.6 Some degree of specialisation is also proposed in the area of legal representation, as

1 See for example, the forms attached to the Child Care Act 74 of 1983.

advocacy for children entails a heightened responsibility and commitment to serve the best interests of children, as well as an ability to communicate at a level that a child can understand. And, whilst this may appear to be a more feasible proposition in large urban jurisdictions, the requirement that legal representatives who act on legal aid briefs first indicate their interest in child advocacy before being appointed to serve as legal representatives is, in the view of the Commission, an achievable goal in more rural areas as well. Further, the level of specialisation of legal representation envisaged in the draft Bill is flexible enough to provide for both urban and rural areas.

3.7 Requiring a degree of specialisation amongst legal representatives through registration provides the added benefit of identifying a pool of private sector lawyers who can receive ongoing information and training regarding the development of child justice in South Africa.

(iv) Proposed preliminary inquiry

3.8 The proposed child justice system hinges on a new process which aims to address effectively the problems that have been experienced in the administration of child justice, particularly in relation to diversion and pre-trial release of children from custody. This is the insertion of the proposed preliminary inquiry as a compulsory pre-trial procedure. Diversion has until now depended entirely on the co-operation of individual prosecutors and the availability of formal programmes offered by NICRO. However, the project committee is of the view that a formal step, prior to charge and plea, needed to be developed in order to ensure the expansion of diversion, promotion of restorative justice and alternative dispute resolution mechanisms, as well as a diminution in the use of pre-trial custody especially where children are involved in the commission of less serious offences. The preliminary inquiry, presided over by a magistrate with broad powers to promote the maximum use of available diversion opportunities, is the culmination of such an approach.

3.9 The examination of child justice models from foreign jurisdictions supports the idea that successful child justice systems are characterised by distinct features which enable the relevant system to be identified as a specific integrated model. The project committee proposes an indigenous model which builds on existing strengths and available human resources in South Africa.

In particular, the idea of the preliminary inquiry is bolstered by the fact that South Africa can draw on the present pool of magistrates, inviting those interested in specialising in child justice and possibly other child related matters² to acquire expertise in the administration of child justice. The experiences of some of the youth justice pilot projects³ suggest that there may be a significant body of magistrates interested in taking forward the notion of a specialised judicial officer.

(v) A dynamic and developing child justice system

3.10 The project committee has adopted a framework in the proposed Bill in which the spotlight falls on a dynamic and developing child justice system. As the history of child justice in South Africa since 1994 has demonstrated, the field as a whole has been characterised by an almost exclusive concentration by law makers, the public and the press on the position of awaiting trial children in prison. There have been, in the experience of successive legislative amendments to section 29 of the Correctional Services Act 8 of 1959 (the relevant current legislation dealing with the position of children awaiting trial in prison) both failures and gains, which have contributed valuable experiences to inform this law reform process.

3.11 Despite the fact that several changes to the legislation pertaining to pre-trial detention of children had to be effected between 1994 and 1998, the fact that the numbers of children awaiting trial have not decreased significantly, and that there has been a hardening of attitudes in some quarters to the plight of children charged with criminal offences, there have nevertheless been positive lessons for this law reform process. One such lesson has been the realisation that because child justice depends on inter-sectoral and inter-departmental responsibilities, the system as a whole needs to be addressed and therefore that piece-meal reforms which tinker with only one part of the process are unlikely to succeed. This has influenced in no small measure the present proposals for a new child justice system. These proposals strive to encompass a vision for, and define the characteristics of a coherent and self contained child justice **system**, as distinct from a series of procedural provisions which spell out powers and duties for various role-players who can

2 It is possible that expertise gained in the administration of child justice would constitute the type of experience that would be valuable to personnel working in the proposed family courts.

3 *IMC Report on the Pilot Projects* 1998.

nevertheless operate in isolation from one another.

3.12 In addition, practical monitoring of the application of the recent legislation affecting awaiting trial children in prison has clearly demonstrated that the concentration of efforts should be directed at the crucial pre-trial phase, before a child is remanded for trial, and before a decision is taken to remand that child in custody. It has proved extremely difficult to get children out of the system (and prison in particular) once they are in it. This knowledge gave rise to the proposal of a preliminary inquiry designed to place the weight of effort of the child justice system at a point before which unnecessary court time is wasted.

3.13 A further benefit derived from the apparent failures of the recent law reform process in this field is that the release of awaiting trial children in 1995 has revealed the dearth of facilities and programmes required to underpin a model child justice system. Moreover, regional disparities in the availability of places of safety, reform schools and NICRO branch offices and the availability of probation workers, have become starkly apparent. Even when the government's secure care plan is fully in place, in most provinces there will still be only one secure care facility, and this may be several hundred kilometres away from the trial court, due to vast geographical distances.

3.14 The proposed child justice system therefore needs to be flexible enough to accommodate provincial and regional differences, and this has influenced some of the proposals contained in the draft legislation, as it may be unwise to include proposals which cannot be implemented at provincial and local level. Therefore, although it would be desirable to provide in legislation that no child may be detained in a prison while awaiting trial, the project committee is of the view that this may not yet be achievable in South Africa, although it may become possible in future as more facilities become available, and if diversion is implemented more successfully, and on a larger scale.

3.15 The project committee is mindful of the fact that accurate statistical information on (for example) the total number of children who come into conflict with the law every year, or are arrested, is at present still not available. Where possible, local and regional statistics have been used in this Discussion Paper to illustrate points raised, but the system proposed in the draft Bill would be enhanced if comprehensive statistical information was available.

3.16 A substantial development during the period of operation of the IMC has been the increased inter-sectoral collaboration, which has furthered the understanding of child justice as an area in which responsibility for implementation is shared by a range of sectors. Therefore, the monitoring system proposed in the legislation introduces a formal arrangement encapsulating this notion of joint responsibility for implementation and monitoring. Also, the crises surrounding the release of children from prison in 1995 has led to the development of probation services in all provinces, to the building of secure care facilities, and a comprehensive review of residential care facilities which link child justice to the welfare and education systems.

3.17 The most important gain, however, has been the realisation that a principled and workable child justice system is not achievable at the stroke of a pen. The development of diversion programmes and specialisation is a longer term ideal which will continue to evolve over a period of time, and therefore a legislative framework is required in which this dynamism and progression can occur. For this reason too, the processes and administration of child justice should be under continuous scrutiny, to ensure that the necessary developments do take place to further the application of the principles and philosophy enshrined in the proposed Bill.

4. COMPARATIVE SURVEY

New Zealand

Introduction

4.1 New Zealand can be regarded as a suitable example for purposes of comparison in that, apart from this country's highly acclaimed innovative approach to resolving the issue of children in conflict with the law, the population is made up of a number of different ethnic groups. The majority of people in New Zealand are of European descent (known as the Pakeha) and constitute more than 80% of the child population. Maori make up around 12% and Pacific Island Polynesians 4% of the child population. Yet, despite the relatively low representation of the latter two ethnic groups, they are over-represented in various indices of social and economic deprivation with higher infant mortality rates, lower life expectancy rates, higher unemployment rates and lower incomes than the dominant Pakeha group. Amongst the known child offender population (statistics applicable in 1993), 43% were described as Maori.¹ The New Zealand approach recognised this imbalance and responded to it by attempting to incorporate traditional, extended family decision-making methods for the resolution of conflict. This approach, documented by the Children, Young Persons and Their Family's Act of 1989, has been labelled as an example of a reasoned approach transforming the law in a way that has made it responsive to the needs of child offenders, their families and communities.² The legislation contemplates the separation of welfare issues from justice issues and the meting out of justice through consensus by involving family members and outside agencies that can offer real rehabilitation alternatives, rather than heavy-handed government intervention. The majority of children are diverted from criminal courts and custodial institutions.³

Principles

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- 1 G M 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 3.
 - 2 L Palme 'No age of innocence: Justice for children' (1997) *The Progress of Nations* at 53.
 - 3 *Ibid.*

4.2 The incorporation of general principles, such as those found in various international instruments, within legislation and the consequent enactment of such principles can be considered to be novel in the sense that it deviates from the traditional and historical mould of legislation. According to a New Zealand report entitled *Family, Victims and Culture: Youth Justice in New Zealand*,⁴ the Children, Young Persons and Their Families Act 1989 (hereafter "the Act") was probably unprecedented in the English speaking world in setting out in statutory form not only its objectives but also a comprehensive set of general principles which govern both state intervention in the lives of children and young people and the management of the youth justice system. The objectives, found in section 4 of the Act, aim to -

- promote the well-being of children, young people and their families and family groups by providing services which are appropriate to cultural needs, accessible and provided by persons and organisations sensitive to cultural perspectives and aspirations,
- assist families and kinship groups in caring for their children and young people,
- assist children, young people and their families when the relationship between them is disrupted,
- provide protection for children and young people,
- ensure that young offenders are held accountable for their actions,
- deal with children and young people who commit offences in a way that acknowledges their needs and enhances their development,
- promote co-operation between organisations providing services for children, young people, families and family groups.

4 *Op cit.*

4.3 In addition to a series of general principles found in sections 5, 6 and 13 of the Act, specific principles governing the youth justice sections⁵ are contained in section 208. These principles emphasise that -

- criminal proceedings should not be used if there is an alternative means of dealing with the matter,
- criminal proceedings should not be used solely in order to obtain welfare assistance for a child, young person and his or her family,
- measures to deal with offending should strengthen the family, extended family, clan, tribe and family group and foster their ability to deal with offending by their children and young people,
- young people should be kept in the community,
- age is a mitigating factor,
- sanctions should be the least restrictive possible and should promote the development of the child in the family,
- due regard should be given to the interests of the victim,
- the child or young person is entitled to special protection during any investigation or proceedings.

4.4 Any decision, recommendation or plan by a family group conference⁶ has to be consistent with the principles outlined above for it to be implemented.

5 The New Zealand Act covers both care proceedings and youth justice.

6 See par 4.15 for a discussion of family group conferences.

Age and criminal responsibility

4.5 In the Act ‘child’ refers to a boy or girl under the age of 14 years, whereas ‘young person’ means a boy or girl of over the age of 14 years but under 17 years (excluding any boy or girl who is or has been married).⁷

4.6 The Act provides that only young persons between the ages of 14 and 17 can be charged in the Youth Court, while children who offend when aged at least 10 years and under 14 years have to be referred to family group conferences in either the care and protection or the youth justice section of the Act. The implication is that children under the age of 10 are not considered to be criminally accountable, and that children under the age of 14 (*ie* the 10 - 13 year old category) cannot be prosecuted except for the offences of murder and manslaughter.

4.7 In respect of age determination, the Act does not go into detail as regards the nature of the evidence required to prove a child or young person’s age when in question. Section 441 of the Act merely empowers courts, in the absence of sufficient evidence, to fix the age of the child or young person which age is then regarded as the person’s true age.

Police powers and duties

4.8 The intention underlying the Act is to encourage the police to adopt 'low key' responses to child offending except where the nature and circumstances of the offence require stronger measures to protect the safety of the public.⁸ Section 214 of the Act justifies an arrest (without warrant) only if the arrest is necessary to ensure the child’s appearance in court, to prevent the commission of further offences, or to prevent the loss or destruction of evidence or interference with witnesses. A child may further be arrested without warrant if he or she has committed a purely indictable offence (murder and manslaughter) or if it is believed that the arrest is required in the public

7 Although the New Zealand Act draws a distinction between child and young person, the term “child” or “children” will be used throughout this document to indicate persons under the age of 18 years. Where, under further discussions of New Zealand legislation the term “child” or “children” is used, such term should hence not be regarded as limiting children to those under the age of 14 years.

8 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 8.

interest.

4.9 After arrest the police may release the child on bail (if eligible) or may deliver the child into the custody of a parent, guardian or other responsible authority or person.⁹ If, however, it is believed that the child is not likely to appear before the court, or may commit further offences, or may lose or destroy evidence or interfere with witnesses, the police have to place the child in the custody of the Director-General of the Department of Social Welfare within 24 hours after the arrest.

4.10 As an alternative to arrest the police may consider merely warning the child, unless this is clearly inappropriate with regard to the seriousness of the offence and the number of previous offences committed by the child.¹⁰ The child may also be taken to an enforcement agency office¹¹ for questioning - where he or she may ultimately be arrested and charged. In such an event the police has to inform the child of his or her rights before questioning. These rights include the right not to accompany the officer to the station unless arrested, the right not to make a statement, the right to consult a lawyer and the right to have a person of his or her choice present when any statement is taken.¹² Section 229 of the Act imposes a duty upon enforcement officers¹³ to notify any person nominated by a child held at an enforcement agency office of that fact and, if that person is not the parent or guardian of the child, or if the child refuses to nominate a person, to notify the parent, guardian or other person having care of the child.

4.11 The police may also issue a formal police caution if a family group conference¹⁴ has recommended that a caution should be given, in which case the caution is given at a police station by a member of the police with the rank of sergeant and above in the presence of the child's parent, guardian, custodian or an adult person nominated by the child.

9 Section 234 of the Act.

10 Section 209 of the Act.

11 This includes a police station and any premises occupied by any State Department or local authority.

12 Section 215 of the Act.

13 In terms of section 2 of the Act enforcement officers include members of the police, traffic officers and other persons whose official duties entail the detection, investigation or prosecution of offences.

14 Discussed in par 4.18.

4.12 Although it does not appear to have been formalised in the Act, there is another procedure by which the police, in lieu of arresting a child in circumstances where further action is deemed necessary, can refer the child to the police Youth Aid section. The New Zealand police have a separate section, called Youth Aid, with a special role regarding child offenders.¹⁵ Each police station has at least one Youth Aid officer who is expected to work preventively in conjunction with the local community and reactively in dealing with cases of child offending. The Youth Aid section has a certain responsibility for deciding the outcome of non-arrest cases involving child offenders. The options are relatively straightforward - the offender may be warned, with or without the addition of informal sanctions, or referred for a family group conference.¹⁶ Informal sanctions may include an apology, reparation, community work, counselling and so forth. Young people are therefore only arrested in certain defined circumstances or for very serious offences.

4.13 An arrested child may be detained in police custody for a period exceeding 24 hours and until court appearance if a senior social worker and a member of the police - who is at least a senior sergeant or a commissioned officer - are satisfied that the child is likely to abscond or be violent, and that suitable facilities for the detention in safe custody of the child are not available to the Director-General of Social Welfare.¹⁷

Diversion

4.14 Reference was made above to limited diversion options that can be exercised by the police (such as warning the child or referring him or her to the Youth Aid section). In cases where the Youth Aid section, which section may also divert cases away from the criminal justice system on a limited basis,¹⁸ finds that action beyond the purview of their powers is required, the child - who at this stage has not been arrested - has to be referred to the Youth Justice Co-ordinator.¹⁹ Youth

15 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 56. Also see T Steward in J Hudson, A Morris, G Maxwell and B Galloway (eds) *Family Group Conferences: Perspectives on Policy and Practice* The Federal Press 1996 at 69 - 70.

16 *Ibid.*

17 Section 236 of the Act.

18 See par 4.12.

19 In compliance with section 245 of the Act.

Justice Co-ordinators²⁰ have the responsibility of negotiating with the police to divert children themselves rather than arrange a family group conference, unless the offence is moderately serious or because of previous offending.²¹

4.15 The family group conference lies at the heart of the novel procedure evolved by the Act.²² Its primary aim is to operate as a diversion mechanism and thus to avoid prosecution, and also to serve as a forum for determining how children who commit offences should be dealt with by also engaging the offender's family, the community and the victim. Family group conferences have to be held where a child is not yet arrested but prosecution is contemplated, and also where a child is arrested and brought before the Youth Court. In the latter instance, unless the child denies the charge, or unless he or she has been arrested for murder, manslaughter or a traffic offence not punishable by imprisonment, the Court does not enter a plea but adjourns the proceedings until the family group conference has been held.²³ A family group conference is not required in the following cases:²⁴

- Where the offence has been committed on a date prior to the date on which the child was convicted and sentenced in the High Court or District Court;
- where the Youth Court made an order in respect of the child for any other offence;
- where the child is subject to a full-time custodial sentence or a community-based sentence; and
- where a Youth Justice Co-ordinator and the child's family hold the view that a family group conference would serve no useful purpose.

4.16 Family group conferences are perceived as a 'second tier' diversion option, as first tier diversion takes place through the police or Youth Aid section. It is thus used in moderately serious

20 They come from a range of backgrounds, eg social services, probation and the prison system.

21 *Family, Victims and Culture: Youth Justice in New Zealand* *op cit* at 10.

22 See in general G Maxwell and A Morris 'The New Zealand Model of Family Group Conferences' in C Alder & J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Canberra: Australian Institute of Criminology 1994 at 15 - 43.

23 Section 246 of the Act.

24 Section 248 of the Act.

cases. It is important to note that diversion can only take place successfully if the child acknowledges responsibility. The jurisdiction of the family group conference is limited to the disposition of cases where the child has not denied the alleged offence.²⁵ Diversion to a family group conference can, however, take place in the case of a denial if the charge against the child has been proved in the Youth Court. The family group conference would then consider ways in which the court might deal with the child.²⁶ The implication therefore is that diversion in New Zealand is not limited to the pre-trial stage, but may still be an option after the child has been found guilty. In fact, an amendment to the Act in 1994 now makes it possible for the Court to direct the holding of a family group conference at any stage of the hearing of any criminal proceedings involving children.²⁷

4.17 The family group conference is made up of the child, his or her lawyer if one has been arranged, members of the family, extended family, clan, tribe or family group, the victim(s) or their representative including the victim's family and supporters, the police, the Youth Justice Co-ordinator and a social worker in cases where the Department of Social Welfare has had a statutory role in relation to the custody, guardianship and supervision of the child.²⁸ Certain time limits for convening a family group conference are also prescribed in section 249 of the Act. Where a child is in custody, the conference must be convened within 7 days to consider placement; where the Court requests a conference to be held, it must be convened within 14 days; and where the Youth Justice Co-ordinator - whose responsibility it is to convene the conference - receives notification of an intended prosecution of a child who has not been arrested or a child aged 10 - 13 who is alleged to be in need of care and protection by virtue of his or her offending, the conference must be convened within 21 days of that notification. The family group conferences also have to be completed within certain time frames, ranging from 7 days to one month after they have been convened, depending on the origin of the conference.

25 Section 259 of the Act; also see *Family, Victims and Culture: Youth Justice in New Zealand* *op cit* at 10.

26 Section 247(e) of the Act.

27 Section 281B of the Act.

28 Section 251 of the Act, as amended.

4.18 It is the family group conference's responsibility to formulate a plan for the child or to make such decisions and recommendations as it deems fit. In cases where the conference is convened after consultation between the police's Youth Aid section and the Youth Justice Co-ordinator (implying that the child has not been arrested and therefore has not yet appeared in court), the family group conference *inter alia* has to ascertain whether the child admits the offence and consider whether the child should be prosecuted for the offence. If it is resolved that prosecution is not called for, the conference, having the power to make broad recommendations,²⁹ may recommend to the relevant enforcement agency other ways of dealing with the offence. The range of possibilities here cover ways of repaying the victim and the community, penalties for misbehaviour and plans designed to reduce the chances of re-offending. According to the report on *Family, Victims and Culture: Youth Justice in New Zealand*,³⁰ the exact details are limited only by the imagination of the parties. Common options apparently include an apology, reparation, work for the victim or the community, donations to charity, restrictions on liberty such as a curfew or grounding and programmes of counselling or training. If the conference is held pursuant to the Court's direction, it has the responsibility again for formulating a plan for the child or making such recommendations as it sees fit. The recommendations in this case are directed to the Court who is obliged to consider them.

4.19 It is the duty of the Youth Justice Co-ordinator to record the decisions, recommendations and plans of the family group conference and to secure agreement with those actions by persons, such as enforcement officers and others who will be directly involved in the implementation of the decisions, recommendations or plans. The family group conference may also reconvene to review its decisions, recommendations and plans upon the initiative of the Youth Justice Co-ordinator or at the request of at least 2 members of that conference.³¹

4.20 Maxwell and Morris³² highlight a number of successful aspects of the family group conference model that have been demonstrated by research in New Zealand. First, there is little

29 See section 258 and 260 of the Act.

30 *Op cit* at 10.

31 Section 270 of the Act.

32 *Family Group Conferences: Perspectives on Policy and Practice op cit* at 88 *et seq.*

support from research to show that family group conferences represent a soft option, as most young persons received what they call 'active penalties', which include supervision, custodial recommendations, financial penalties, work and restrictions of liberty. Second, far fewer cases appear in court, and fewer young people appearing in court receive court orders; fewer young people are now receiving sentences of residence with supervision, and sentences are shorter. Third, fewer young people are being remanded while awaiting finalisation of their cases in custody. Finally, young people are, in the main, more likely now to be dealt with by informal means, within the community and without a record of conviction.

Courts

4.21 All *arrested* children have to be brought before what is termed in New Zealand as the Youth Court as soon as possible.³³ The Youth Court has been created as a branch of the District Court to deal with youth justice cases only. Its establishment underlines the importance of the principle that the offending of young people should be premised on criminal justice and not welfare principles; that is, on notions of accountability and responsibility for actions, due process, legal representation, requiring judges to give reasons for certain decisions, and imposing sanctions which are proportionate to the gravity of the offence.³⁴

4.22 It would also appear that the court process is reserved for a minority of children in conflict with the law in view of the powerful diversion mechanisms that exist in New Zealand, such as diversion by the police and the important role of the family group conferences. The legislation is clearly aimed at enabling families to influence outcomes. Thus the Youth Court cannot make a disposition unless a family group conference has been held and it has to take the plans and recommendations put forward by the family group conference into account. Even at the sentencing stage, parents or guardians are entitled to make representations to the Court if an order is contemplated that will involve the parent or guardian.³⁵

33 Section 237 of the Children, Young Persons and Their Families Act. If the case so requires, the child may also be brought before a Family Court.

34 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 11 - 12.

35 Section 288 of the Act.

4.23 Young persons beyond the age of 16 years are dealt with in the same manner as an adult, that is, in the District Court or, if the offence is serious, in the High Court. The very serious offences of murder and manslaughter by any child aged 10 years or above are automatically transferred by the Youth Court to be dealt with in the High Court. The Youth Court can transfer other cases involving serious offences (such as arson and aggravated robbery) to the High Court. There is also provision in other cases for the Youth Court to transfer matters to the District Court depending on the seriousness of the case and the previous offending history of the young person. However, such cases are rare and the vast majority of children accused of crimes are dealt with by family group conferences and the Youth Court.³⁶

4.24 It appears from section 277 of the Act that adult co-accused, in the event of cases falling within the Youth Court's jurisdiction, may be tried in the Youth Court. In such cases the adult is deemed to have been convicted in the District Court.

4.25 Before making any of the orders referred to in paragraph 4.30, the Court may request a report from a social worker. Such a report is compulsory, however, before supervision orders, supervision with residence orders, supervision with activity orders, community work orders or orders transferring a case to the District Court may be made. The social worker's report has to be accompanied by a plan containing details of how the order is to be implemented.³⁷

4.26 Although the Act does not appear to specify a time frame within which proceedings in the Youth Court have to be finalised, a number of sections attempt to give effect to the principle that actions should occur within a time frame that makes those actions meaningful to the child or young person. Section 322 allows the Court to dismiss any information charging a young person with the commission of any offence if satisfied that the time that has elapsed between the commission of the offence and the hearing has been unduly protracted. Section 281 requires any family group conference ordered by the Court to be convened within 14 days. Section 332 states that, as far as is practicable, proceedings in the Youth Court have to be arranged in a manner that minimises the time taken for the proceedings to be heard.

36 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 8.

37 Section 335 of the Act.

4.27 As far as the atmosphere of the Youth Court is concerned, the Act 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.³⁸

We 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.

The formidable nature of the courtroom derives both from the physical lay-out and from court etiquette. The physical setting itself was, for half of the areas we visited, a standard District Court room in which the judge sat on an elevated bench with lawyers facing, the public at the rear and the young person in the dock. The only standard modification in these courts was that the family usually sat on the chairs in the area normally occupied by the witness box to the right of the judge. In other courts, smaller Family Court rooms were used but families still tended to be placed near the back as if they were visitors while the professionals occupied the front rows. People stood to greet the judge's entrances and exits, stood to address the court using a formal language, and required permission to speak. The order was controlled by the judge and, excepting formal addresses by lawyers, it rapidly became apparent that the role of the participants was to answer questions. While much of the formal etiquette is undoubtedly functional in allowing for an orderly process, it also contributed to the fact that, when asked a question, most young people or family members did so with a mumbled "yes" or "no".

4.28 The decisions of the Youth Court are subject to appeal to the High Court by the young person both in respect of the finding of the Court and any order made by the Court based on that finding.³⁹ The young person's parents or guardians also have the right of appeal to the High Court in regard to any order of the Youth Court involving them. An adult co-accused likewise has the right to appeal against a conviction and/or sentence of the Youth Court.

4.29 Since the adoption of the New Zealand legislation in 1989, concerns have been expressed inter alia in the media, by parliamentarians, the police and others about whether or not children aged 10 - 13 years who offend are adequately dealt with under the Act. Some commentators have

38 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 149.

39 Section 351 of the Act.

argued that prosecution in the criminal court, as opposed to diversion, would be a more effective response to children in conflict with the law. These and other criticisms ultimately led to a report published by the Office of the Commissioner for Children to the New Zealand Ministers of Justice, Police and Social Welfare. Although the report revealed many shortcomings in the existing system, mainly in the areas of inter-agency cooperation, referral processes and service availability, no change in the law as far as intensifying the role of the Youth Court is concerned, was recommended. Responding to this issue the report states as follows:⁴⁰

Given the fact that most Police referrals are dealt with by arranging Family Group Conferences to develop plans and that the difficulties seem to lie principally in responding in ways that will be effective in meeting the needs of child offenders and reducing offending, what then could be achieved by using criminal court processes? Under the jurisdiction of the Youth Court, custodial options are a last resort and few, if any, of the offenders in this study would be considered appropriate candidates for these options had they offended as 14 - 16 year olds. Furthermore, residential placements were being used for those in the sample who were seen as a risk to themselves or others. It could be argued that when courts make orders for services they are more likely to be delivered. Against that is the argument that such services should be able to be made available through the Children and Young Persons Service rather than through court orders. Court proceedings are costly in terms of finance and stress for families and children and increased funding through the Children and Young Persons Service would be a more economic and constructive solution. A further argument is that the courts are more effective in making young people accountable and in reducing reoffending but there is no evidence to support this claim in research comparing outcomes through Police referrals directly to the Children and Young Persons Service and court referrals of 14 - 16 year olds in the youth justice system.

Sentencing

4.30 If a charge against a child or young person has been proved, the Youth Court⁴¹ may make one of the following orders in terms of section 283 of the Act: discharge from the proceedings,

40 G Maxwell and J Robertson *Child Offenders: A Report to the Minister of Justice, Police and Social Welfare* Wellington: Office of the Commissioner for Children 1995 at 43.

41 See the discussion in par 4.21 above.

admonition, delay the order for a maximum of 12 months (a type of conditional discharge), imposition of a fine, payment of a sum towards the cost of the prosecution, payment of reparation towards emotional harm or loss of or damage to property, restitution, forfeiture of property, disqualification from driving, confiscation of motor vehicles, supervision with residence,⁴² community work, supervision with activity,⁴³ or placing the person under the supervision of the Director-General of Social Welfare or other person or organisation for a maximum of 6 months. In the case of an offender aged 15 years or above, the Court may also enter a conviction and order that he or she be transferred to a District Court for sentencing. This would happen when the nature or circumstances of the offence are such that if the young person was an adult, he or she would be sentenced to custody and the Court is satisfied that any order of a non-custodial nature would be inadequate. Thus the Youth Court has no jurisdiction to order a custodial sentence.

Sentencing guidelines

4.31 Section 284 of the Act contains certain guidelines which have to be taken into account by the Youth Court in coming to a decision whether to make any of the orders under section 283. These are the following:

- The nature and circumstances of the offence;
- the personal history, social circumstances and personal characteristics of the young person;
- the attitude of the young person towards the offence;
- the response of the young person's family, extended family or family group to the offence and to the young person himself or herself;
- any measures taken or measures proposed to be taken by the young person or his or her family to make reparation or apologise to the victim;
- the effect of the offence on the victim;
- previous offences proved to have been committed by the young person, penalties

42 A supervision with residence order may last for up to 9 months and is made up of 3 months in the custody of the Department of Social Welfare and up to 6 months supervision following the period of residence.

43 Supervision with activity involves up to 3 months' structured supervised activity and may be followed by up to 3 months' supervision.

imposed or orders made in respect of such offences and the effect of those penalties and orders on the young person; and

- any decision, recommendation or plan made or formulated by a family group conference.

4.32 In addition to the above-mentioned factors, the Youth Court also has to be guided by the principles set out in section 208 of the Act.⁴⁴

Legal representation

4.33 Section 227 of the Act provides that a child or young person has to be informed by an enforcement officer of his or her right to consult with a lawyer (barrister or solicitor) before being questioned, at an enforcement agency office, in relation to the commission of an offence or the possible commission of an offence. The section applies irrespective of whether the child or young person has been arrested or not. In the case of an arrest, the child is entitled to consult privately with the lawyer at the enforcement agency office. It would appear that legal representation is not compulsory for children in conflict with the law prior to appearance in the Youth Court, and no duty rests upon the state to provide it. However, if a child appears before the Youth Court charged with an offence, section 323 requires the Court, unless the child is already represented, to appoint a barrister or solicitor, who is then called the Youth Advocate, to represent the child in those proceedings. Upon the Youth Advocate's appointment the Court will have regard to his or her cultural background, personality, training and experience to ensure that the Advocate is suitably qualified to represent the child. The Youth Advocate's fees and expenses are paid by the state.⁴⁵

4.34 The Court may also, on the application of any interested person, appoint a lay advocate in addition to legal counsel.⁴⁶ This is to ensure that the Court is made aware of all relevant cultural matters and that the child's family, extended family, family group, clan or tribe are represented to the extent that those interests are not otherwise represented in the proceedings. The provision

44 These principles have already been dealt with. See par 4.3.

45 Section 325 of the Act.

46 Section 326 of the Act.

provides a mechanism both for ensuring due process in cases that appear before the Court and for redressing some of the criticisms that have been made of the criminal justice system in dealing with Maori people.⁴⁷

4.35 Despite the ample provision in the New Zealand Act for the legal representation of children in conflict with the law, there appear to be certain shortcomings in the way the system works in practice. After a sample study on what happened to nearly 700 young people who came to attention for offending in 1990 to 1991, the following observations were made:⁴⁸

[T]here were no cases in the sample in which either the arresting officer or the young person informed us that a barrister or solicitor had been present during the interview. A few young people said that they had asked for a lawyer to be present and this was treated dismissively. This again raises the question of the extent to which young people are being systematically informed of their rights.

Young people's rights are also protected through the provision of legal representation. However, most young people in the sample were dealt with without legal advice or representation (because they were dealt with by police warning or by direct referral to family group conferences). Discretionary decision-making does take place at these points, but these young people miss out on appropriate advice or representation. There were no examples of youth advocates becoming involved in non-court cases. Thus there was no opportunity for young people attending non-court family group conferences to have legal advice about whether or not they should admit the offence or the consequences of any admission. Nor did the young people have legal advice in the family group conference when they wished to question details in the summary of facts. The Government has agreed to extend the role of youth advocates to meet such situations although there is evidence that this is not happening in all areas. Even in those cases where the court ordered the family group conference, only 59% of family group conferences were attended by youth advocates although in all cases where charges were laid in court a youth advocate was appointed. Many of the youth advocates served their clients' interests well. In other cases, however, clients received a token service with little effective consultation and representation. Some youth advocates were not well-versed in the Act. Others appeared unaware of the details and background of the case. Others still appeared to be arguing in the interests of justice in general or on behalf of the victim rather than on behalf of their client.

47 *Family, Victims and Culture: Youth Justice in New Zealand op cit* at 132.

48 G M Maxwell and A Morris 'Deciding about Justice for young people in New Zealand: The involvement of family, victims and culture' in J Hudson and B Galloway (eds) *Child Welfare in Canada: Research and Policy Implications* Thompson Educational Publishing 1995 at 175.

Uganda

Introduction

4.36 The project committee considers Uganda to be suitable for purposes of comparison for a number of reasons. First, a similarity to South Africa is that Uganda is a developing country which, since 1986, has been trying to re-establish normality in social, economic and political life after 14 years of economic and political chaos during which there was tyrannical repression and civil wars.⁴⁹ It is, therefore, a country undergoing transformation. Second, as an African country Uganda is 'closer to home' than most countries with modern, developed legal systems and it is thought that South Africa should also draw on African experiences when reforming its laws. Third, Uganda has recently completed a review of its existing laws concerning child welfare and children in conflict with the law in relation to international and other documents on the rights of children, culminating in the 1996 Children Statute, implemented in 1997. Finally, the Children Statute appears to be a successful attempt at striking a balance between the need for legislation complying with internationally recognised norms and principles on the issue of children on the one hand and the retention of customary law and practice which are particularly powerful forces in Uganda in the deciding of social issues on the other.⁵⁰

Principles

4.37 Section 4 of the Children Statute 1996 (hereafter "the Statute") states that certain welfare principles and children's rights will be the guiding principles in the making of any decision based on the provisions of the Act. These principles and rights are set out in the First Schedule to the Statute under the heading *Guiding Principles in the Implementation of the Statute*. In general it is stated that the child's welfare will be the paramount consideration and that any delay in determining matters relating to a child should be regarded as prejudicial to the child's welfare.

49 J Parry-Williams 'Legal reform and children's rights in Uganda - some critical issues' (1993) *The International Journal of Children's Rights* at 50.

50 See too J Sloth-Nielsen and B van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) *Stellenbosch Law Review* 261 - 279.

4.38 Interestingly, the Guiding Principles also draw on the provisions of two international instruments. Clause 4 of the First Schedule provides as follows:

A child shall have the right -

- (a) ...
- (b) ...
- (c) to exercise, in addition to all the rights stated in this Schedule and this Statute, all the rights set out in the U.N. Convention on the Rights of the Child and the O.A.U. Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this statute.

4.39 The Ugandan legislation consequently provides an example of the enactment of principles found in international instruments, thus elevating the status of those principles to binding local law.

Age and criminal responsibility

4.40 Section 3 of the Statute describes a child as a person below the age of 18 years. With regard to the minimum age of criminal responsibility, section 89 of the Statute sets the age at 12 years. This constitutes an increase in the minimum age compared to the position prior to the introduction of the Statute. Previously it had been 7 years.⁵¹ It would appear that the age of 12 years is also the minimum age of arrest. Section 89 provides that no child below the age of 12 years shall be charged with a criminal offence.

4.41 The Statute provides that where a person is brought before a court and it appears that he or she is under 18 years of age, the court has to conduct an inquiry into the age of that person and may take any evidence, including medical evidence, into account.⁵² If, subsequent to an order or judgment by the court it is found that the person's age has not been correctly stated, the age presumed or declared by the court is deemed to be the true age for purposes of the proceedings.

Police powers and duties

51 Cf *Issue Paper 9* p 10.

52 Section 108 of the Statute.

4.42 Provisions in the Statute relating to police powers and duties are not as detailed as those found in the New Zealand legislation. Section 90(1) of the Statute merely provides that upon the arrest of the child, the police may under justifiable circumstances caution and release the child. It is evident, however, if regard is had to the provisions of section 90(2), that the Statute intentionally does not contemplate a detailed exposition of police powers since reference is made to criteria - relating to the police's power to dispose of cases at their discretion without recourse to formal court hearings - that need to be laid down by the Inspector-General of Police.⁵³

4.43 The police have a duty, as soon as possible after the arrest of a child, to inform the child's parents or guardians as well as the Secretary for Children's Affairs of the local government council for the area in which the child resides of the arrest, and to ensure that the parent or guardian is present at the time of the police interview - except if it is not considered to be in the best interests of the child.⁵⁴ If the parent or guardian cannot be contacted immediately or is unavailable, a probation officer or social worker or other authorised person has to be informed with a view to attending the police interview.

4.44 Section 90(6) of the Statute stipulates that, in cases where the arrested child cannot be taken to court immediately, the police have to release the child on bond (police bail) on the child's own recognisance or on a recognisance entered into by his or her parent or other responsible person. A child will, however, not be released if the police find that the charge is a serious one, or that it is in the child's interest to remove him or her from association with any person, or that releasing the child will defeat the ends of justice.

4.45 In the event of release on police bond not being granted, a child may be detained in police custody for a maximum of 24 hours before being brought to court.⁵⁵ The police also has a duty to ensure that no child will be detained with an adult person, and that a female child, while in

53 At this stage, the project committee does not have access to these regulations, if they have in fact been formulated.

54 Section 90(3) and (4) of the Statute.

55 Section 90(7) of the Statute.

custody, will be under the care of a woman officer.⁵⁶

Diversion

4.46 Uganda provides an example of a country with very limited resources. Not being in the position to afford an expensive and sophisticated court infrastructure requiring more magistrates, court buildings, remand homes, transport facilities and so forth, yet desiring to adopt a progressive child justice system within the framework of children's rights, the Statute entrenches a system that is affordable, achievable, acceptable and beneficial to children.

4.47 The Statute has incorporated a way of finding local solutions to local problems by giving village committees (known as Village Resistance Committee Courts) limited criminal jurisdiction as courts of first instance. These Resistance Committees already had certain judicial powers⁵⁷ and have some understanding of the laws of evidence.⁵⁸ In the survey on Resistance Committees done by the Uganda Child Law Review Committee, the majority of those interviewed at Resistance Committee level favoured Resistance Committee Courts as opposed to Magistrates Courts:⁵⁹

The arguments in favour of the RC Courts were mainly based on their nearness to the people and the opportunity it gives people to seek justice in a more relaxed atmosphere, this gives them a chance to express themselves freely, and to put questions to those party to a case. In children's cases, those interviewed could not see why a child should be taken out of the community where he/she has grown up, and where his/her behaviour is well known. To them, a child is best corrected in his/her own society.

4.48 Section 93 of the Statute now empowers Village Resistance Committee Courts (VRCC) to try the following criminal cases: affray (fighting in public), idle and disorderly, common assault, actual bodily harm, theft, criminal trespass and malicious damage to property. The VRCC may

56 Section 90(8) and (9) of the Statute.

57 Conferred on them by the Resistance Committees (Judicial Powers) Statute, 1988.

58 See J Parry-Williams 'Legal reform and children's rights in Uganda - some critical issues' (1993) *The International Journal of Children's Rights* at 64.

59 *Ibid.*

make an order for any of the following reliefs⁶⁰ in respect of a child against whom the offence is proved:

- Reconciliation (a peaceful settlement of the case is encouraged and may include the child to ask for pardon from the person reporting him or her);
- compensation (an order to make a suitable payment for the loss or damage the child has caused another);
- restitution (an order to replace or return something lost or stolen to its owner and may include payment for any damage);
- apology (an order to make a statement expressing that the child regrets the wrong inflicted);
- caution (an order not to repeat the wrong inflicted with a threat of future punishment if repeated).

4.49 In addition to the reliefs reflected above, the VRCC may make a guidance order requiring the child to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court, the duration of which is limited to 6 months. The VRCC is precluded from making an order in terms of which the child is remanded in custody,⁶¹ and if the view is held that the case involving a child is of a very serious nature and that the child should be placed in a detention centre, the case has to be referred to the Family and Children Court.

4.50 This first tier local level community forum introduced by the Statute can be seen as a form of diversion to community structures. The emphasis is on mediation and restitution, and orders are called reliefs rather than punishments.

60 The word "reliefs" is an interesting innovation as it removes the stigmatising association with "punishment" and "penalty".

61 Section 93(7) of the Statute.

Courts

4.52 The next tier in the structure is the Family and Children Court (F&CC), which has jurisdiction to hear and determine all criminal charges against a child except an offence punishable by death and an offence for which a child is jointly charged with a person above the age of 18 years.⁶² As pointed out above, the F&CC can also hear cases referred to it by the Village Resistance Committee Courts in view of the seriousness of the offence and cases where a detention order is deemed necessary.

4.53 All cases involving children charged with offences in courts other than the F&CC have to be remitted to the F&CC except where the offence is one punishable by death or where the child is jointly charged with an adult.⁶³ In the case of adult co-accused, although the child will then not be tried in the F&CC, but in a Magistrate's Court or High Court, the child still has to be remitted to the F&CC for purposes of sentencing.

4.54 Section 105 of the Statute requires a High Court, if proceedings involving a child are conducted before such a court, to have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children.

4.55 An important provision regarding the nature of the proceedings conducted in the F&CC is to be found in section 17 of the Statute. Apart from providing that the proceedings in this court have to be held in camera, it is directed that the proceedings shall be as informal as possible, and "by enquiry rather than exposing the child to adversarial procedures".

4.56 An appeal against decisions of the F&CC lies to a Chief Magistrate's Court, from the latter court to the High Court, from the High Court to the Court of Appeal, and from this court to the Supreme Court.

Sentencing

62 Section 94 of the Children Statute.

63 Section 101 of the Statute.

4.57 The Family and Children Court (F&CC) can make the following orders where the charges have been admitted or proved against a child:⁶⁴

- Absolute discharge;
- caution;
- conditional discharge for not more than 12 months;
- making a child promise to be of good behaviour during a period of 12 months or otherwise be punished;
- after taking into consideration the child's ability to make a payment, order compensation, restitution or the payment of a fine (in which case, upon the child's failure to pay the fine, the child will not be detained);
- a probation order, on the advice of the probation and social welfare officer, which may include a condition not to change residence without informing the mentioned officer, or to report to the Probation Office at intervals.

4.58 Corporal punishment is specifically excluded as an alternative order.

4.59 The F&CC can also make an order, where the charges against a child have been admitted or proved, for the detention of the child in a detention centre for a period of not more than 3 months if the child is below 16 years of age; not more than 12 months if the child is above 16 years or 3 years if the child has committed an offence punishable by death.⁶⁵ As far as detention orders are concerned, the Statute contains a number of significant safeguards which are clearly in line with the principles enunciated in international instruments. The Statute states unequivocally that detention has to be a matter of last resort and should only be made after careful consideration, after all other reasonable alternatives have been tried and where the seriousness of the offence warrants

64 Section 95 of the Statute.

65 Although the F&CC has no jurisdiction to try an offence punishable by death, section 101 of the Statute provides that if a case is proved against a child in a court higher than the F&CC, the child has to be referred to the F&CC for sentence. The higher court may also make an order giving directions on whether the child should be kept in custody and, if so, whether the child should be released on bail until he or she is brought before the F&CC.

a detention order.⁶⁶ The court also has a duty of ensuring that a suitable place is readily available before making a detention order. If a child has been held in custody prior to a detention order being made, the period on remand has to be taken into consideration when the detention order is made.

4.60 Before a detention order or probation order can be made, the probation and social welfare officer has to submit a written report on the child with particulars about the child's social and family background, how, where and with whom the child is living and the conditions under which the child committed the offence.

4.61 Section 100 of the Statute also prescribes certain time limits within which cases involving children should be completed. As a general rule it is provided that such cases should be handled expeditiously and without unnecessary delay. If the case of a child appearing before the F&CC is not completed within 3 months after a plea has been entered, the case will be dismissed and the child will not be liable to further proceedings for the same offence. Where, owing to the seriousness of a charge, a case is heard by a court superior to the F&CC, the maximum period of remand may not exceed 6 months, after which the child has to be released on bail. If such a case has not been completed within 12 months after the plea, the case likewise has to be dismissed with the child not being liable to further proceedings for the same offence.

4.62 Although the Statute does not prescribe a list of factors that the court needs to take into account upon sentencing, section 95(4) warns that detention, which is one of the orders that the F&CC may make, should be a matter of last resort. The section further stipulates that such an order shall only be made after careful consideration and after all other reasonable alternatives have been tried, and where the seriousness of the offence warrants a detention order.

4.63 An interesting provision is to be found in section 102 of the Statute. It states that the words "conviction" and "sentence" shall not be used in reference to a child appearing before a Family and Children Court, and instead, the words "proof of an offence against a child" and "order" shall be substituted for conviction and sentence respectively. The New Zealand legislation,

66 Section 95(3) of the Statute.

while it does not explicitly draw this distinction, uses the phrase “where a charge against a young person is proved” for conviction and the word “order” for sentence.⁶⁷

Legal representation

4.64 The Statute contains no detailed provisions regarding legal representation. Paragraph (e) of section 17(1), which section sets out the procedure to be followed in the Family and Children Court, merely provides that a child shall have a right to legal representation. Whether there is a duty upon the state to provide such representation free of charge is not clear.

Scotland

Introduction

4.65 The Commission, in selecting Scotland as a country for purposes of comparison, had regard to the fact that the recently implemented Children (Scotland) Act 1995 is an Act that not only conforms to commitments under the CRC,⁶⁸ but in some instances also surpasses those commitments.⁶⁹ The entire approach to children in conflict with the law in Scotland differs from that in other countries in that the well-being and welfare needs of children have been the centre of attention long before the realisation of international principles and norms applicable to children and did not become so as a result of those principles and norms. Thus, as far back as 1964, Scotland produced a report which was to completely change the face of child justice in that country. This report, known as the Kilbrandon report,⁷⁰ recommended that no attempt should be made to change the then existing system of child justice. Instead it was recommended that the system should be completely abolished and replaced by a new system which would clearly separate two important functions: the establishment of guilt or innocence on the one hand, and the decision on what

67 Although the heading to section 284 reads “Factors to be taken into account on *sentencing*” (own emphasis).

68 Ratified by the British Government in December 1991.

69 Cf Scottish Office *Scotland’s Children: A Brief Guide to the Children (Scotland) Act 1995* 1995 at 5.

70 Named after Lord Kilbrandon, a Scottish judge, who chaired the committee responsible for producing the report.

measures would help each individual child on the other. At the time this was an enormously far-reaching proposal, without precedent in either English or Scots law.⁷¹

4.66 The Kilbrandon report saw little difference between the child offender and the child in need of care and protection. They were regarded equally as children in need, leading the committee to recommend the establishment of panels of lay people who would be appointed for their interest in and knowledge of children to take over the function of 'magistrates' in deciding whether compulsory measures should be taken relating to the care of children. In terms of the recommendations, disputes on matters of fact should, however, still be decided by a magistrate (in Scotland known as the sheriff) and not by the lay hearing. Once the facts were established, it would be for the hearing or panel to decide on the measures of care appropriate to the child.

4.67 Statutory provision for the system as recommended by the Kilbrandon committee was made in the Social Work (Scotland) Act 1968. Part III of that Act, which established the children's hearings system, was implemented in 1971 to allow time for the changes brought about by the reorganisation of social work to become established first.

4.68 That the children's hearing system worked well for almost two decades is evident from the fact that reform initiatives commenced only in 1988 when the Secretary of State appointed a review group to consider options for change to child care law in Scotland. Reform was sparked off by an increase in the incidence of child abuse, child sexual abuse and social changes such as the increase in separation and divorce, rising unemployment and the growth of drug and alcohol dependence among young people during the 1970's and 1980's. Action on the recommendations of the review group was delayed pending the finalisation of other reports dealing with child care, as well as the Scottish Law Commission's report on family law. The Children (Scotland) Bill followed in 1994. During the deliberations on the Bill the government stressed the need to ensure that young people who commit offences be dealt with effectively, and the need to set clear boundaries for young people by also pointing out the consequences of failing to respect the rights of others.

71 Scottish Office *The Children Hearings System in Scotland: A Handbook for Children's Panel Members* Edinburgh: The Social Work Services Group, New edition 1996 at 15.

4.69 The Children (Scotland) Act 1995, fully implemented on 1 April 1997, marks a significant stage in the development of legislation on the care of children and largely replaces those parts of the Social Work (Scotland) Act 1968 which relate to children. It is centred on the needs of children and their families and defines both parental responsibilities and rights in relation to children. It sets out the duties and powers available to public authorities to support children and their families and to intervene when the child's welfare requires it.⁷²

Principles

4.70 The Children (Scotland) Act 1995 (hereafter "the Act") not only conforms to principles under the UN Convention on the Rights of the Child, but also to obligations under the European Convention on Human Rights.⁷³ Principles appear to be incorporated within specific provisions of the Act and are not stated separately in the form of guidelines. Thus section 73(1) of the Act for example provides that no child shall be subject to a supervision requirement for any period longer than is necessary in the interests of promoting or safeguarding his or her welfare.

4.71 Three main themes run through the Act:⁷⁴

- The welfare of the child is the paramount consideration in decisions being made by courts and children's hearings;
- no court should make an order relating to a child and no children's hearing should make a supervision requirement unless the court or hearing considers that to do so would be better for the child than making no order or supervision requirement at all (the no order or minimum intervention principle);
- the child's views should be taken into account where major decisions are to be

72 *The Children's Hearings System in Scotland: A Handbook for Children's Panel members* op cit at 23 - 24.

73 *Scotland's Children: A Brief Guide to The Children (Scotland) Act 1995* op cit at 5 - 6.

74 These principles have been enacted in section 16 of the Act.

made about his or her future.

4.72 Further, the Act, as far as children in conflict with the law is concerned, is founded upon the following principles:

- Every child has the right to be treated as an individual;
- each child who can form his or her views on matters affecting him or her has the right to express those views;
- any intervention by a public authority in the life of a child should be properly justified and should be supported by services from all relevant agencies working in collaboration;
- regard must be had to a child's religious persuasion, racial origin and cultural and linguistic background;
- every effort should be made to preserve the child's family home and contacts;
- proceedings involving children should be subjected to strict time limitations.

Age and criminal responsibility

4.73 It should be borne in mind that the level at which the minimum age of criminal responsibility in a particular country is set, is not necessarily indicative of the way a child is dealt with after committing an offence. Although Scotland has one of the lowest ages of criminal responsibility (8 years),⁷⁵ the progressive children's hearing system in that country in fact avoids contact with the formal justice system for all children under 16, except in the case of the most serious offences.⁷⁶

75 The age is set by section 41 of the Criminal Procedure (Scotland) Act 1995.

76 Cf UNICEF International Child Development Centre (1998) *Innocenti Digest 3* at 5.

4.74 The Act provides in section 93(2)(b) that ‘child’ means, for purposes of Chapters 2 and 3 of Part II of the Act,⁷⁷ a child who has not attained the age of 16 years, or a child over 16 and under 18 years in respect of whom a supervision requirement is in force.

4.75 The Act gives no guidelines as to the type of evidence required for age determination. It merely states that a children’s hearing may make an inquiry as to the age of the child and may proceed upon the child’s indication of his or her age or after the hearing has determined the age - if the age falls within the hearing’s jurisdiction as outlined above. A fresh determination of the age may be made at any time before the conclusion of the proceedings.⁷⁸

Police powers and duties

4.76 If the police arrest a child under the age of 16 for any reason and believe that the case needs further consideration, they will refer that child to what is known in Scotland as the Reporter.⁷⁹ In this case the police have to provide the Reporter with legal evidence that will uphold the grounds for referral.⁸⁰ The police may, however, instead of referring the child to the Reporter, issue a formal police warning where -⁸¹

* the crime or offence is not serious enough to warrant referral to the procurator

77 Which deals with the still to be discussed children’s hearings and the supervision and protection of children respectively.

78 Section 47 of the Act.

79 The Kilbrandon report envisaged that the decision to refer children to a children’s hearing should be that of a single independent individual, namely the Reporter. Reporters are involved in all aspects of the hearings procedure - the referral process, the hearing itself and recording and transmitting decisions. Most Reporters have qualifications and experience in either law or social work, or both, but whatever their background, they need a working knowledge of the law relating to the children’s hearing system and also an understanding of child development and welfare. A national Reporter service has been set up in Scotland, headed by a Principal Reporter, with offices throughout the country.

80 There are 12 conditions or grounds for referral set out in section 52 of the Children (Scotland) Act 1995 which may indicate that a child is in need of compulsory measures of supervision. The fact that a child has committed an offence constitutes one of the grounds.

81 *The Children’s Hearings System in Scotland: A Handbook for Children’s Panel Members op cit* at 87.

fiscal;⁸²

- * referral to the Reporter is likely to result in a decision that no further action should be taken;
- * the child has not been formally warned on more than one occasion; and
- * the crime is admitted and the child and parents agree to co-operate.

4.77 In such an event the child and parents are requested to attend at a police station in connection with the charge. The child is seen by a senior police officer, in the presence of a parent, and is asked if he or she admits the charge. If responsibility is denied or disputed, the case is referred to the Reporter for further action. If the child admits responsibility the senior police officer will administer a formal police warning. Discretion is used in the selection of cases for warnings, based on the criteria described above.⁸³

4.78 Certain categories of cases do not qualify for diversion by the police and have to be referred to the procurator fiscal. These are:⁸⁴

- * Treason, murder, rape and other serious crimes;
- * offences alleged to have been committed by a child together with an adult;
- * certain categories of road traffic offences;

82 Procurators fiscal are appointed for each sheriff court district in Scotland. They decide what action should be taken in respect of crimes reported to them and prosecute on behalf of the Crown in the sheriff courts. They are not independent as they are bound to follow the Lord Advocate's directions and instructions. Procurators fiscal do not prosecute in the High Court of Justiciary. Prosecutions in that court are undertaken by the Lord Advocate either personally or more usually through his deputed, the Solicitor General or Advocates Depute.

83 *The Children's Hearings System in Scotland: A Handbook for Children's Panel Members* *op cit* at 87.

84 *Ibid.*

- * offences alleged to have been committed by a child over 16 years old who is the subject of a supervision requirement.

4.79 It appears from section 63 of the Act that arrested children, in those instances in which their cases have been referred to the procurator fiscal, may be detained in a place of safety pending the procurator fiscal's decision whether to proceed with a case. Once a decision has been made that the charges are not to be proceeded with, the police inform the Reporter of this fact. The Reporter may nevertheless consider that compulsory supervision measures are necessary in respect of the child. If this is the case, the Reporter must arrange for a children's hearing to take place not later than the third day after the information has been received. The purpose of this hearing would be to determine whether a warrant should be granted to keep a child in a place of safety, and whether the Reporter should arrange a hearing for purposes of putting the grounds for referral to parent and child.

Diversion

4.80 In a fashion analogous to the family group conferences in New Zealand, the children's hearing system in Scotland lies at the heart of the child justice system. This system is run on welfare principles, implying that it takes account of all aspects of a child's conduct and not only the offence or the presenting problem.⁸⁵ The hearing will decide on a course of action that is in the best interests of the child. By moving the responsibility for the disposal of a case from the criminal process to a lay decision-making system, the Kilbrandon committee⁸⁶ hoped that people would be able to recognise that the incident or offence for which a child is referred may only be one of several aspects to consider in relation to a child's welfare. The twin focus of the hearings system is that it regards all children as individuals, but also considers them in the context of their families and communities.

85 It should be borne in mind that the children's hearing system in Scotland has been devised not only to deal with children who have committed offences, but also with all other aspects of a child's life where some form of intervention appears to be required. It would consider what other people had done, or more often, neglected to do for the child, and what life prospects the child might have. For purposes of this discussion paper, however, the discussion will be confined to the role of children's hearings in relation to cases where a child has committed an offence.

86 See par 4.65.

4.81 As pointed out above,⁸⁷ the police may refer information about a child who has committed an offence, except those offences referred to in par 4.78, to a Reporter. Apart from the police who may exercise limited diversion options as referred to above, the Reporter can be regarded as the first major diversion mechanism. Having received the information, the Reporter, in terms of section 56 of the Act, has to make an initial investigation and may also request a report on the child from the local authority. Once the Reporter is satisfied that the necessary information is available, he or she will consider whether a children's hearing should be arranged. A hearing will only be arranged if the Reporter is satisfied that there are suitable grounds for referral, and that the child is in need of compulsory measures of supervision.⁸⁸ If the Reporter does not choose to refer the child to a hearing, he or she may either decide that no action is necessary, in which case the child and other relevant persons have to be informed accordingly, or refer the case to the local authority for further action. Once the Reporter has decided that no action is necessary, no action can subsequently be arranged based solely on the same set of facts.⁸⁹ According to statistics it is clear that the Reporter's discretion serves to divert a high percentage of young offenders away from the criminal justice system. In 1994, only 30% of cases referred to the Reporter on offence grounds were subsequently taken to a hearing.⁹⁰

4.82 The Reporter, having decided to call a hearing, has to give the panel members,⁹¹ the child and relevant persons (such as the child's parents or guardians) 7 days written notice of the time and place of the hearing. The chief social worker also has to be informed of the hearing. In general, no person other than a person whose presence is necessary for the proper consideration of the case, or whose presence is permitted by the chairperson, may attend the hearing. Persons with a duty to

87 See par 4.76.

88 Section 52 of the Act.

89 Section 56(2) of the Act.

90 L Edwards and A Griffiths *Family Law* Edinburgh: W Green/Sweet & Maxwell 1997 at 224.

91 A children's hearing consists of a chairperson and two other members, and must include both a male and a female in terms of section 39 of the Act. Panel members, appointed by the Secretary of State on the recommendation of the Children's Panel Advisory Committee, are supposed to be lay representatives of their community with some interest in or experience of children and their problems, and are unpaid - although expenses are met. However they do receive extensive training in relevant areas of law, social work and child psychology. See Edwards & Griffiths *Family Law supra* at 222.

attend the hearing are the child, who also has an absolute right to attend,⁹² relevant persons and the panel members. Persons who should attend the hearing are the Reporter and a social worker. Other parties entitled to attend the hearing are representatives of the child and relevant persons, representatives of the Council of Tribunals, the press, a police officer or prison officer, a safeguarder⁹³ and the father of the child if he is living with the child's mother.

4.83 The hearing is conducted in a manner which is conducive to an atmosphere in which the child, relevant persons and panel members can talk freely, unrestricted by the rules of legal procedure and evidence which are normally required in a judicial forum. It is the chairperson's duty to explain the grounds for referral to the child and the relevant persons, and to make sure that the grounds are understood and accepted by the child and relevant persons.⁹⁴ If the grounds are denied or not understood, the hearing has to decide whether to discharge the grounds or to send them to the sheriff (the equivalent to the South African magistrate) for proof. In the latter instance the Reporter has to make an application to the sheriff for a finding as to whether the grounds for referral are established. The child and relevant person are required to attend the hearing before the sheriff.⁹⁵

4.84 The proceedings before the sheriff are held in chambers in terms of section 68, and have to be heard by the sheriff within 28 days of the application being lodged. The application to have the grounds of referral established is presented by the reporter, and legal aid is available for representation of both parents and child. Although the basic rules of evidence and procedure are observed at these proceedings, there are court decisions to the effect that section 68 proceedings

92 The hearing has the power to issue a warrant to compel the child to attend in terms of section 45 of the Act on cause shown that it is necessary, in which case the child once found will be taken to a place of safety. The child can only be kept in a place of safety by virtue of the warrant for 7 days. If the hearing has to be continued, and there is a fear that the child will abscond, or the child needs to be kept in a place of safety for his or her own protection, then the hearing can grant a warrant to keep the child in a place of safety for up to 22 days.

93 A safeguarder may be appointed in terms of section 41 of the Act by the hearing if it is considered to be in the child's interests. This person's role is similar to a *curator ad litem* in ordinary court proceedings and he or she has to represent the best interests of the child. The safeguarder is often, though not necessarily, a lawyer.

94 Section 65(4) of the Act.

95 Section 65(8) of the Act.

are neither civil nor criminal but uniquely *sui generis*.⁹⁶ If the grounds for referral are established or accepted, the sheriff remits the case back to the children's hearing to consider and dispose of the case.⁹⁷ However, if the grounds are found not to be proven, the sheriff has to dismiss the application and discharge the referral and any warrant by means of which the child may have been detained.⁹⁸

4.85 Once the grounds of referral have been either accepted or established in court, the case is remitted back to the children's hearing for consideration of the case. It is the duty of the hearing to involve the child, safeguarder (if present), relevant person and any representatives in the discussion in order to obtain their views on what arrangements would be in the best interests of the child. Following consideration of the case, three categories of decision are open to the hearing: it may either continue (postpone) the case to gather further relevant information, discharge the referral or make a supervision requirement under section 70 of the Act if satisfied that compulsory measures of supervision are necessary in respect of the child. The hearing may attach such conditions to a supervision requirement as they deem fit, such as requiring the child to live outside the family home, or permitting the child to stay within the family setting but requiring supervision by social workers. The child may also be required to reside at a named residential establishment, in which case the person in charge of such an establishment has the authority to restrict the child's liberty to such an extent as that person may consider appropriate with regard to the terms of the supervision requirement.⁹⁹ In terms of section 73 of the Act a supervision requirement shall not remain in force for a period exceeding one year. The child or relevant person may request a review after three months, and local authorities may request a review at any time if warranted by the circumstances.

4.86 In exceptional circumstances the hearing may require that the child, usually (although not invariably) a child having been referred on the grounds of an offence,¹⁰⁰ should reside in secure

96 See the cases quoted in Edwards & Griffiths *Family Law supra* at 235.

97 Section 68(10) of the Act.

98 Section 68(9).

99 Section 70(4).

100 Edwards & Griffiths *Family Law supra* at 238.

accommodation. The hearing must be satisfied that such a requirement is necessary and that either

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- * the child has previously absconded or is likely to abscond again and in that event the physical, mental or moral welfare of the child would be at risk; or
- * the child is likely to injure himself or some other person unless kept in such accommodation.

4.87 The actual decision to place a child in secure accommodation at any given moment is not taken by the children's hearing. The hearing may issue the authorisation, but it is the head of the establishment concerned in agreement with the chief social work officer of the relevant local authority who will decide to exercise this at the appropriate time.¹⁰² If an authorisation for a child to be kept in secure accommodation has been in effect for more than 6 weeks but has not been implemented, the child or relevant person may request a review of the supervision requirement. The reporter has to arrange this review hearing within 21 days of receiving the request.

4.88 Children under a secure accommodation condition are effectively subject to an unlimited sentence of detention which can potentially last until the age of 18, although such a condition has to be reviewed within three months of the condition first being made.¹⁰³

4.89 An appeal against the disposal of a children's hearing lies to the sheriff within three weeks under section 51 of the Act. The appeal may be lodged by either the child or any relevant person. If the sheriff is not satisfied that the disposal by the children's hearing is justified, he has to allow the appeal and may -

- * remit the case back to the hearing for reconsideration along with the reasons for the

101 Section 70(10) of the Act.

102 *The Children's Hearing System in Scotland: A Handbook for Children's Panel members op cit* at 154.

103 In terms of the Secure Accommodation (Scotland) Regulations 1996 as quoted by Edwards and Griffiths *Family Law supra* at 238.

decision;

- * discharge the child from any further hearing or proceedings; or
- * substitute his or her own disposal for that of the children's hearing. The sheriff may, however, only make a disposal which could have been made by the hearing under section 70 of the Act.

4.90 A further appeal against the disposal lies from the sheriff to the sheriff principal and then to the Court of Session.

Courts

4.91 Apart from the children's hearing system which has been devised to divert children away from the criminal justice system, and which has been given wide powers to deal with children who have offended, including the authority to issue warrants in specified circumstances and to place children in detention under secure accommodation, there is no specialised *court* for children in Scotland. Although in the majority of cases a child who commits an offence will be dealt with by a children's hearing instead of being prosecuted in a criminal court, there are some situations in which the Crown or the procurator fiscal¹⁰⁴ takes the decision that the appropriate course is to prosecute children for the offence in the normal criminal courts. This might be, for example, because of the seriousness of the alleged offence, or because the child has committed a large number of offences, or because the children's hearing system has exhausted the good that it can realistically do.¹⁰⁵ If the child, on prosecution, pleads guilty or is found guilty after trial, the criminal court has the power, and sometimes the duty,¹⁰⁶ under the Criminal Procedure (Scotland) Act 1975, to seek advice from a children's hearing as to how it should dispose of a case, ie what

104 See footnote 82. Also see A Cleland & E Sutherland *Children's Rights in Scotland* Edinburgh: W Green/Sweet & Maxwell 1996 at 230.

105 Information obtained from annotations by Professor K McK Norrie to the Children (Scotland) Act 1995 in the Butterworths edition of the United Kingdom Statutes.

106 The High Court normally has a discretion whereas the Sheriff Court is obliged to refer the case to a children's hearing for disposal.

sentence, if any, is appropriate, or to remit the case to the children's hearing for disposal by them.

4.92 In assessing the children's hearing system, the following observations with regard to the efficiency of the system as opposed to a court-based system for dealing with children who offend are significant:¹⁰⁷

Increasingly, however, public opinion requires young persons to be accountable for their crimes and greater precedence is given to the needs of the victim as well as the offender. It is clear that some young offenders are resistant to rehabilitation, and will continue to offend until they pass out of the hearings system and into the courts. Mid-adolescence is the peak age group for offending and a substantial percentage of those appearing in the adult criminal justice system are young persons aged 16 and 17. This poses two questions: first, do the disposals available to the hearing discourage recidivism? Secondly, if not - as seems plausible for at least a hard core of offenders - how can the hearing deal with these children better? One option might be to allow the hearing better access to some of the disposals the courts can make in respect of young adult offenders - for example, intensive probation schemes. Some progress is being made in this direction, with a number of intensive supervision schemes currently under trial in Scotland for young offenders under compulsory supervision requirements.

A final issue in this area is whether it would not be more appropriate for *all* young offenders to the age of 18 to be dealt with, or at least disposed of, by the hearing rather than the courts. Experience shows that young offenders tend to progress fairly rapidly towards a custodial sentence once they enter the criminal court system. Offenders under 18 who are still under existing supervision requirements can be referred to a hearing rather than prosecuted in the criminal courts, and even offenders who are not subject to existing supervision requirements, but still under 18, can be remitted to the hearing for disposal, rather than sentenced after being found guilty in court. Yet, in practice this power is rarely exercised. Currently, official guidelines on the interaction between criminal justice and social work services recommend that greater use should be made of the hearings system for young offenders and that local authorities should make a suitable range of facilities available to hearings making disposals. However, there is anecdotal evidence that sheriffs still tend to perceive the hearing as a 'soft option' for repeat offenders and that children are sometimes discharged from supervision requirements before they reach 16 in the belief [that] the courts will be better able to deal with them.

It would be a clearly retrograde step to retreat from the hearings model to a purely court-based system for dealing with children who offend. The most radical approach to *reform* of the hearings system then would be to acknowledge that the Kilbrandon ideal of treating children in need, and children who offend, within an identical regime, as both 'children in trouble', is flawed or at least outdated. These can be seen as two groups of children with quite different problems, in which case any system dealing with them needs different

powers of disposal and/or treatment to respond effectively. Yet, ... there is as yet no empirical data to disprove the Kilbrandon thesis that delinquency is a product of social and family conditions, and thus no reason to begin applying the adult justice model to children who offend.

Sentencing

4.93 It has been pointed out that, apart from the children's hearing system, there is no specialised *court* for children in Scotland and that children are sometimes prosecuted in the normal courts.¹⁰⁸ These courts, in sentencing a child offender, have the full range of disposals open to them. The disposals are: detention, fines, caution for good behaviour, probation, supervised attendance, community service, admonition, absolute discharge, disqualification from driving a motor vehicle and payment of compensation to the victim. Children are detained in a young offenders institution rather than imprisoned in an adult prison.¹⁰⁹

Guidelines for disposals by children's hearings

4.94 Reference has already been made to the disposals that can be made by a children's hearing,¹¹⁰ to a proposal that the range of disposal options available to the hearings may be expanded,¹¹¹ and to the fact that the Act is founded upon certain principles.¹¹² These principles establish a broad framework for all decisions by children's hearings. Of importance is the 'no order' or 'minimum intervention' principle, implying that hearings and courts need to be certain that making an order will be better for the child than making none at all.¹¹³

4.95 Moreover, a children's hearing can make a disposal or decision, in terms of section 16(5) of the Act, which is inconsistent with the child's welfare if it is considered that there is a risk of

108 See par 4.91.

109 Information supplied by Dr David Nichols of the Scottish Law Commission.

110 See par 4.85.

111 See par 4.85.

112 See par 4.71 and 4.72.

113 Section 16(3) of the Act.

serious harm to the public.¹¹⁴

Legal representation

4.96 Both the child and parents are allowed to bring along one person to accompany them to a children's hearing.¹¹⁵ This may be a person providing support, but may very well be a lawyer.¹¹⁶ The scope for legal representation at a children's hearing is limited by the fact that legal aid is not available. Non-availability of legal aid is commonplace in tribunal proceedings, and was originally intended to foster the non-adversarial spirit of the hearing process.¹¹⁷ It is probably intended that the safeguarder, who may be appointed to represent the interests of the child and who has a function similar to that of a *curator ad litem* in court proceedings, should be in a position to fulfill the role of a legal representative, although the safeguarder may not necessarily be a lawyer. There have been proposals in Scotland that the role of the safeguarder should be expanded to something approaching a child advocate, but they have not been implemented.¹¹⁸

4.97 In terms of section 92 of the Act, which section amends section 29 of the Legal Aid (Scotland) Act 1986, legal aid is available to the child and any relevant person in relation to the child in, among others, the following instances:

- * An appeal to the sheriff against a decision of the children's hearing to grant a warrant to find and keep or to keep a child in a place of safety;
- * an appeal against any other decision of a children's hearing;
- * an application to the sheriff for a finding as to whether the grounds for referral are established and an application for the review of such a finding; and

114 According to Edwards and Griffiths *Family Law supra* at 233 this kind of disposal, such as committing the child to secure accommodation, is difficult to square with the original Kilbrandon philosophy.

115 See the discussion of children's hearings in par 4.80 *et seq.*

116 Edwards and Griffiths *Family Law supra* at 231.

117 *Ibid.*

118 *Ibid* 232.

* appeals to the sheriff principal or to the Court of Session.

4.98 In the first instance mentioned above legal aid is available without inquiry into the resources of the child or the relevant person. In the other instances legal aid will be granted if the granting authority¹¹⁹ is satisfied that legal aid would be in the interests of the child and, after inquiry into the financial circumstances of the child and relevant person, that the expenses of the case cannot be met without undue hardship to the child or relevant person. Legal aid consists of representation by a solicitor and, where appropriate, by counsel.

Conclusion

4.99 It is evident from the survey above that the three countries focussed upon have developed child justice models suited to each country's individual needs. New Zealand, on the one hand, having had a more welfarist approach to children accused of crimes prior to the introduction of the 1989 Children, Young Persons and Their Families Act, has now adopted a justice model with the law being made responsive to the needs of child offenders, their families and communities. Scotland, on the other, have - since the Kilbrandon Committee's report - always had an approach of dealing with children (be they accused of crimes or in need of care) on the basis of welfare principles. The Ugandan example, perhaps leaning more towards a justice approach, retains diversion mechanisms and involves the community at an early stage of the conflict resolution process. Although the project committee regards none of the models referred to as a blueprint for a child justice system in South Africa, they were found to be useful both in the sense that they are representative of various foreign child justice models and in stimulating a debate about the creation of a new model suitable for our purposes.

4.100 In deciding where to place the proposed South African model within the welfare/justice divide, the project committee has noted the debates on the welfare versus justice models which have unfolded during the twentieth century. The international history of "juvenile justice" began in the USA at the beginning of the early 1900s. This saw the development of separate courts and systems for dealing with children accused of crimes. The approach was focussed on rehabilitation

119 Which may be the sheriff or the Legal Aid Board.

and as the years passed, the welfare of the child came to outweigh the notion of criminal responsibility. This process, though well-intentioned, began to erode the due process rights of children and placed them at a higher risk of institutionalisation “for their own good”. The leaning towards this welfarist approach ended in 1967 with the US Supreme Court case *In re Gault*.¹²⁰ In this case a 15 year old boy named Gerald Gault was accused by a neighbour of having made a “lewd” telephone phone call. The boy was brought before an administrative tribunal. He was not legally represented (as this was not a court), his parents were not notified, the complainant did not testify, there was no record of the proceedings and no right to appeal. The tribunal decided that Gerald Gault should be sentenced to a state industrial school until the age of 21 years. The Supreme Court found that children were “persons” in terms of the due process clause of the constitution and were therefore entitled to due process rights.

4.101 As will emerge later in this Discussion Paper, the project committee has opted for an inter-sectoral model which follows a primarily justice approach with welfare support mechanisms. The model focuses on diversion options which promote accountability coupled with a vigilant approach to the protection of the due process rights of children.

120 387 U.S. 1 (1967).

5. PRINCIPLES AND FRAMEWORK

Introduction

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

5.2 Comment was invited in Issue Paper 9 on the question as to whether and in what way identified principles should be incorporated into proposed legislation for children. The following four options were put forward for consideration:

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

5.3 It was also pointed out that, in addition to principles, the objectives of the legislation could be set out in order to enlighten all persons involved with the administration of such legislation as well as the public at large.

Comment on Issue Paper 9

Written responses

5.4 Most respondents did not comment on the inclusion of principles within the legislation. The Association of Law Societies did not support the proposal that general principles be included in the legislation as these principles are already included in the Constitution.

Responses to questionnaire

INCLUSION OF PRINCIPLES	RESPONDENTS SUPPORTING
i) at the beginning of the legislation	10
ii) in the particular section	30
iii) a combination of (i) and (ii)	70
iv) incorporated within specific clauses	5
v) no response	18
vi) other	8

Evaluation and recommendations

5.5 The South African Constitution and international instruments give an outline of what should be included in a future South African child justice system. In line with these principles the project committee is of the view that the over-all approach should aim to promote the well-being of the child, and to deal with each child in an individualised way. A key aspect should be diversion of cases in defined circumstances away from the criminal justice system as early as possible, either to the welfare system, or to suitable diversion programmes run by competent staff. There should be

a vigilant approach to the protection of due process rights. The involvement of family and community is of vital importance, as is sensitivity to culture, tradition and the empowerment of victims. There should be an emphasis on young people being held accountable for their actions. This should be done in a manner which gives them an opportunity to turn away from criminal activity.

5.6 Children going through the criminal justice system should be tried by a competent authority (with legal representation and parental assistance) in an atmosphere of understanding conducive to his or her best interests. The child should be able to participate in decision-making. All proceedings should take place within the shortest appropriate period of time and there should be no unnecessary delays.

5.7 In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided by the principle of proportionality, the best interests of the child, the least possible restriction on the child's liberty and the right of the community to live in safety. Depriving children of their liberty, either whilst they await trial or as a sentence, should be a measure of last resort and should be restricted to the shortest possible period of time. Mechanisms for ensuring all of this need to be built into the child justice system.¹

Does the ratification of the CRC have immediate consequences for South Africa?

5.8 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*² 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".

5.9 Barrie,³ discussing an Australian case in which the majority of the High Court of Australia

1 A Skelton 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' (1996) *Acta Juridica* at 180 - 196.

2 1995 (3) SA 391 (CC) par 35.

3 GN Barrie 'Legitimate expectation and international treaties' (1997) *SALJ* at 474.

held that the fact that the CRC was not incorporated into Australian law, did not mean that its ratification was of no significance for Australian law. He draws a comparison between Australian and South African law and states:⁴

In Australian law, as indeed in South African law (*Pan American World Airways Incorporated v SA Fire & Accident Insurance Co Ltd* 1965 (3) SA 150 (A); section 231(4) of the Constitution of the Republic of South Africa, Act 108 of 1996), the provisions of an international treaty to which the country is a party do not form part of municipal law unless those provisions have been validly incorporated into the country's municipal law by statute. This principle has as its foundation the proposition that the making and ratification of treaties fall within the province of the legislature (Parliament). Consequently a treaty which has not been incorporated into Australian municipal law cannot operate as a direct source of individual rights or individual obligations under Australian law.

5.10 This view seems to be in accordance with the legal position in South Africa. Section 231(4) of the Constitution provides that “any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

5.11 In a discussion on the status of the Convention on the Elimination of All Forms of Discrimination Against Women, Dugard comments:⁵

The Convention on the Elimination of All Forms of Discrimination Against Women ... (has) already been signed and will no doubt soon be ratified. ... When incorporated into municipal law in terms of section 231(3) our courts will be bound to apply it as if it were an ordinary statute.

5.12 It would appear that even if specifically ratified, an international treaty or standard rules or general guidelines lack legal obligatory force and are referred to as ‘soft law’ or non-legal rules. There is, however, a growing body of consensus that such documents embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of existing law. Quite often they become more directly relevant through

4 *Ibid* at 475.

5 J Dugard ‘The role of International law in interpreting the Bill of Rights’ (1994) *SAJHR* at 214.

incorporation in binding international instruments, domestic laws and court judgments. It is clear then, that it is necessary for us to enact in domestic law those principles from the international instruments that we wish to base our new system of child justice upon.

The International Instruments

5.13 The international instruments read together with the South African Constitution are useful in two respects. Firstly, they may be incorporated into legislation to guide interpretation and action within its scope. Secondly, they can offer guidance in the legislative process by providing standards that new child legislation should meet.

5.14 The international instruments that govern child justice are both binding and non-binding in nature and have been in existence for several decades. The 1955 Standard Minimum Rules for the Treatment of Prisoners had already set out the principle of separation of 'young prisoners' from adults in custodial facilities and the separation of convicted detainees from awaiting trial prisoners. The International Covenant on Civil and Political Rights (CCPR) reiterates these principles in the form of 'hard law', as well as prohibiting the death penalty for persons found guilty of a crime committed when they were under the age of 18 years. The CCPR specifically states (article 14.4) that "in the case of juvenile persons, the [court] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation".

5.15 Having ratified the CRC, it is clear that South Africa now incurs the obligation spelled out in the Convention regarding submission of reports to the Committee on the CRC. The ratification also establishes a legal framework for the recognition of children's rights. Areas of domestic law will have to be reviewed in the light of the provisions of the Convention.⁶

5.16 There are various provisions within the Beijing Rules and the Riyadh Guidelines that seek to enhance the role that the courts and the judicial officers should play in the child justice system.

6 J Sloth-Nielsen 'Ratification of the UN Convention on the Rights of the Child: Some implications for South Africa' (1995) *SAJHR* at 419.

The Beijing Rules

5.17 Rule 6 is aimed at allowing discretionary powers at all levels of criminal proceedings to ensure that those charged with the function of administering justice in cases involving children do so in a manner that will ensure an outcome most appropriate to the needs of each individual case. The need to curb the abuse of discretionary powers is clearly recognised and the provision accordingly urges the adoption of measures that could enhance accountability in the exercise of such discretion.⁷

5.18 The adverse effects of stigmatisation and labelling of children are addressed by rules 8 and 21 which provide for the protection and non-disclosure of identity in the course of court proceedings and in the use and safekeeping of records.

5.19 The investigation and prosecution are subject to the following considerations in terms of rules 10 and 11:

- * notification of parents or guardians without undue delay in the case of the apprehension of a juvenile,
- * judicial consideration of release without undue delay,
- * respect for the legal status of the child at all times,
- * consideration of disposal of the case without recourse to formal hearings,
- * referral to the community or other services requires consent of the juvenile or of parents or guardians,
- * provision for temporary supervision and guidance, restitution and compensation of victims.⁸

7 HA Strydom, JL Pretorius and ME Klinck *International Human Rights Standards* Vol 1 'The Administration of Justice' Durban: Butterworths 1997 at 16.

8 *Ibid* at 17.

5.20 Rule 11.2 stresses that diversion may be used at any time of the decision making process - by the police, prosecution or other agencies such as the courts, tribunals, boards or councils. Rule 11.3 emphasises the importance of obtaining the consent of the child or his or her parent or guardian to the recommended diversionary process. These considerations serve to avoid the stigma of a formal conviction and sentence and to provide for alternatives at any stage of criminal proceedings, especially where the offence is of a non-serious nature and some form of social control and rehabilitation by alternative institutions is deemed appropriate and constructive.

5.21 The rules also deal comprehensively with the situation where a child is deprived of her or his liberty. Rule 13 prescribes that -

- * detention pending trial should be used only as a measure of last resort and for the shortest possible period of time;
- * detention pending trial should wherever possible be replaced by alternative measures such as close supervision, intensive care or placement within a family or in an educational setting or home;
- * juveniles in detention pending trial shall be kept separate from adults and shall be detained in a separate institution or a separate part of an institution also holding adults;
- * while in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality.

5.22 The rules on adjudication and disposition of cases (rules 14 - 18) promote proceedings according to the principles of a fair and just trial and which take into account the best interests of the child. Rule 15 grants the child the right to have legal representation or to apply for free legal aid where there is provision for such legal aid in the country. The Rules further stress the importance of finding a solution that will reflect the proportionality between the offence, the

interests of the child and that of society. Rule 16 requires that before a competent authority renders sentence, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case. The need for professional education, in-service training and refresher courses is advocated by rule 22 which further stipulates that juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the system.

The Riyadh Guidelines

5.23 The Guidelines are based on the assumption that the “prevention of juvenile delinquency is an essential part of crime prevention in society”. The Guidelines thus adopt a child-centred orientation and favour preventative programmes that focus on the well-being of young persons and their development in partnership with society and community-based programmes.

5.24 The Guidelines provide a framework for state and non-state programmes alike. State involvement can be summarised as follows:

- * preventative action should include an analysis of the problem, inventories of programmes and services, co-ordination of preventative action between governmental and non-governmental agencies, inter-disciplinary co-operation between different levels of governmental and non-governmental agencies;
- * provision of an educational system that could effectively educate children on social norms and values and that could provide preventative programmes and strategies;
- * the mass media should be encouraged to minimise the level of pornography, the use of drugs and violence and demeaning and degrading behaviour in presentations and to promote egalitarian principles and roles;
- * the juvenile justice system should protect the rights and well-being of young persons, prevent victimisation, abuse and exploitation, restrict and control the accessibility of

weapons and make provision for the implementation of the UN Standard Minimum Rules and Guidelines on Juvenile Justice and the Prevention of Juvenile Delinquency.

5.25 It is quite unfortunate that the Guidelines should make reference to ‘juvenile delinquency’, when in section 5(f) it clearly states that the labelling of a young person as a ‘deviant’, ‘delinquent’ or ‘pre-delinquent’ often contributes to the development of a consistent pattern of undesirable behaviour by young persons.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty

5.26 Rules 17 and 18 of these 1990 rules deal extensively with children detained whilst awaiting trial. All efforts should be used to apply alternative measures and when preventative detention is necessary, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible period of detention.

Rule 18 sets out the conditions under which an untried juvenile may be detained:

- * juveniles should have the right to legal counsel or legal aid and to communicate regularly with their legal counsel;
- * juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and to continue education or training, but should not be required to do so;
- * juveniles should receive and retain such materials for the leisure and recreation as are compatible with the interests of the administration of justice.

5.27 The rules contain an extensive section on the management of juvenile facilities.

The Convention on the Rights of the Child⁹

9 T Hammarberg ‘Justice for children through the UN Convention’ in *Justice for Children* Dordrecht: Kluwer Academic Publishers 1994 at 62 states: "The philosophy behind the Convention is that children, too, are equals; as human beings they have the same value as grown-ups. The right to play underlines

5.28 Article 40(1) of the CRC emphasises that the treatment of a child in conflict with the law should take account of, among other things, the desirability of promoting the child's reintegration and the child's assumption of a constructive role in society and in article 40(4) sets out a variety of dispositions which should be considered and which would effectively enable a custodial sentence to be avoided. The Beijing Rules echo this approach in Rule 5:

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

5.29 Rule 11 of the Beijing Rules encourages the use of 'diversion' for young people committing all but the most serious offences.

5.30 The international principles as well as the Constitution guarantee the due process rights of the child. Article 40 of the CRC states that the child must have the benefit of a fair trial. Most of these elements come into play prior to the trial itself; the right to be informed clearly of the exact charges being levelled, the right to be presumed innocent, the right not to be forced to confess or to give incriminating evidence and the right to legal assistance. The trial itself cannot be deemed fair if any of these rights have been previously violated. Article 40 also emphasises the child's right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth and which takes into account the child's age. The parents of the child should normally be present at juvenile proceedings, and the child's privacy respected - implying that the case should be held in camera and that the child's identity should not be divulged by the authorities or the press.

5.31 The African Charter on the Rights and Welfare of the Child, 1990, is different 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

that childhood has a value in itself; these years are not merely a training period for adult life. The idea that children have equal value may sound like a truism, but it is, in fact, a radical thought - not at all respected today."

“responsibilities”.¹⁰ 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’. South Africa is now a signatory to the African Charter,¹¹ although it is not yet in force. However, the question of the child’s responsibilities in proposed child care and protection legislation has been raised in various fora in this country.¹² The opinion has been expressed that children’s rights cannot be viewed in isolation and that emphasis should not be placed solely on children’s rights to the exclusion of the rights of their parents and the community at large. Further, the Charter emphasises the responsibilities of parents and communities for the well-being, growth and development of the child, and the project committee proposes including principles in the proposed legislation which reflect the importance of parental responsibility, as well as the child’s right to maintain family contact.

Framework derived from the South African policy documents

5.32 South African policy documents have recently endorsed international principles that govern the manner in which children who find themselves in trouble with the law should be treated by the legal system. Linked to international developments is the recent endorsement in the *National Crime Prevention Strategy* and the IMC’s *Interim Policy Recommendations* of the need to introduce restorative justice values, principles and practices for child justice. Restorative justice relies on reconciliation rather than punishment, on offenders accepting responsibility for their behaviour, and on the involvement of victims in the negotiation of an agreement or outcome including restitution, which may be symbolic. Restorative justice practices facilitate the reintegration of the offender back into society,¹³ drawing on community-based and indigenous models of dispute resolution. In line with national policy, the restorative justice approach forms part of the framework underpinning a new child justice system.

10 J Sloth- Nielsen and B van Heerden ‘New Child Care and Protection Legislation’ (1997) *Stellenbosch Law Review* at 261.

11 South Africa became a signatory in October, 1997.

12 SA Law Commission ‘The Review of the Child Care Act’ *Issue Paper 13* at 16.

13 CRC article 40(1).

5.33 The overwhelming response to the questionnaire in respect of the placement of the principles in the legislation was that there should be principles governing the administration of the child justice system at the beginning of the legislation and that principles pertaining to a particular section should be set out at that section, where they could be used to assist with the interpretation of those provisions.

5.35 The project committee has decided to follow the approach suggested above and recommends that not only certain general principles be included in the proposed legislation, but also a list of objectives that can be effective in guiding all role-players in the operation and interpretation of the proposed legislation. The objectives and general principles identified by the project committee are the following:

Objectives

- To promote the spirit of *ubuntu*¹⁴ in the child justice system;
- to promote the child's sense of dignity and worth;
- to protect the child's procedural rights;
- to reinforce the child's respect for human rights and fundamental freedoms of others through holding the child accountable for his or her actions and safe-guarding victims' interests and the interests of the community;
- to promote reconciliation, restitution and responsibility through the involvement of parents, families, victims and communities by means of a restorative justice approach;
- to provide for appropriate sentencing of children who have been convicted of offences;
- to promote co-operation between all Government Departments, other organisations and agencies involved in ensuring an effective child justice system.

14 Academics and jurists caution against attempting to define an African notion in a foreign language. See Y Mokgoro 'Ubuntu and the law in South Africa' *Seminar Report: Constitution and the Law* October 1997 where she states that it has "been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with scarcity of resources, and a fundamental belief that *Ubuntu ngumuntu ngabantu/ motho ke motho ba batho ba bangwe*, which literally translated, means "a human being is a human being because of other human beings".

Principles

- The principle that all responses to children accused of crimes must be in proportion to the circumstances of both the child and the nature of the offence, and that a child must not be treated more severely than an adult would have been in the same circumstances.
- The principle that children must be dealt with in a manner which respects their cultural values and beliefs and that they should be addressed in language that they understand.
- The principle that all child justice matters must be dealt with speedily.
- The principle that a child must at all times be given an opportunity to express an opinion and to be involved in the making of decisions affecting him or her.
- The principle that no child must be unfairly discriminated against and that children must have equal access to available services.
- The principle that no child must be deprived of his or her liberty unlawfully or arbitrarily.
- The principle that arrest, detention and imprisonment must be used only as a measure of last resort and for the shortest appropriate period of time.
- The principle that no child must be placed in a residential facility for the sole purpose of gaining access to services.
- The principle that every child deprived of liberty must be separated from adults unless it is considered for educational and training reasons not to be in the child's best interests.
- The principle that every child must have the right to maintain contact with his or her family, and access to health care and social services.
- The principle that parents and families are responsible for the well-being and development of their children, and that they should be supported in this role.
- The principle that parents and families have the right to assist their children in proceedings under the proposed legislation and to participate in decisions affecting them.
- The principle that children should not be discriminated against on the basis of lack of family support or opportunities and that a child's age should be a mitigating factor.

6. AGE AND CRIMINAL RESPONSIBILITY

(i) Age and terminology

Current South African law

6.1 In both international and national law the definitions of juveniles as well as children are directly or indirectly related to age. The term "juvenile", however, may differ from that of "child". The Constitution of South Africa, in section 28, defines a child as a person below the age of 18. The Criminal Procedure Act 51 of 1977 provides for special procedures in instances where children under 18 are dealt with after arrest and during court proceedings. Examples in point are section 50(4) and (5) (duty to notify parent or guardian of arrest of person under the age of 18; duty to notify probation officer of arrest of child under the age of 18); section 72(3) (accused under the age of 18 entitled to be assisted at criminal proceedings by parent or guardian) and section 153(4) (proceedings to be held in camera where the accused is under the age of 18 years).

6.2 The present Correctional Services Act 8 of 1959 defines a juvenile as a person under the age of 21 years. Within departmental practice, however, the category "child" has now been recognised as distinct from juvenile and children are those under the age of 18. In the new Correctional Services Bill a definition of child has been incorporated, and the age limit of 18 is used.

6.3 The Child Care Act 74 of 1983 also defines a 'child' to mean any person under the age of 18 years.

6.4 In Issue Paper 9 attention was drawn to the fact that both international law and national law recognises the age of 18 years as the appropriate age for separation of young people from the adult criminal justice system. The project committee therefore considered that no reform in respect of this age would appear to be necessary. Respondents were requested to comment on the age of 18 as an upper age limit and also on the choice of the terminology 'juvenile' or 'child' or 'youth' or 'young person' as this would be relevant to the title and wording used throughout the proposed

legislation.

Comment on Issue Paper 9

Written responses

6.5 Most of the respondents agree with the international view that the age at which young people should be separated from the adult criminal justice system is 18 years. Professor CJ Davel of the University of Pretoria's Private Law Department, cautions that the CRC stipulates that a child is a person below the age of 18 years "... unless, under the law applicable to the child, majority is attained earlier" and submits that legislation should specifically nullify the emancipation of a person younger than 18 years to include such emancipated minor within the ambit of the legislation.¹

6.6 Whilst most respondents favoured the terms 'young person'² or 'youth justice', there were others who had more individual choices. Magistrate Rothman, a Commissioner of Child Welfare at the Durban Magistrate's Court, preferred the term 'minor'. Many jurisdictions have adopted the term 'child'³ in their nomenclature and Professor van Bueren⁴ argues that the retention of the term 'child' in the title of the statute serves as a reminder to all who read and interpret the statute that they are dealing with children. The Grahamstown office of the Attorney-General argues strongly against the use of the term 'child':

- 1 It is widely accepted, though, that the protective rights in the CRC apply to all children below the age of 18 years, despite the possibility of emancipation below that age: see G Van Bueren *The International Law on the Rights of the Child* 1996 who points out that the 1985 Beijing Rules (rule2(2)(a)) defines a "juvenile" as a "child or young persons who under the respective legal systems may be dealt with for an offence in a manner which is different from an adult". This allows States to determine their own upper age limit for a juvenile justice system, but it is argued that the juvenile justice rules in the CRC supplant the limitation of the earlier Beijing Rules, and apply to all children below 18 years regardless of whether national criminal law treats some young persons as adults.
- 2 In the New Zealand Children Young Persons and Their Families Act, 1989, 'child' refers to a boy or girl under the age of 14 years, whereas 'young person' means a boy or girl over the age of 14 years but under 17 years.
- 3 See the Ugandan Children Statute, 1996, which defines a child as a person below the age of 18 years; the Children (Scotland) Act 1995 defines a child as a person who has not attained the age of 16 years, or a child over 16 and under 18 in respect of whom a supervision requirement is in force (section 93(2)(b)).
- 4 At the SA Law Commission/UNDP International Conference in Gordon's Bay, November 1997.

Some very serious crimes are committed by persons below the age of 18 years. These youthful offenders often display a maturity in respect of their criminal actions which totally belie their age. As the word 'child' is normally used to denote a person of immature mental and physical development, it seems unrealistic to refer to these type of juvenile offenders as 'children', especially so when they are closer to the benchmark age of 18 years old.

6.7 Comment from academics on the choice of terminology was varied. Professor FFW van Oosten and Ms A Louw of the University of Pretoria found it "difficult to conceive of any reasons why 'juvenile' as opposed to 'child', 'youth' or 'young person' should be unacceptable".

6.8 However, Professor Davel of the same university supports the use of the term 'child' and submits that the terms 'juvenile' and 'offender' be avoided in all proposed legislation so that we may begin to move away from the labelling of children. Professor JH Prinsloo of the Institute of Criminological Sciences at the University of South Africa submits that the project committee's criticism of the term 'juvenile justice' is justified and suggests that prospective legislation enacting criminal justice procedures for children and young persons may be called 'The South African Children and Young Persons Act'.

Responses to questionnaire

TERMINOLOGY	RESPONDENTS SUPPORTING
i) juvenile	24
ii) child	48
iii) youth	9
iv) young person	55
v) other	0
vi) no response	6

UPPER AGE LIMIT	RESPONDENTS SUPPORTING
i) 18 years	99
ii) other	15
iii) no response	9

Evaluation and recommendations

6.9 The responses indicate fairly widespread agreement on the rejection of the term “juvenile”. The respondents were also clear that “youth”, although a popular term in many other countries, is affected by the recent political past and, in South Africa, has been regarded as including people up to the age of 35 years.⁵ The remaining options were “child” and “young person”, and respondents favoured these in virtually equal numbers. The project committee has decided to opt for the term “child”. This is motivated primarily by section 28 of the South African Constitution which provides that “a child” is a person under the age of 18 years, as well as the terminology and definition of the CRC. A further impetus derives from the desire to integrate the work of this committee with that being undertaken by other project committees of the Commission which together will have an impact upon the development of a comprehensive body of law relating to children. There is thus a need to use terminology consistent with that being used in other investigations.⁶

6.10 The reluctance to use “child” by those who do not favour it appears to be based on the fact that the term implies innocence and is associated with pre-adolescence. This feeling, however, seems to be far more prevalent amongst English and Afrikaans speakers. In African languages the equivalent word for “child” does not appear to carry this connotation, possibly because childhood is a social state that can apply to older persons who have not undergone the steps⁷ necessary for transition to majority and is not defined by any specific cut-off age. Because people in their

5 See, for example, the definition of “youth” contained in section 1 of the National Youth Commission Act 19 of 1996: “youth means persons between the ages of 14 and 35”.

6 Chiefly the project committee on the Review of the Child Care Act and the project committee on Sexual Offences Against Children.

7 Such as initiation and formation of a separate household.

twenties or thirties living at home who have not yet married are often referred to as “children”, an implicit association with “innocence” does not prevail.

6.11 In recommending the choice of the word “child” to describe persons under the age of 18 years, the project committee further recommends that the draft Bill proposed in this Discussion Paper be named the “Child Justice Bill”. Reference is made throughout the paper to the child justice system, and child justice courts.

6.12 The project committee also regards the retention of the age of 18 years as the upper age limit to be desirable in view of the general consensus among respondents and the fact that this age appears to be unproblematic.⁸

6.13 The project committee acknowledges that in the proposed system there is a disparity between the proposed ages at which children may be held in prison awaiting trial, and the age at which they may be sentenced to imprisonment - 16 years is proposed as the minimum age for admission to prison while awaiting trial, and 14 years as the minimum age for children to be sentenced to imprisonment. It is possible that this discrepancy could be eliminated by selecting the age of 15 years, which is the age set for compulsory schooling by the South African Schools Act 84 of 1996, and is the age below which children are prevented from working, according to the Basic Conditions of Employment Act no 75 of 1977. Comment is invited on this issue.

(ii) Criminal responsibility

Current South African law

6.14 There is general agreement that the test by which criminal responsibility⁹ is determined is whether the accused’s mental faculties were, at the time of the alleged offence, sufficiently

8 Cf SA Law Commission ‘Review of the Child Care Act’ *Issue Paper 13* 1998 at 54.

9 CR Snyman *Strafreg* 3rd edition Durban: Butterworths 1992 at 164 (note 5) states, with regard to the Afrikaans term “toerekeningsvatbaarheid” that it is usually translated as ‘criminal capacity’, ‘criminal accountability’ or ‘criminal responsibility’. The author does not prefer ‘criminal responsibility’, however, since it may lead to confusion with the concept of criminal liability, which presupposes the presence of all elements of liability.

developed or unimpaired to render him or her capable of -

- * appreciating the nature and quality of his or her conduct;
- * appreciating the wrongfulness of his or her conduct; and
- * acting in accordance with an appreciation of the nature and quality or the wrongfulness of his or her conduct.

6.15 Youth as a defence to criminal responsibility is governed by two common law presumptions which are based, either fully or partially, on physical age limits.¹⁰ First, a child under the age of seven years (meaning a child who has not yet reached his or her seventh birthday) is irrebuttably presumed to be *doli incapax*, irrespective of such child's actual mental capacity to appreciate the nature, quality or wrongfulness of the act, and to control his or her conduct accordingly.¹¹ According to Van Oosten¹² the test is a purely physical one. The second common law presumption rules that a child between the ages of seven and fourteen years (the upper limit implying a child who has not yet reached his or her fourteenth birthday) is rebuttably presumed to be *doli incapax*. The burden of rebutting the presumption by establishing such child's criminal responsibility rests on the prosecution. Van Oosten argues that in principle this means that a mixed test which incorporates both the physical and psychological elements, applies.¹³

6.16 The presumptions date back to Roman Law and were designed to protect children, but practitioners and academics have noted that the *doli incapax* presumption is all too easily rebutted and that it does not in fact present an impediment to the prosecution and conviction of young people.¹⁴ In practice, for instance, a mother of an accused child is frequently called to testify as to whether her child understands the difference between right and wrong. An answer in the affirmative is often considered sufficient grounds to rebut the presumption of *doli incapax*. It has also been pointed out that generally the test when used in practice ignores the child's capacity to

10 FFW van Oosten 'Non-pathological criminal incapacity versus pathological criminal incapacity' (1993) *SACJ* 132.

11 Burchell and Milton *Principles of Criminal Law* 1991 at 200.

12 *Ibid* 133.

13 *Ibid*.

14 *Ibid* at 125.

control his or her conduct in accordance with an appreciation of its nature, quality or wrongfulness.¹⁵ The courts have noted that caution should be exercised where accused are illiterate, unsophisticated, and moreover are children "with limited grasp of the proceedings".¹⁶

6.17 The fact that many children do not enjoy legal representation during criminal proceedings - many appear without parental assistance and are ill-equipped to defend themselves in criminal proceedings - may have a bearing on decisions relating to the fixing of a minimum age of criminal responsibility.

6.18 In Issue Paper 9 the following options for improving the present situation were put forward for consideration:

- (i) Retention of the *doli capax / doli incapax* presumption, *ie* with a lower threshold age of 7 years, but placing more emphasis on rebutting the presumption, such as including a requirement that the state should lead expert testimony on an accused child's development.
- (ii) Raising the lower age of criminal capacity from 7 to 10 years and retaining the presumption for children over 10 years and under 14 years with certain safeguards.
- (iii) Parting with the rule of *doli capax / doli incapax* and raising the minimum age of criminal responsibility to the age of 12 or 14 years.

Comment on Issue Paper 9

Written responses

Regarding the minimum age of criminal capacity, a common theme that has emerged from the responses to the Issue Paper is the substantial support for raising this age, with almost all

15 *Ibid*, and sources cited there.

16 *S v M* 1982 (1) SA 240 (N).

respondents pegging the lower limit at at least 10 years¹⁷ although some expressed a preference for a higher limit of 12 or 14 years.

6.19 Most respondents favoured the third option but were not specific as to whether the minimum age should rest at 12 or 14 years. The National Institute for Public Interest Law and Research (NIPILAR) strongly advocated for the creation of a dual system of welfare and justice which has all children under 14 years being processed through the welfare system and children over 14 years through the justice system. The Department of Welfare and Population Development in the Gauteng Province shares this approach with the added suggestion that not only the child under 14 years but also his or her entire family should be referred to social-work intervention which would include a form of treatment to educate and support the family in respect of future negative behaviour.

6.20 Mr D Oosthuysen of Justice College takes the view that criminal capacity should not be central to the issue of the minimum age at which children should be taken through the criminal justice system. He recommends a clause which will provide that children below a certain age are not prosecuted, and that this should not be linked to any test regarding criminal capacity. Mr Oosthuysen raises the possibility of exceptions to this rule in the form of a special certificate to be issued by the Attorney-General.

6.21 Professor van Oosten and Ms Louw find the suggestion of the project committee that age limits “should be linked to cultural conceptions relating to childhood and maturity” (paragraph 3.18 of the Issue Paper) unacceptable and demand scientific evidence in this regard. The Issue Paper does provide some statistical data indicating that less than 10% of cases are instituted against children under 14 years. Professor Prinsloo refers the project committee to his own research findings which indicate that -

... at least 21 % of all children appearing on criminal charges in court may be in need of care. The research also confirms and reflects society’s tolerance towards accused children by the fact that the appearance of children of ages 11 and 12 years in criminal courts

17 Where countries have established an age of criminal responsibility below the age of 10 years, there has been criticism from the United Nations Committee on the Rights of the Child.

represents only 1.3%. Children of the ages 12 to 14 years represent a further 2.6% to account for 3.9% of the population of young persons involved in the particular study and socio-geographical area.

6.22 Superintendent Nilsson, the Provincial Police Commissioner of the Western Cape, has submitted statistics of children arrested in 1996 in the Western Cape indicating that 13.9% (1 834 children) were under 14 years of age. In 1997 this percentage was 14.7% (2 045 children). These statistics do not provide an indication of how many children were under 12, or older than 12 but under 14. In his analysis of the 1997 figures, though, Superintendent Nilsson asserts that the figures show that “youth offenders did not become younger on average, as is claimed in some circles”.¹⁸ He supports the proposal that all children under the age of 12 years be referred to the Children’s Court.

Responses to questionnaire

MINIMUM AGE OF CRIMINAL CAPACITY	RESPONDENTS SUPPORTING
i) retaining the present legal situation	47
ii) raising the minimum age of criminal capacity from 7 to 10 and apply the existing rule to children over 10 years and under 14	63
iii) raising the minimum age to 12 or 14	25
iv) other	5
v) no response	4

18 N Nilsson ‘Analysis of Arrests of Youth Offenders in the Western Cape from 1995 to 1997’ unpublished documents, SAPS, Western Cape.

Evaluation and recommendations

6.23 South Africa has one of the lowest threshold ages of criminal responsibility in the world. Many academics and practitioners have argued that the minimum age should be raised in accordance with international rules. The age set should be related to the age at which children are able to understand the consequences of their actions. The age chosen should be framed within a thorough understanding of children's cognitive, emotional and social development.

6.24 The following table gives an indication of the minimum age of criminal responsibility in a number of countries:¹⁹

MINIMUM AGES OF CRIMINAL RESPONSIBILITY									
7	8	9	10	12	13	14	15	16	18
Bangladesh	Australia	Ethiopia	Australia	Canada	Algeria	Belarus	Denmark	Argentina	Brazil
Cyprus	(ACT)	Philippines	(most states)	Cyprus	Burkina Faso	Bolivia	Egypt	Belarus	Colombia
India	Kenya		Nepal	Jamaica	France	China	Finland	Belgium	Costa Rica
Jordan	Iran - (girls)		Nicaragua	Korea	Madagascar	Croatia	Iceland	Bolivia	Peru
Lebanon	Scotland		U K (except Scotland)	Morocco	Niger	Germany	Iran - (boys)	Chile	
Namibia				Spain	Senegal	Italy	Norway	El Salvador	
Nigeria	Sri Lanka			Uganda	Tunisia	Japan	Peru	Indonesia	
Pakistan				Yemen	Uzbekistan	Korea	Sudan	Poland	
Sudan						Paraguay	Sweden	Portugal	
Tanzania						Romania		Spain	
Thailand						Russian Fed			
Zimbabwe						Rwanda			
						Ukraine			
						Vietnam			
						Yugoslavia			

6.25 It has to be stated, though, that in countries such as Brazil, Colombia and Peru, although the official age of criminal responsibility is given as 18, the actions of children from the age of 12

19 Obtained from UNICEF International Child Development Centre (1998) *Innocenti Digest 3* at 5 and from 'Old enough to be a criminal?' (1997) *The Progress of Nations* at 56.

are subject to legal proceedings. In the United States of America the age of criminal responsibility is established by state law. Only 13 states have set minimum ages, ranging from 6 to 12 years old. Most states rely on common law, which holds that between the ages of 7 and 14 children cannot be presumed to bear responsibility but can be held responsible.²⁰

6.26 The Committee on the Rights of the Child constantly refers, in its Concluding Observations on State Party Reports, to the desirability of setting the highest possible minimum age.²¹ Countries where the minimum age of criminal responsibility has been set at 10 or below have been particularly criticised. The Committee was therefore gravely concerned about the fate of the 1969 Children and Young Persons Act in England and Wales, which contained a provision to raise the age from 10 to 14. The Act was never implemented and was finally repealed in 1991 - just before the United Kingdom became a state party to the CRC.²²

6.27 The project committee recognises that the setting of a minimum age may be a somewhat arbitrary exercise - as children mature at different rates, and one child of a particular age may differ markedly in his or her understandings or perceptions from another child of the same age. This gives rise to the question as to whether there should indeed be any prescribed age below which a child is presumed to lack criminal capacity, and whether, instead, it would be feasible to hold an inquiry in respect of each and every child to establish whether he or she has criminal capacity. In deciding upon this issue, the project committee has had regard to the international instruments.

6.28 The Convention on the Rights of the Child requires the establishment of laws which set “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”²³ The Beijing Rules (which were written prior to the CRC), require that the lower age of

20 ‘Old enough to be a criminal?’ (1997) *The Progress of Nations* at 56.

21 *Innocenti Digest 3 supra* at 4 - 5. The CRC places a duty on state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. The Beijing Rules (Rule 4) recommend that when states establish such an age of criminal responsibility, “the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional mental and intellectual maturity”. The Commentary to the Rules points out that if the age were set too low or was non-existent, the concept of responsibility would become meaningless.

22 *Ibid.*

23 Article 40(3)(a).

criminal responsibility “should not be fixed a too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”²⁴ These international instruments thus unequivocally require the setting of a specified lower age limit below which a child may not be prosecuted.

6.29 The project committee has identified three main approaches to the issue of minimum age and criminal capacity. The first of these is to retain the current common law rule that a child who is seven or ten years old but has not yet turned 14 years is presumed to be *doli incapax*, with additional measures to ensure enhanced protection of such children. The second approach is to depart entirely from the *doli incapax* presumption, and to set a minimum age of prosecution, not directly linked to the actual criminal capacity of the child. The third approach is to have a dual or “split” level of minimum age of prosecution, setting a general minimum age, and providing specific exceptions to that rule. The details regarding these approaches are set out below. The project committee has found the question regarding the minimum age at which children can be taken through the criminal justice system to be a complex and challenging one. It has been decided, therefore, to set out the various approaches and comments and to call for comments and suggestions from the respondents to this Discussion Paper.

The retention of the doli capax and doli incapax presumptions

6.30 The advantage of the *doli capax* and *doli incapax* presumptions is that they recognise the need for younger children to be dealt with differently from older children. This bears witness to the fact that even in Roman times there was recognition of the fact that very young, immature children should not be presumed to have criminal capacity. The presumptions also allow for a flexibility of approach, focussing on the individual child.

6.31 The criminal responsibility test linked to the *doli incapax* presumption as applied by the courts has, however, been the subject of criticism by some academics. Snyman,²⁵ recording his

24 Rule 4.1.

25 *Op cit* 187.

disapproval, states that in practice the prosecution usually takes a shortcut by merely asking a child whether he or she knew that the action concerned was wrong. Such an approach, firstly, negates the fact that the test for criminal responsibility centres around the accused's mental capabilities, and is not based on knowledge or the lack thereof. Secondly, the approach in practice only involves one aspect of the accused's knowledge, namely his or her knowledge of the wrongfulness of the action, while the importance of the accused's knowledge of the factual content and consequences of his or her action is disregarded. Thirdly, the approach applied has no reference to the accused's capacity to act in accordance with an insight into right and wrong (referred to as the conative aspect of the test of criminal responsibility). Snyman contends that it goes without saying that a child, before he or she can be regarded as criminally responsible, has to have the necessary capacity to resist and to control his or her will.²⁶ It is quite common for children to act impulsively, or to be influenced by adults or older children to such an extent that their resistance to what is wrong is either non-existent or substantially less than that of a normal adult.

6.32 In similar vein Van Oosten records that the courts have often paid mere lip-service to the criminal responsibility test and while applying the test under the guise of criminal responsibility, it is actually one of fault - which tends to confuse and identify these issues with one another.²⁷ He argues that the test not only ignores the child's capacity to appreciate the nature and quality of the act, but also the child's capacity to control his or her conduct in accordance with an appreciation of its nature, quality and wrongfulness.

6.33 De Wet and Swanepoel²⁸ also mention the over-simplified test applied by the courts in merely inquiring whether the child knew that what he or she did was wrong. The authors contend that in accordance with this test, it is more readily presumed that a child is criminally responsible when committing a common law offence than when committing a statutory offence.²⁹ Even when a child knew that what he or she did was wrong, the child may nevertheless be so immature that he or she is incapable from refraining from that which is wrongful. De Wet and Swanepoel call for

26 *Ibid.*

27 Van Oosten *op cit* 133.

28 *Strafreg* 4th edition by JC de Wet Durban: Butterworth 1985 at 111.

29 This is echoed by Snyman *op cit* 188.

expert evidence to be led in establishing criminal responsibility in the case of children between seven and fourteen similar to the hearing of such evidence in the case of mentally ill persons.

6.34 It appears from the foregoing that the simplified test of criminal responsibility of children is generally applied by the courts, is unsatisfactory. The assumption can be made that the problem does not lie so much in the nature of the law rules regulating criminal responsibility but in the application of those rules by the courts.

6.35 It is proposed, therefore, that if the *doli capax* and *doli incapax* presumptions are to be retained in any future system, expert testimony must be led in each individual case in order to establish that a child was not only aware of the wrongfulness of his or her actions, but also had the capacity to act in accordance with that knowledge and the consequences of the wrongdoing. The proposed legislation should therefore demarcate the parameters of the test and make expert testimony compulsory. An “expert” in this situation would be a psychologist or other professional person who has specific knowledge of childhood development who has undertaken a thorough professional assessment of the child.³⁰

6.36 In recommending a requirement that expert testimony in relation to each individual child is compulsory, consideration must be given to the feasibility of this, given resource and capacity constraints in South Africa, especially outside the few large urban areas.

6.37 As has been mentioned, the age of seven as a minimum age of criminal capacity, even offset by the *doli incapax* presumption, would constitute one of the lowest ages of criminal capacity in the world, and countries with such low minimum ages have been criticised by the UN Committee on the Rights of the Child, to which South Africa, due to ratification of the CRC, must regularly report.

6.38 In responses to the Issue Paper there was support for the retention of the *doli capax* and

30 Cf sections 77 - 79 of the Criminal Procedure Act, 1977, where provision is made for an inquiry to be conducted in the case of persons suffering from mental illness or defect relating to the capacity of the accused to understand the proceedings, by the medical superintendent of a psychiatric hospital designated by the court or other psychiatrists.

doli incapax presumptions (provided that better protection for individual children is provided regarding the rebuttal of *doli incapax* presumption). However, far more support was obtained for an alternative option set out in the Issue Paper, which was the retention of the *doli incapax* presumption for children under 14 years, but raising the minimum age to that of 10 years - with the additional protections regarding the rebuttal of presumption.

6.39 Comment is invited upon the approach of retaining the *doli capax* and *doli incapax* presumptions, on the desirability and feasibility of providing additional evidentiary protections regarding rebuttal, and of the appropriate minimum age of criminal capacity within this framework.

The adoption of a minimum age of prosecution

6.40 A second option is to depart from a test which is based on criminal capacity and to set, instead, a minimum age below which a child may not be prosecuted. It has been pointed out that the current rules applicable to the determination of what is presently termed ‘criminal capacity’ in South Africa, do not in fact properly reflect the common law meaning of capacity: as far as a child below the age of 7 is concerned, the rule is one of substantive law and not an evidentiary rule, and as far as the rebuttable presumption applicable to a child between 7 and 14 is concerned, the present test excludes the second leg of the inquiry, namely, whether the child had the capacity to control his or her actions in accordance with the appreciation of unlawfulness. It might therefore be argued that the words ‘minimum age of prosecution’ rather than ‘criminal capacity’ provide a more accurate reflection of the threshold test, and additionally, it describes more accurately the practical implications of the minimum age rule. The possibility of a minimum age of prosecution was raised in the Issue Paper, but the responses on this point were obscured by the fact that the question of a minimum age of prosecution was linked with the idea of every child below the minimum age being dealt with in the Children’s Court. The project committee is of the view that it is advisable to separate these questions.

6.41 The suggestion that all children below the minimum age of prosecution should automatically go through the welfare system via the Children’s Court has not found favour with

Commissioners of Child Welfare,³¹ who point out that this is not a necessary route in some instances, and that it might unduly clog the Children's Court. It is pointed out that not all very young children who offend are necessarily in need of care, and that assessment by a probation officer would enable those who are in need of care to be separated from those who can be required to be accountable for their deeds through other mechanisms, such as a police caution, apology or family group conference.

6.42 In the present welfare system in South Africa serious concerns have been raised about the protection of children's procedural rights in the Children's Court system and in the institutions linked to the application of Children's Court procedures.³² Concerns have to some extent been addressed by the Regulations to the 1996 Child Care Amendment Act, which came into operation on 1 April 1998, especially as regards administrative transfers of children from care institutions into institutions for more troubled children, and as regards administrative extension of the duration of Children's Court orders. In addition, the S A Law Commission project committee on the Review of the Child Care Act, in *Issue Paper 13*, raises problems pertaining to the Children's Court procedure in Chapter 9. The project committee is therefore aware of the fact that the welfare system is not necessarily a more "benign" option than the criminal process. Thus although the project committee would like to see more cases being channelled through the Children's Court, this option should be reserved only for those cases where specific circumstances indicate that the child may be in need of care.

6.43 Within the second option a minimum age of prosecution is set. Ages recommended by different respondents to the Issue Paper included 14, 12 or 10 years of age. Within this approach no exceptions are envisaged. Children younger than this age would therefore not be accountable for their actions.

6.44 The advantage of this "minimum age of prosecution" option is that it is easy to apply, is predictable and equitable and does not require costly expert testimony. The disadvantage of the

31 As became evident at a workshop with Children's Court Commissioners conducted by a member of the project committee at Justice Training College in October 1997.

32 See in general IMC *In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* 1996

option is that it is inflexible, and the setting of the minimum age is likely to be controversial. If the age is set too high, many will be of the view that children below the age are “getting away with crime”. If the age is set too low, young children charged with non-serious offences will be swept into the net, and may not be sufficiently protected.

6.45 The project committee invites comment on the “minimum age of prosecution” approach as well as on the actual minimum age which should be adopted.

Minimum age of prosecution with exceptions

6.46 The third option also supports the idea of a minimum age of prosecution rather than a minimum age of criminal capacity, but comprises a “dual level”. This means that whilst a general age below which children cannot be prosecuted is set, certain specific exceptions to this rule might be made.

6.47 One way in which this might be done is to link the exception to seriousness of the offence. An example of this is in the United Kingdom (excluding Scotland) where the general age below which children may not be prosecuted is 14, but in the case of serious, violent crime children of 10 years of age may be prosecuted. It appears that this approach is not linked to any particular rationale regarding criminal capacity, as it is unlikely that a child who lacks the capacity to commit theft will necessarily possess criminal capacity when it comes to commit murder. It seems that the approach is aimed at appeasing public concern regarding serious, violent offences committed by children and ensuring that community outrage when the isolated serious offence is committed by such children can be accommodated.

6.48 In considering the second and third options, it should be borne in mind that there are indications that children younger than 12 years do not in practice receive sentences of imprisonment,³³ nor are they often sentenced to attend a reform school. Both of these sentences are residential care sentences at present which would be most likely to be used in cases where

33 See statistics from the Department of Correctional Services on children in prison, reproduced in J Sloth-Nielsen ‘Juvenile justice review 1997’ (1998) *SACJ* 105 *et seq.*

serious offences have been committed by young offenders. It can be concluded that either cases where children below the age of 12 years are convicted of serious offences are very rare indeed, or, alternatively, that non-custodial sentences or other options (such as referral to industrial schools through the mechanism of a Children's Court inquiry) are utilised by courts in these cases. There is thus the experience from practice, as well as considerable public support, for raising the age of criminal responsibility to 12 or 14 years.

6.49 The third option as proposed by the project committee sets the minimum age of prosecution at 12 (or 14) years and makes provision for a child of 10 years and above to be prosecuted for the following serious and/or violent crimes:

- (a) murder,
- (b) rape,
- (c) indecent assault involving the infliction of grievous bodily harm,
- (d) robbery with aggravating circumstances,
- (e) 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 R50 000,
- (f) any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

6.50 The project committee invites comment on the third option.

6.51 The proposed draft Bill provides for all the options reflected above by referring to a minimum age of prosecution instead of mentioning specific ages. In view of the fact that the second and third options provide for assessment of children who are below that minimum age but

older than 10 years, additional provisions have been inserted at appropriate places to accommodate these options.

(iii) Age determination

Current South African law

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

6.53 In terms of section 337 of the Criminal Procedure Act 51 of 1977 the presiding judicial officer may estimate the age of a person if in any criminal proceedings the age of that person is a relevant fact of which no or insufficient evidence is available. Courts have correctly indicated, however, that the finding of the presiding officer may not be simply based on observation.³⁴ There should be a proper attempt at finding evidence and in the absence of such evidence the accused should, for example, be examined by a district surgeon.³⁵

6.54 The recent changes to the law concerning pre-trial child detention³⁶ put the question of age determination firmly on the agenda. In the past “there were few benefits to be had by false declarations of youthfulness. This changed dramatically with the introduction of section 29³⁷ with its twin cut-off points of 14 years and 18 years. It was, for juveniles and adults, all the more tempting to deceive about age, since release from custody was more or less guaranteed”.³⁸ A related problem reflects the converse: it also became more tempting for officials to record ages

of arrestees on warrants as being 14 or over, since only then was the option of detention after first appearance in court possible.

6.55 Documentary proof of age is not always available, for several reasons, one of which is that many children's births were not registered in the past. Alternative methods, such as examination

34 *S v Manyololo* 1969 (4) SA 356 (E); *S v Job* 1978 (1) SA 736 (NC).

35 A Skelton ‘Children, young persons and the criminal procedure’ in J A Robinson (ed) *The Law of Children and Young Persons in South Africa* Durban: Butterworths 1997 at 106.

36 See the discussion of pre-trial detention and release policy below.

37 Section 29 of Act 8 of 1959, as amended by Act 17 of 1994 and re-amended by Act 14 of 1996.

38 J Sloth Nielsen ‘1994 - 1995 Juvenile Justice Review’ (1995) *SACJ* 331 at 335.

by the district surgeon, are inexact and are not always helpful when precise cut off points (like 14 or 18 years) have to be established.

6.56 In the past it has been argued that the best way in which to solve the problem of proof of age (or lack thereof) would be to formulate a presumption that a child should be deemed to be the age he or she claims to be until such time as the contrary is proved.³⁹

6.57 However, given recent unfavourable experiences with the implementation of section 29 and abuse by adults claiming to be children, this proposal may not be ideal. Monitoring of prisons by the IMC⁴⁰ has revealed the presence of older persons incarcerated with children, claiming to be children, as well as the converse: very young children, whose ages are reflected on the warrants of detention as being 14 years or over.

6.58 The IMC report concludes that "the only answer to the problem in the long term is for the birth date of every young person to be registered ...".⁴¹ Respondents were invited in the Issue Paper to come forward with proposals since, admittedly, there are no quick solutions to this issue.

Comment on Issue Paper 9

6.59 Most respondents were silent on this issue and some were of the view that the present option of bringing a child before an appropriate court for determination of age at the earliest possible opportunity is reasonable in the circumstances.

6.60 A more accurate method which is sometimes used in South Africa is to have the child's wrist X-rayed. This method determines bone age and whether the *ulna epiphysis* has started fusing or has fused. If the *ulna epiphysis* has fused, the bone age then corresponds to that of an 18 year

39 Community Law Centre *Report of the International Seminar on "Children in Trouble with the Law"* 1995.

40 A monitoring project involving NGOs was set up by the IMC to investigate the effects of the Correctional Services Amendment Act 14 of 1996.

41 IMC *Interim Policy Recommendations* at 51.

old.⁴² It is, however, an expensive option. The Natal Society of Advocates suggests that the best available option would be to have the child examined by a District Surgeon to determine age unless a probation officer or social worker is able to determine it to the satisfaction of the court. The Association of Law Societies supports the proposal that clear guidelines be created for all role-players, namely probation officers, police and judicial personnel, in determining the age of children. The office of the Attorney-General, Grahamstown, suggests that the provisions of section 337 of the Criminal Procedure Act 51 of 1977 be re-enacted in child justice legislation until the ideal position is reached where all births are registered. Superintendent Nilsson of the SAPS, Western Cape, suggests that it would be helpful if youth assessment, reception and referral centres are computerised and linked with the Department of Home Affairs to do enquiries any time of the day. The Johannesburg office of the Gauteng Department of Welfare and Population Development is of the view that if juvenile courts, victim support services, police child protection units and arrest, reception and referral centres are in one building, it would be viable to also have a doctor on the premises to do the medical examination of victims and assist with the age determination of child offenders.

6.61 Referring to the example of street children who live without any form of parental guidance and who have been abandoned by society, the Tshwaranang Legal Advocacy Centre argues that these children might well live by completely different moral codes for survival and recommends that all children who appear older but claim to be below 18 years, should be evaluated by a psychologist to determine whether or not they are over the age of 18.

Evaluation and recommendations

6.62 The proof of age problem is one that, in the short term, could increase with a dedicated

42 In terms of a submission by Magistrate A P McMahon, Johannesburg. See also A Skelton in JA Robinson (ed) *The Law of Children and Young Persons in South Africa supra* at 166.

Child Justice Act, rather than diminish.⁴³ The project committee has surveyed the options currently available and comes to the conclusion that there is no totally accurate method of age determination which will answer the current problems. The long term solution remains that of registration of the births of all children. However, even if this process begins as from now, it will take 10 years before it begins to be of assistance to the child justice system. It is therefore necessary, in the view of the project committee, to include provisions regarding the determination of age in the proposed draft Bill to guide decision makers, the police, probation officers etc.

6.63 The police officer is the first person who will come into contact with the child and will ask the child his or her age. In the normal course of events the police officer will either release the child to his or her parents or guardians or deliver the child for assessment by a probation officer. Where an arrested person claims to be under the age of 18 years but appears to the police officer to be over 18, or where a child claims to be younger than 10 years but appears to the police officer to be older than 10, it is recommended that the police officer should take the child to a probation officer for an age assessment, or, if a probation officer is not available, to a district surgeon for an age estimation (this will be a general age estimation based on a physical examination, and not based on the wrist X-ray due to the costliness of the latter procedure). In cases where the probation officer or district surgeon gives a clear assessment of the person's age as 18 years or older, the person should be deemed to be an adult and taken through the normal criminal courts. He or she should, however, have the opportunity of raising the question of his or her age again at the first appearance in court - see paragraph 6.67 for a discussion of the appearance of persons claiming to be children when they appear in the adult court. In cases where the district surgeon provides an assessment of age which is inconclusive about the age of the person, the police officer should refer the child to the probation officer for further age assessment.

In cases where the district surgeon finds a child to be under the age of 10 years, such child should not fall within the ambit of the proposed legislation if 10 is set as the minimum age of prosecution.

43 The IMC *Interim Policy Recommendations*, at 51, asserts that police and probation officers have said that the promulgation of section 29 has led to an upsurge of young people claiming to be under 18 or under 14 years.

6.64 In all cases where there is uncertainty as to the age of the child, this should be taken up by the probation officer. The project committee recommends that a special “assessment of age” form be used by the probation officer to record details about the steps taken to ascertain the age of the child. Working on all this information the probation officer should make an **age assessment** for the purposes of pre-trial decision-making.

6.65 If the probation officer is still uncertain as to the age of the child after making these inquiries, he or she should cause the child to be taken to the district surgeon for age assessment. The report of the district surgeon should be attached to the age determination form. In cases where the district surgeon provides an estimation of age which is inconclusive about the age of the person, he or she should refer the child back to the probation officer concerned for aged determination by an inquiry magistrate. Proof of age or the completed determination of age form should be handed to the magistrate at the preliminary inquiry.⁴⁴ Taking all this information into account as well as questioning the child and calling for any further information which he or she may require, the magistrate could make **a determination as to the age**⁴⁵ of the child, which should be entered into the record as the age of the child and should be considered to be his or her correct age until such time as any contrary evidence is placed before that court or any other court.

6.66 The project committee further recommends that in making either an assessment or a determination as to the age of the child, the probation officer, the inquiry magistrate or any other officer presiding in a court in terms of the provisions of the proposed draft Bill, should have regard to all the evidence relevant to the age of the child in the following order of cogency:

- A valid birth certificate, identity document or passport;
- any other form of registration of birth, identity or age acknowledged by the Department of Home Affairs;
- an estimation of age made by the district surgeon;

44 Discussed in Chapter 9.

45 This provision echoes section 337 of the Criminal Procedure Act which allows the presiding officer to estimate the age of a person in criminal proceedings. In *R v Hadebe and Another* 1960 (1) SA 488 (T) it was held that the presiding officer must say how he came to such determination, what evidence there was, and whether reliance was placed on personal observation. This approach was followed in *S v Sibiya* 1964 (2) SA 379 (N), *S v Buthelezi* 1964 (3) SA 519 (N), *S v Manyololo* 1969 (4) 356 (E), *S v Mavundla and Another*, *S v Sibisi* 1976 (2) SA 162 (N).

- a previous determination of age by a magistrate under the proposed legislation or under the Criminal Procedure Act;
- statements from a parent, legal guardian, or a person likely to have direct knowledge of the age of the child; or a statement made by the child or person whose age is to be determined;
- secondary documentary evidence, such as a baptismal certificate, school registration forms, school reports, and other evidence of a similar nature if relevant to establishing a probable age.

6.67 The project committee further recommends that where a person appearing in a court other than the proposed child justice court discussed in Chapter 10 (ie an ordinary court) claims to be under the age of 18 years,⁴⁶ the presiding officer should stand the matter down for an age assessment. The person can then be assessed by a probation officer, using an age determination form as described above, and if necessary he or she should then be taken to the district surgeon for a medical age assessment. All the information gathered should then be presented to the presiding officer of the court in which the accused person first appeared and the magistrate can make a determination of age based on the information.

6.68 If the age of the person is found to be below the age of 18 years and the trial has not yet commenced, it is recommended that the presiding officer of the court in which the person first appeared should transfer the matter to the inquiry magistrate for further proceedings under the proposed draft Bill. In those cases where the trial has already commenced, the remainder of the proceedings should be concluded before the presiding officer of the court that commenced hearing the matter and such proceedings should be conducted in terms of the provisions of the proposed draft Bill.

46 Evidence by a person as to his or her own age is hearsay - *R v Kaplan* 1942 OPD 232, *R v C* 1955 (1) SA 86 (O).

7. PRE-TRIAL PROCEDURES PERTAINING TO POLICE POWERS AND INVESTIGATION

Current South African law and practice

7.1 The present South African position is regulated by the Constitution, the Criminal Procedure Act and the Correctional Services Act (as amended).¹ In addition, the CRC contains provisions pertaining to police powers and duties.² The constitutional provision mirrors that to be found in international instruments, and provides, with respect to children, that detention shall be used as a matter of last resort only, and for the shortest appropriate period of time. Section 28(1)(g) also makes the point that the child has the additional right to be "treated in a manner, and kept in conditions, that take account of the child's age."³ The Constitution provides further for specific rights for all accused, detained and sentenced persons which also apply to children.⁴

Arrest

7.2 There are no provisions of the Criminal Procedure Act concerning arrest that apply specifically to children, save for section 50(4) discussed below. It has been noted that arrest⁵ is the primary method of securing the attendance of children in court in practice.⁶ Other options in the Criminal Procedure Act 51 of 1977 include a written notice to appear in terms of section 56 which

1 Also see Chapter 2.

2 Article 37 provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Detention includes detention in police cells before first appearance in court.

3 This too refers to treatment by police and conditions and police cells.

4 Section 35 of the Constitution.

5 It is still not clear how many children are arrested in South Africa annually. The only province for which information on arrests of children in conflict with the law is available, is the Western Cape. Approximately 14 000 children were arrested in 1997. The figure for 1996 is 12 500.

6 Arrest is used indiscriminately for both serious and minor offences. In some foreign jurisdictions, distinctions between minor and serious offences are drawn and alternative methods of securing the attendance at court of young persons involved in the commission of less serious offences are often used.

can be issued by the police, and the use of a summons in terms of section 54.⁷ However, their use in practice has been hindered by reason of the fact that a written notice can only be issued for very minor offences, and because of the necessity of locating a parent or guardian prior to the handing over of a written notice or summons for the purposes of warning the parent or guardian to attend court proceedings. Similarly police bail which can be granted before first appearance in court at the police station in the instance of certain minor offences in terms of section 59, has also been used infrequently in the case of children because of the failure of the police to locate parents and guardians as well as the difficulties associated with monetary bail for children generally.⁸

*Notification of parents, guardians and other roleplayers*⁹

7.3 Attention has already been drawn, in paragraph 2.46, to the inconsistency in the Criminal Procedure Act as far as sections 50(4) and 74(2) are concerned, which needs to be rectified.¹⁰

7.4 In terms of section 50(5) of the Criminal Procedure Act, the police have to notify a probation officer when a child is arrested. In the absence of a probation officer, an available correctional official must be notified of the arrest of any child. It appears that this is not consistently done in practice, and is not even widely known, especially to probation officers. It has been in operation since 1993.

7.5 Pilot projects and provincial initiatives have shown that the key to effective release policy

7 General statistics comparing the use of pre-trial detention in comparison to pre-trial release are not readily available. In the Western Cape 41,3% (1995) and 33,3% (1996) of arrested children were released by courts into the care of parents or guardians after first appearance, and a further 9,1% (1995) and 12,1% (1996) were released by courts on their own recognisance. This suggests that a large number of arrested children were detained for some period after arrest only to be released at court. Bearing in mind that at least 50% were released by courts, it is questionable whether detention was necessary at all. As far as placement is concerned, the aim is to place a child with his or her family as soon as possible after arrest. In the Western Cape only 11,7% of arrested children were placed at their parents by the police in 1995. The figures for 1996 are 11,8%, and 10,9% for 1997.

8 For a discussion of bail, see Chapter 9 below.

9 Article 40(2)(b)(ii) of the CRC states that a child should be informed promptly and directly of the charges against him or her and, if appropriate, through his or her parents or legal guardians.

10 See also 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.

is the speedy location and involvement of parents and guardians, so that children may be released into their care. Early intervention, including the assessment and reception of young offenders, forms one pillar of the overall IMC Recommendations regarding transformation of the child and youth care system. In the Western Cape, since 1994, use has been made of community based “family finders”, who can track down a person who is able to take responsibility for a child in conflict with the law. According to Probation Services, Western Cape, the assessment centres could not function without the family finders. Similarly, the Durban Assessment Centre also incorporated a family finding element, and the IMC *Project Go* has also required the appointment of such persons for the purposes of placement of children out of residential care facilities back to the care of parents or guardians. However, the pilot projects and practice have also revealed that not only family finders, but probation services themselves can and do fulfil a role in locating parents and guardians where they have been drawn into children’s cases.¹¹ It has been asserted that the role of probation officers supplements the police in this regard. The location of families and other support persons is not always sufficient though: many probation officers report that parents, when contacted, are reluctant to take responsibility for their children, for a variety of reasons: poverty, the feeling that they do not have sufficient control over the child, and often, feelings of inadequacy or embarrassment because their child has come into conflict with the law.

7.6 Two key limitations have been identified in the present legal framework: The first is that the persons who are notified must be parents or guardians, whilst there are often other family members, other care-givers or responsible adults available who can assume responsibility for a child. Second, the present obligation upon the police to notify parents or guardians is limited to the situation where “it is known that they can readily be reached or can be traced without undue delay”. The practical effect is often that police are reluctant to proceed outside their precinct to trace parents or guardians, and may be inclined to use the limitation as a barrier to locating adults.

11 There could be a statutory provision enabling the probation officer performing the assessment to direct the police (arresting or investigating officer) to notify a particular person whose identity has been revealed during the interview procedure to appear for assessment: children frequently reveal the identity of the adults in whose charge they are only after arrest, at assessment stage, to a probation officer rather than to the police, yet the probation officer has no statutory powers to arrange for the attendance of the parent or guardian.

*Informal diversion by police and police cautioning*¹²

7.7 Although the present South African system regards the prosecutor as *dominus litis*, it has been noted that the police too have a gatekeeping role in the criminal justice system.¹³ They can choose not to charge an arrested person in certain instances (for example loitering). There is no known study of informal police decision making of this type in South Africa to illustrate the extent to which the police at present play this role. Currently there is no regulated form of cautioning in South Africa.¹⁴

*Detention in police custody*¹⁵

7.8 The Constitution provides that children must be separated from adults whilst in detention; this clearly refers to detention in police custody, including both cells and vehicles. In addition, all arrested persons must be brought before court within 48 hours after arrest according to section 35(1)(d) of the Constitution.

7.9 The Beijing Rules spell out that "[w]herever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home".¹⁶ The Commentary to the Rules stresses the danger to children of "criminal contamination" while they remain in detention pending trial, and encourages

12 Article 40(3)(b) of the CRC states that diversion of children/young people away from the mainstream criminal justice system should be possible at all stages of the process.

13 Cf Community Law Centre *Law, Practice and Policy: South African Juvenile Justice Today* Cape Town: University of the Western Cape at 37. In the *National Crime Prevention Strategy* document (at 61 par 1.6.7) it is pointed out that limited use of diversion type alternatives is made by the police in certain cases. These usually involve victim/offender mediation.

14 International studies show that there are two possible types of police caution to be considered. One is an informal police caution to be administered by the police officer at the scene. A second type of police caution is a formal caution in the presence of the parents or guardian by a ranking officer. The decision that the police should be required to administer a formal caution as a form of diversion could be made by the police or probation officer.

15 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.

16 Rule 13.2.

the development of new and innovative measures to avoid pre-trial detention.

7.10 The 1994 amendments to Section 29¹⁷ of the Correctional Services Act 8 of 1959 attempted to limit the period spent in detention in police cells after arrest. The first amendment limited pre-trial detention to 24 hours (save in the case of children over 14 charged with scheduled offences who could be held for 48 hours). The 1996 amendment retained the distinction between children below 14 years and those from 14 to 18 years. In this latter category children could be detained for up to 48 hours regardless of the nature of the offence, as the previous time limitations proved to be unworkable, and did not allow sufficient time to locate parents, social workers, and to prepare the docket in readiness for first appearance in court.

7.11 The 1996 legislation was intended to prohibit detention of children in police cells altogether after this initial period. However, despite the express exclusion of police cells as places of detention after first appearance in court, children continue to be held in police cells. After May 1998 the 1994 position on 24 hour detention comes into effect again as a result of the provisions of section 29(5) of the Correctional Services Act.

7.12 The project committee is aware of the particular vulnerability of children whilst in police custody.¹⁸ The concern about children in custody in police cells is reflected in the attempts in 1996 to prohibit detention in police cells save for an initial period after arrest. The vulnerability relates, amongst other things, to the difficulties of monitoring compliance with the rule that children are separated from adults whilst in detention, as inspections of police cells are neither routine nor sufficiently frequent; to the poor physical conditions in police cells, where (for example) proper supervision and adequate exercise facilities are often not available; and to the problem that services (health services, welfare services etc) to children cannot be effectively provided whilst in police custody. The project manager of the Durban Arrest, Reception and Referral project for instance reported: "Throughout the running of the project there was poor co-operation from SAPS. As a result, 1 084 children were detained overnight or longer in police cells instead of being brought to

17 See Chapter 2.

18 There was a public outcry after the death of 13 year old Lubabalo Mazweni in police custody in Butterworth, Eastern Cape, on May 8 1997. The child had been arrested on a charge of stealing sweets from a shop, and was incarcerated in a cell with an adult accused, who battered him to death.

the Centre for assessment. This resulted in time and money being wasted as, on many occasions, probation workers on duty spent an entire shift without seeing any children”.¹⁹

Conduct of the initial investigation by the police

7.13 There are currently no specific legislative provisions that differentiate between children and adults as regards investigative procedures. Children currently have fingerprints taken, regardless of their age or of the offence for which they have been arrested. They may also be questioned, may make a confession which is admissible in court as evidence against them, may be required to point out evidence, and participate in an identity parade. In all of these situations, the rules applicable to adults apply equally to children, and at present the law does not recognise their possible immaturity, suggestibility, and vulnerability during the investigative process. There is case law²⁰ to the effect that a confession, admission or pointing out may be excluded as inadmissible evidence where a child has not been afforded the opportunity of obtaining parental advice and assistance. However, although the current police obligation to notify parents or guardians commences “forthwith” after arrest, there is (apart from the above-mentioned cases) no explicit requirement that parents (who may provide important protections) be present at pre-trial procedures. NGO policy proposals in 1994 mooted the possibility of evidence which is obtained in the absence of a parent or guardian being rendered statutorily inadmissible.²¹

7.14 In Issue Paper 9 the following proposals were put forward for consideration:

1. National guidelines should be drawn up on the powers of the police to arrest persons who appear to be under the age of 18.²²
2. Broadening of the scope of application of the written notice to appear and the summons should occur.

19 IMC *Report on the Pilot Projects* 1998 at 18.

20 See *S v Kondile* 1995(1) SACR 394 (SEC) discussed in J Sloth-Nielsen (1995) *SACJ* 338.

21 *Juvenile Justice For South Africa: Proposals for Policy and Legislative Change supra* at 27.

22 Also see IMC *Interim Policy Recommendations* at 36.

3. Distinctions between minor and serious offences could be drawn, and alternative methods for securing the attendance of children involved in the commission of less serious offences could become mandatory.
4. The police should continue to bear the primary responsibility for tracing and notifying parents, guardians or other persons.²³
5. The arresting officer should bear this responsibility, and should, as is currently the case, have the additional responsibility of also notifying the probation services. Where assessment, reception or referral centres are functioning, the police should have a duty to take the child as soon as possible to this centre, even if it is after hours.²⁴ Otherwise the notification of a probation officer will trigger the necessary assessment.
6. Informal diversion as presently practised by police (for example, asking a child to move, instead of arresting for loitering) may not need to be regulated in legislation, but, in line with international rules, provision could be made for more diversion options to be exercised by police. Police cautioning has been suggested as an appropriate and inexpensive option for South Africa.²⁵

Comment on Issue Paper 9

Written responses

Alternatives to arrest

7.15 Most respondents support the view that distinctions should be drawn between minor and serious offences and that alternative methods of securing the attendance of children at court be

23 Notification should occur whether arrest or an alternative means of securing attendance of the child is used.

24 Assessment and referral are dealt with fully in Chapter 8.

25 IMC *Interim Policy Recommendations* at 39.

explored. Ms Louw and Professor van Oosten are of the view that the proposal regarding a possible alternative to securing a child's attendance at court by means of arrest in the absence of clear statutory guidelines delineating the distinction between minor and serious offences could be problematic.

7.16 There was a varied response to the retention of the schedule of offences to determine whether or not a young person may be detained in police custody. The Natal Law Society also had reservations that the second option might prove to be rather inflexible in cases where a detention might be warranted despite the offence being listed as a non-detention one. The Society raises the concern that once detention is a permitted option for listed offences, it will tend to become the norm, being the easier course for the police to follow in the absence of some safeguard such as immediate mandatory assessment. The Law Society of the Cape of Good Hope prefers individual assessment to an option based on schedules in respect of which children may or may not be detained.

7.17 Captain Nilsson of the SAPS observes that an effective family finder system would help to have more written notices issued before the first appearance. This indicates support from the police, not only for increased authority to release any child held in custody before his or her first court appearance to the parent or guardian, but also for practical assistance.

Notification of parents, guardians and other role players

7.18 The majority of respondents agreed that the police should continue to be responsible for tracing and notifying parents or guardians.

Informal diversion by the police and police cautioning

7.19 The Department of Welfare and Population Development of Gauteng recommends that the powers of the police be extended to permit the police to directly refer children to diversion programmes or to community service with the proviso that records of such referral are kept for future reference. Ms Louw and Professor van Oosten caution that the idea of informal diversion

by the police may pose the following pitfalls: firstly, placing the decision to divert exclusively in the hands of the police officer on the scene may lead to inconsistencies where discretionary powers are arbitrarily exercised, and secondly, that the process can only be effective if the child recognises the authority of the police officer and is in fact cautioned from repeating the offence. The office of the Attorney-General, Grahamstown, on the other hand recognises that it would be impossible to attempt to legislate for all possible scenarios and therefore it should be left to the arresting authorities to develop a practical system incorporating the proposals set out in paragraphs 5.10 and 5.11 of the Issue Paper.

Detention in police custody

7.20 No specific comment other than the comment submitted by the Natal Law Society and the Law Society of the Cape of Good Hope dealt with under the heading *Alternatives to arrest* above, was received.

Responses to questionnaire

POLICE POWERS AND DUTIES	RESPONSES
i) alternative methods to arrest	yes: 120 no: 23
ii) arresting officer to be responsible for notifying parents, guardians	yes: 131 no: 12
iii) police caution by police officer at the scene	11
iv) a formal caution by a ranking officer in the presence of parents or guardians	109

Evaluation and recommendations

7.21 The UN Convention on the Rights of the Child provides in Article 37(b) that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". Release of children from pre-trial detention has been emphasised as a primary concern for the protection of children.²⁶ The Human Rights Committee of the United Nations has disapproved of unrestricted pre-trial detention for children.²⁷

7.22 The proposed child justice legislation seeks to modify and enhance those powers already assigned to the police in terms of the Criminal Procedure Act in order that they may become more effective participants and protectors of the rights of children in the new child justice system.

7.23 The project committee is of the view that specialisation within the police can greatly improve the way in which the child justice system deals with children. However, there are certain impediments to including provisions which create a new "specialised unit" within the police in the proposed legislation. The first of these relates to the arresting officer, who operates prior to, at, and immediately after arrest. Arresting officers are of necessity members of the general police service, responding to a wide range of complaints. It is impossible to predict where and when children will be apprehended, and so it is not feasible to develop specialist arresting officers. The second impediment relates to the function of the investigating officer, or an officer who can take over from the arresting officer at the time that the child is received at the police station or other place of assessment. Whilst specialisation is more feasible at this later stage rather than at the arrest stage, it is apparent to the project committee that this approach is practical in urban areas where the case loads will be better served by a specialised response. In rural areas, however, it is unlikely that there would be enough child justice cases to warrant a full time specialisation by police officers.

7.24 It is recommended therefore that all police officers undertaking arrests should be trained to deal appropriately with the arrest of children (and alternatives to arrest). In addition, police

26 G van Bueren *The International Law on the Rights of the Child* Dordrecht: Kluwer Academic Publishers 1995 at 176.

27 *Ibid.*

dealing with children at the police station or other place of assessment and during the investigation of the case must also have received specialised training. In centres where the number of cases is large enough to warrant it specialised police officers, dealing only with child justice cases should be designated to undertake the reception, referral and investigation aspects of the child justice system.

Arrest

7.25 As pointed out earlier, arrest is currently used most often to secure the attendance of children at court. Although alternatives to arrest exist, it appears that they are used infrequently by comparison to arrest, due to problems in locating parents or guardians, and also because the existing schedules in the Criminal Procedure Act provide for a very limited range of offences in respect of which release of a child on police warning, for instance, can be contemplated. Most respondents supported the suggestion that distinctions should be drawn between minor and serious offences, and that this be used to provide statutory guidance in deciding whether alternatives to arrest would be more appropriate. Broadening of the schedules of offences in the current Criminal Procedure Act allowing release on police bail or police warning (J14 as it is commonly known), would greatly enhance the possibility that alternatives become more frequently utilised. A recent precedent is to be found in the Criminal Procedure Second Amendment Act 85 of 1997, where the power to approve release of an accused person in the pre- first appearance phase is granted to the Attorney-General, in consultation with the police, for a wide variety of offences (listed in Schedule 7 to the Act). It is therefore proposed that in respect of offences referred to in Schedule 1²⁸ of the proposed draft Bill, it must be presumed, unless there are sufficient reasons to the contrary, that an arrest should not be effected and that alternatives to arrest should be used. The project committee recommends that alternatives to arrest should include:

- * requesting the child to accompany the police officer to a place where assessment can be effected;
- * written notification to the child and, if available, the parents or family of that child to appear for assessment at a place and on a date and at a time specified in the notice;

28 See par 8.42.

- * granting of a recognisance by a police officer at the place of arrest, to be noted in the pocket book of the officer concerned, informing the child to appear for assessment at a specified place, date and time;
- * accompanying the child to his or her home, where a written notice or a summons can be given to the child and his or her parents, guardian, family member or other suitable adult;
- * opening a docket for the purposes of consideration by the Attorney-General as to whether the matter should be set down for the holding of a preliminary inquiry or whether the child should be charged.

The proposed Bill defines a recognisance as an informal caution to the child by a police officer to appear at assessment on a specified date and at a specified place and time or by a magistrate to appear at a preliminary inquiry or at a court.

Due process at arrest

7.26 The Constitution provides, in section 35(1), that every person who is arrested for allegedly committing an offence has the right -

- (a) to remain silent;
- (b) to be informed promptly -
 - (i) of the right to remain silent, and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible but not later than -
 - (i) 48 hours after arrest, or
 - (ii) the end of the first court day after the expiry of 48 hours if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

Subsection (4) requires information to be given in a language that the person understands.

7.27 These provisions apply equally to children, but a question may be posed as to whether children require additional protections.²⁹ The *Interim Policy Recommendations* of the IMC³⁰ recommends the development of guidelines for police officers who arrest children. The Recommendations go on to say that "rules must be set so that the language and process used is understandable to children. A child-friendly booklet or pamphlet should be developed in the required official languages and handed to the young person at the time of arrest".

7.28 The Juvenile Justice Drafting Consultancy's 1994 proposals suggested that at the time of arrest, the police officer should inform the child "in language that he or she understands" of the nature of the offence for which he or she is being arrested, the right to remain silent, the right to the presence of his or her guardian or other responsible adult during questioning and the assistance of a youth justice worker, and legal representation if the case goes to court or the child is to be detained.

7.29 In the light of the above, it is recommended that children 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. The following rights, to be explained in language that the child understands, should specifically be included in the draft legislation:

- * to remain silent (and the consequences of not remaining silent);
- * the right to have the child's parents, guardians, a family member or other suitable adult contacted;
- * the right to have the above-mentioned persons present during the noting of a confession, admission, pointing out or identification parade as referred to in the Criminal Procedure Act;
- * the right to legal representation; and
- * the right to obtain legal representation as contemplated in section 35 of the Constitution

29 Article 40(2)(b)(ii) of the CRC provides that upon arrest, a child must be informed promptly and directly of the charges against him or her and, if appropriate, through his or her parents or legal guardians.

30 At 36.

and section 3 of the Legal Aid Act, 1969.

7.30 The manner or format in which these rights are conveyed (save the requirement that they must be explained in appropriate language) need not be spelt out in the proposed legislation.

7.31 It is also recommended that a warrant of arrest for a child may be issued by a child justice magistrate or an inquiry magistrate³¹ with the further provision that upon arrest such person be taken to a probation officer for assessment.

7.32 The project committee further recommends that the legislation should encompass the principle that in effecting an arrest in terms of the draft Bill, minimum force must be used, provided that where minimum force is in dispute, the onus of proving that minimum force was used rests on the person so alleging in any civil action that may be instituted. The use of deadly force should only be justified in those circumstances which are provided for in clause 10(6) of the draft Bill and which are in accordance with recent amendments to section 49 of the Criminal Procedure Act, 1977, as contained in the Judicial Matters Amendment Bill 95 of 97.

Locating parents and guardians, and involving them in pre-trial stages

7.33 As is evident from the responses to the Issue Paper and the questionnaire, the public response was that it would be most prudent for the police (and in particular, the arresting officer) to retain the responsibility of locating the child's parents.³² The IMC's *Interim Policy Recommendations* also suggested that the obligation to notify parents or guardians should continue to rest on the police,³³ who are after all the first role players to have contact with the child, and are therefore at the front line of efforts to locate relevant adults. Although reference has been made by some respondents to the success achieved by "family finders", the project committee is of the opinion that the appointment of community based family finders is a question of practice

31 That is the officer presiding in the proposed preliminary inquiry discussed in Chapter 9.

32 Section 50(4) of the Criminal Procedure Act 51 of 1977.

33 Also see 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.

that does not necessarily require legal regulation. However, where particular problems or needs exist, the continued use of family finders from communities is desirable and therefore should be encouraged.

7.34 Because, as pointed out above, probation officers and social workers at present appear to have some success in tracing families and parents, it appears advisable to retain the provision of the Criminal Procedure Act that provides that (in addition to notification of parents or guardians), the arresting officer also has the duty to notify probation services.³⁴ Where assessment centres are not available in rural areas, this provision will ensure that assessment in regard to a child arrested in a rural area can nevertheless take place at the earliest possible opportunity.

7.35 Along with the view that the primary responsibility for finding parents or guardians should remain with the arresting officer, it is proposed that the legislation should separate the obligation to notify parents or guardians from the present limitation that this is only required where it can be done without undue delay. Instead, the legislation should follow a more peremptory formulation than that to be found in the present section 50(4) of the Criminal Procedure Act, and require that the arresting officer notify the parents or guardian “forthwith” of the arrest. This will remedy the fact that police are reluctant to pursue the location of parents or guardians where it may involve travelling outside the immediate jurisdiction of the police station. Further, experiences at pilot assessment centre projects have indicated that where such formal assessment centres exist, with the possibility that a probation officer might undertake the family finding task, there is correspondingly less incentive for the police to make the necessary efforts in this regard. The proposed legislative solution, in the Commission’s view, is to grant to probation officers the power to issue a requisition notice to the police to find a specified person, family or address.

7.36 Finally the requirement that only the parent or guardian be notified, has been identified as unduly restrictive, and moreover, at odds with present realities in South Africa, where persons other than legal guardians or parents frequently assume responsibility for children. Therefore, it is proposed that the legislative definition be broadened to include, apart from a parent, guardian or family member, another suitable adult whom the child identifies as significant to his or her life, and

34 Section 50(5).

who has a prior relationship of responsibility towards the child.³⁵ In recognition of the voluntary involvement of these persons, the procedure for their attendance is not intended to be compulsory.

7.37 No responses or comments were received to the effect that the present provisions of section 74 of the Criminal Procedure Act (which provides that parents or guardians of an accused under 18 years may be warned to attend the proceedings, and required by the court to attend subsequent appearances) were in practice in any way inadequate or unsuitable, and it is therefore proposed that a provision approximating the present section 74 should be included in the new legislation. The distinction in future, however, would be that the first point at which parental involvement would be required, would be at the assessment, whereafter the parent (or other suitable person) would also be required to attend the proposed preliminary inquiry.³⁶

7.38 It must also be mentioned that the present legislation does allow for a child to be warned by a court (sometimes described as “released on warning”) in terms of section 72(1)(a) of the Criminal Procedure Act, although it has been pointed out³⁷ that a misconception exists that children can only be released into the custody of their parents or guardians in terms of section 72(1)(b) of the Act. This has meant in practice that magistrates are reluctant to release a child until parents or guardians have been found, as they have frequently held that they cannot release a child on his or her own recognisances unless the child has been emancipated. However, courts have held that children who fail to appear in court after being warned to do so in terms of section 72(1)(a) are liable to conviction and sentence,³⁸ which by implication refers to the possibility (in present legislation) of release of children independently of their parents or guardians and independently of such persons being located.

7.39 It is recommended that the proposed legislation should include the possibility of release of children (by police and at the proposed preliminary inquiry) where the child is of sufficient age and

35 At present powers are available to presiding officers to make orders affecting parents or guardians: section 72 of the Criminal Procedure Act for example (also see *S v N* 1997 (1) SACR 84).

36 See Chapter 9.

37 Memorandum to the Law Society of South Africa by Legal Resources Centre, dated 3 April 1998.

38 See *S v Tokota* 1997 (2) SACR 367, referred to in J Sloth-Nielsen ‘Juvenile Justice Review 1997’ (1998) *SACJ* 105.

understanding to comprehend the conditions of release, or where there are reasons to dispense with the requirement of notification of a parent, guardian or other adult.³⁹

7.40 It is further recommended that if children are to be released on their own recognisance, measures should be taken to ensure that they can get home safely. In order to ensure this, regulations to the proposed legislation should include the provision of transport costs for the child to get to his or her home and back to court on the next court date. Alternatively the child should be assisted to be transported home.

Arrest by a private person without warrant

7.41 It is recommended that a provision similar to that in section 42 of the Criminal Procedure Act be re-enacted in respect of the arrest of a child by a private person subject to the provisions in respect of the use of minimum force which are applicable to police officers as set out above.

Diversion by the police and police caution

7.42 In view of the support from both government departments⁴⁰ and other respondents for the legislative recognition of diversion by police and the incorporation in legislation of provisions enabling the use of police cautioning, the project committee recommends that provisions in this regard be included in the proposed legislation. Police cautioning is widely recognised in foreign jurisdictions (Canada,⁴¹ Germany, Australia, New Zealand, The United Kingdom), and has been found to be an appropriate and suitable option for children in conflict with the law.⁴² Moreover,

39 Such as the petty nature of the offence, the delay that might be occasioned by requiring notification, or the fact that the child is in reality living an independent life.

40 Department of Welfare and Population Development and the South African Police Service.

41 Section 8(1)(c) of the Canadian Young Offenders Act 1993 makes provision for the police officer to require the child to enter into an undertaking to apologise to the victim of the offence.

42 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 particularly remarkable. In some police forces, there are 'caution plus' schemes by which the child is not merely cautioned, but is required to participate in an offender group over a period of months with the aim of helping the person to overcome personal difficulties, be they at home, at school or work, health or emotional problems.

it would enable compliance with international rules in this regard. Clearly, the weight of opinion on the form that police cautioning should take in new South African legislation falls in favour of introducing a system of formal cautions, to be administered by a ranking officer, in the presence of the child's parents or guardian (see the table setting out responses to the questionnaire above). However, despite fears expressed by some respondents that the inclusion of informal cautioning powers for the police might have the effect of entrenching the arbitrary exercise of discretion, the project committee is of the view that the *National Crime Prevention Strategy* is framed broadly with the intentional purpose of "maximising the potential" for diversion to take place, and that this supports the introduction of informal cautioning in minor cases and non-serious cases where possible, as well as formal cautioning which is then spelt out in the legislation. However, mindful of the previously mentioned fears associated with arbitrary exercise of power, and mindful of the possibility that the introduction of informal cautioning may inadvertently open the door to corruption, it is proposed that informal cautioning not be regulated in the principle Act itself, but dealt with in regulations to be developed by the South African Police Service. In the proposed legislation, therefore, the weight falls on formal cautioning, as envisaged by the majority of respondents to the Issue Paper on this question.

7.43 The project committee further recommends that upon the decision by a probation officer after assessment or by a prosecutor or magistrate, a police officer with the rank of superintendent or above or a police station commander should be authorised to administer a formal caution to the child in the presence of the parent, guardian, family member or other suitable adult. Such formal caution should be administered in private, whether in a police station or other setting, in the presence of the probation officer if he or she is available, and in the presence of the parent, guardian, family member or other suitable adult. The police officer, on the recommendation of the probation officer, should be able to administer such caution with or without conditions as set out in forms annexed to the proposed draft Bill. It is also recommended that a record of such caution should be forwarded to the Provincial Commissioner of Police, who should cause a register of cautions to be kept. The police and probation services should have access to the register, which may also be made available for bona fide research purposes with the permission of the Provincial Commissioner. The project committee further recommends that the record of the caution be expunged after a period of two years from the date on which the caution was administered.

Detention in police custody

7.44 As the Constitution and the international rules provide clear indications of the formulations of protections for children in police custody, it is proposed that legislation should spell out the conditions under which children may be held, as well as their rights whilst in police custody. Although it may be argued that this is repetitive of rights that are already enshrined in the Constitution (such as separation from adults), the project committee is of the view that there is a need for comprehensive restatement in the proposed legislation, which is accessible to all. Therefore, it is recommended that the following rights be included, after an overall provision detailing the constitutional provisions that treatment of children whilst in detention should be in conditions appropriate to the age of the child: the right to proper food, to medical treatment where required, the right of access to reasonable visits by parents, guardians, and legal advisors and religious counsellors, access to reading material, adequate exercise, and the right of access to adequate clothing, which should include the provision of sufficient blankets and bedding for warmth.

7.45 Statistics from the pilot project on the Assessment, Reception and Referral Centre in Durban, where a key performance goal was to ensure that children, who were seen in the assessment centre over a period of a year, spent no longer than 12 hours in police custody prior to being seen by probation officers, show that this goal was not achieved in 40% of the children's cases where they had not been released on police warning or police bail. Nevertheless, where children were brought timeously to the centre, further processes (such as increased efforts to successfully locate parents and guardians, greater use of diversion in petty cases, and more frequent referrals to the Children's Court system), were able to occur much more rapidly.

7.46 However, as pointed out above, provisions in the Correctional Services Act already limited detention in police custody to 24 hours. This did not prove to be workable, and had to be increased once again to the maximum of 48 hours allowed by the Constitution. It is proposed to retain the requirement that children not be detained in police custody longer than an initial 48 hours before being brought before an inquiry magistrate,⁴³ but to encourage (in the proposed provisions

43 As proposed in Chapter 9.

itself) the bringing of children for assessment at the earliest opportunity after arrest. The project committee recommends that the arresting officer should inform the probation officer in whose area of jurisdiction the arrest of the child has taken place forthwith of such arrest, or at least within 12 hours. If an alternative method of securing the attendance of the child at assessment has been used, and the child is therefore not in custody, the police officer concerned should inform the probation officer in whose area the assessment will take place no later than 72 hours after the alternative to arrest has been effected.

Release from police custody before preliminary inquiry

7.47 It is recommended that a police officer should be able to release a child alleged to have committed an offence - referred to in Schedule 1 to the proposed draft Bill - on own recognisances or into the care of a parent, guardian, family member or other suitable adult on any one or more appropriate conditions as defined in the legislation. It is further recommended that a child arrested for an offence - referred to in Schedule 2 to the draft Bill - may be released from custody by a police officer, in consultation with the Attorney-General, on the conditions referred to.⁴⁴

Conduct of the initial investigation by the police

7.48 The trend towards recognising the need for additional protections for children in the pre-trial phase is already evident in our recent case law, as pointed out above, and specifically in respect of investigation procedures with potentially serious consequences for the child, such as the making of an admission or confession. It is proposed that provisions pertaining to investigative procedures should be included in the ambit of the proposed statute, both for reasons of clarity, and because it will then be widely available to both children and those tasked with implementation. To this end, it is 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,

44 The offences listed in Schedule 2 of the proposed draft Bill are based on the offences listed in Schedule 7 of the recently adopted Criminal Procedure Second Amendment Act 85 of 1997. This legislation grants the Attorney-General wide powers to authorise the release of a person on bail, in consultation with the police, without the necessity of a court appearance in the event of offences listed in Schedule 7.

guardian, family member, legal representative or another suitable adult present.⁴⁵

7.49 With regard to noting of fingerprints of children, the project committee is extremely concerned that fingerprinting at the police station can be a labelling and stigmatising process which is inappropriate where the primary goal of diversion is to avoid such contact with the system.⁴⁶ The project committee therefore recommends 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. The project committee further recommends that the fingerprints of children 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.

45 It is further recommended that evidence obtained during these procedures without the assistance of any of the persons referred to should be inadmissible as evidence in proceedings of the proposed child justice court discussed in Chapter 10.

46 Cf FW Miller, RO Dawson, GE Dix and RI Parnas *The Juvenile Justice Process* 3rd edition United States of America: The Foundation Press Inc 1985 at 210 where the Revised Code of Washington Annotated, Title 13 (13.04.130.) is quoted: "(1) Neither the fingerprints nor a photograph of any juvenile may be taken without the consent of juvenile court, except as provided in subsection (2) and (3) of this section and RCW 10.64.110. (2) A law enforcement agency may fingerprint and photograph a juvenile arrested for a felony offense. If the court finds a juvenile's arrest for a felony offense unlawful, the court shall order the fingerprints and photographs of the juvenile taken pursuant to that arrest expunged, unless the court, after a hearing, orders otherwise."

8. ASSESSMENT AND REFERRAL

Current South African practice

Assessment

8.1 The development of probation services has been a key goal of the IMC process.¹ Until now probation work did not involve a separate career option, nor was there a special departmental section within most provincial welfare departments dealing with probation work. Although there are some specialised probation workers, in the main, probation work was effected by social workers who perform this duty in addition to other aspects of social work practice. Increasingly, the functions of probation officers and social workers performing probation work have expanded beyond the preparation and presentation of pre-sentence reports in the period since 1994, and more specialisation has occurred.² The Assessment Centres have utilised the services of probation officers in the preliminary stages of the proceedings, after arrest and before a child appears in court, in order to assist in locating families, to investigate the possibility of diversion, and to provide social background histories to the justice functionaries,³ mainly the prosecutor. This initiative has caught on nationally and many provinces are now establishing processes and procedures akin to assessment centres.

8.2 If the term “Assessment Centres” is seen to be a description of a place, it may be a little misleading. In point of fact, assessment is a process of evaluation of the child, the child’s home or family circumstances, the nature and circumstances surrounding the alleged commission of the offence, and whether the child accepts responsibility for this. In addition, the possibility of conversion to a Children’s Court inquiry is investigated, as also diversion or other restorative

1 See in general IMC *Interim Policy Recommendations supra*.

2 J Sloth-Nielsen ‘1994 - 1995 Juvenile Justice Review’ (1995) *SACJ* at 331. See too IMC *Report on the Pilot Projects* 1997 and 1998.

3 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.

justice options.⁴ Although a central office is in most instances used for the assessment process, it is not necessary for a specified location to be identified, and assessment could conceivably take place in an informal setting, such as the local school, or even in the child's home. In other words, the absence of a designated building or office for assessment is not a bar to implementation of assessment practices in rural areas.

8.3 In the models that have been developed so far, two options have in practice been identified: one model has used offices in the police station for assessment, the other an office adjacent to the juvenile court. The advantages of the former are that, as long as children are brought to the police station,⁵ they will be assessed immediately, and problems caused by waiting for the police to bring children are not experienced. The disadvantage though, is the fact that police stations are not very child friendly environments, and the child may not be certain that questioning by a probation officer is different from interrogation by a police officer. This in turn can affect the confidence the child is prepared to place in the probation officer, the child's willingness to divulge details about his or her family and home address, and acceptance of responsibility for the purposes of diversion. With the second model, the main difficulty has already been highlighted,⁶ namely the fact that the police do not always bring children to court for assessment as promptly as they should, and that children then fall through the cracks and appear in court without assessment having taken place. A third option that has been put forward by probation officers, is that assessment take place at the offices of probation workers themselves, or the local Department of Welfare. The difficulty with this option (which admittedly has, to the Commission's knowledge, not been tried yet), is that the police would have to stay there during the assessment, as they could argue that there may be security risks attached to this option.

8.4 The Stepping Stones Pilot Project in Port Elizabeth was fortunate in bridging the problems outlined above because the services were centralised in a separate building, housing a charge office,

4 See in general IMC *Report on the Pilot Projects* 1998.

5 In jurisdictions where there are many police stations in a district, internal arrangements can be made to bring all arrested children to one police station for assessment purposes. So, for example, in the Wynberg magisterial district, where 17 police stations serve the court, one has been identified, and all children are brought there.

6 IMC *Report on the Pilot Projects supra* at 18.

court and probation officers. This may not be able to be replicated throughout the country, though, and the project committee therefore wishes to emphasise that expensive physical structures are not a prerequisite to the provision of assessment services.

8.5 The 1994 NGO proposals⁷ for a new juvenile justice system introduced the concept of a Youth Justice worker (YJW), modeled on the New Zealand counterpart. The notion was that this person, with legal and social work training, would organise family group conferences, diversion, refer cases away from court, and generally play a central role in the juvenile justice system. One difficulty with the proposal, though, was the fact that this job would be an entirely new post in government, probably in the Justice Department, with no clear precedent in our civil service. Another difficulty was caused by the impression that the YJW would carry great responsibility and case loads, performing both social work type functions as well as mediation, convening and guiding family group conferences and protecting young people during the trial period, in a country where these kinds of specialised skills required are not readily available. More importantly, there were indications of overlap with the role of probation officers, whose role in a juvenile justice system was then not clear.⁸ Thus attention turned to the development of probation work, with a special focus on probation work for a juvenile justice system. The IMC pilot projects have included the establishment of assessment centres, staffed by probation officers or social workers performing probation work, training of probation officers, facilitating the establishment of norms and guidelines for assessment, and laying the basis for the appointment at provincial level of more posts specifically for probation work. South Africa's recent history has therefore revealed that future juvenile justice development hinges on the availability of professional probation officers, especially in order to further the expansion of diversion services, early intervention, and to identify cases where children require transfer to the welfare system as children in need of care. It has become clear that these functions will fall to people initially trained as social workers/welfare officers,⁹ rather than to any new appointees with hybrid training and multi-disciplinary backgrounds employed by, for example, the Justice Department.

7 See Chapter 2 above.

8 See Community Law Centre *Law Practice and Policy: South African Juvenile Justice Today* University of the Western Cape 1995.

9 Diversion, as one of the four pillars of the National Crime Prevention Strategy, has been allocated to the Department of Welfare as lead ministry.

8.6 However, the role of the probation officer in the present juvenile justice system has been limited to providing advisory services to prosecutors and courts. The stated goals of the Western Cape assessment centres are to assist in the location of parents, guardians or families, to make recommendations regarding placement of the child in the pre-trial phase, and to make recommendations concerning the progress of the case through the criminal justice system: *ie* whether the matter should be converted to a Children's Court inquiry, whether diversion is possible, or whether the matter should proceed to court for adjudication.¹⁰ The assessment projects elsewhere in the country have similar goals.¹¹ Since the prosecutor is *dominus litis*, the probation officer's recommendation is at present simply advisory in nature. Similarly, as the court bears responsibility for deciding on placement - release, bail, detention in a place of safety, or any other option - the probation officer's views on placement, too, are recommendations which the court can accept or reject. In practice, it appears that probation officers' recommendations are generally followed by justice officials, who perceive the pre-trial services offered by probation workers for children in trouble with the law as invaluable to them, and to the smooth functioning of the juvenile court.¹²

Referral

Decision to refer

8.7 Diversion is the referring of *prima facie* cases away from the criminal justice system with or without conditions. Conditions can range from a simple caution, participation in particular programmes, to reparation or restitution. Diversion can take place prior to arrest, prior to charge, prior to plea, prior to trial or prior to sentencing. The international instruments require the inclusion of diversion in child justice legislation. They do not spell out how this should be done. Diversion is predicated upon the child acknowledging responsibility for the offence regarding which he or she is accused of having committed.

10 See J Sloth-Nielsen footnote 2 above.

11 Cf IMC *Report of the Durban Pilot Assessment, Reception and Referral Centre* 1997.

12 *Ibid.* This comment relates to assessment services. Many complaints have been noted by justice personnel regarding long delays experienced by courts while awaiting pre-sentence reports by probation officers.

8.8 Diversion up until the present time has depended mostly upon the mechanism of voluntary withdrawals by the prosecutor. Indications are that this has not been effective on a wide scale. Prosecutors are not specialised in or trained for this type of assessment and decision making and have operated in the absence of a legislative framework for diversion. Diversion for juveniles has expanded in practice, and, although formal programmes seem to be confined to those offered by NICRO, substantial numbers of young people are currently being diverted to these programmes or other options.¹³

8.9 A distinct procedure prior to charge can ensure that diversion decisions are taken, and that cases involving children are correctly channelled to a suitable option such as a programme, to a Children's Court inquiry, or to criminal court. In recent child justice literature in South Africa, this step has become known as "referral".¹⁴ It is desirable that referral should take place as soon as possible after arrest or after an alternative means for securing attendance of the child has occurred.

8.10 Comment was invited in the Issue Paper on how this distinct step should be legislatively framed. A second question that was posed is who should be involved in the referral process.

Diversion programmes

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

13 NICRO offered this service to 4 000 young people in 1997, and the organisation planned to expand this number to 10 000 in 1998. Also see L Muntingh (ed) *Perspectives on Diversion* NICRO National Office Cape Town: 1995.

14 See for example Community Law Centre *Report of the International Seminar on "Children in Trouble with the Law"* University of the Western Cape 1993, Juvenile Justice Drafting Consultancy *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* 1994 and IMC *Interim Policy Recommendations*.

and principles.

8.12 As mentioned above, formal diversion services are at present mostly rendered by NICRO branches in all nine provinces. Diversion programmes are run by probation services in some areas and it is envisaged that probation officers will in future undertake and/or organise a greater proportion of diversion options.

8.13 At present the opportunity to be diverted into a programme is limited.¹⁵ The number of diversions handled by NICRO annually has been regarded as representing a small percentage of the potential number of child cases which would be suitable for diversion.

8.14 Diversion programmes currently run in South Africa by NICRO include youth empowerment schemes (a six session life skills training programme), pre-trial community service (between 30 and 100 hours), family group conferencing¹⁶ (a restorative justice alternative conflict resolution forum involving victims) and the journey programme (outdoor experiential learning). These are the most frequently used programmes. *Ad hoc* examples of diversion have also emerged, such as referral of matters to traditional structures or street committees. There have been imaginative and inexpensive examples of diversion practices operated by prosecutors such as essay writing. A need has been identified for programmes which would be of benefit to children charged with sexual offences, and pilot projects for these cases have emerged.¹⁷ These programmes could be used as diversion options or as components of a sentence.

8.15 Whilst the development of diversion programmes by both the NGO sector and the state in South Africa is of great importance, the absence of formal programmes, administrative and other difficulties need not be a serious impediment to the operation of diversion. This view is endorsed

15 IMC *Interim Policy Recommendations* at 40. Studies indicate that fewer than 5% of cases involving children are channelled to Children's Court enquiries.

16 The IMC has a pilot project operating in Pretoria on family group conferencing. Also see Chapter 2.

17 Contribution by Deputy Attorney-General N Fleischack at a conference co-hosted by the Community Law Centre and Rapcan on Child Sexual Offenders at Cape Town, October 1997.

by the Constitutional Court in *S v Williams*,¹⁸ quoting *S v Sikunyana*¹⁹ with approval.

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

Restorative justice

8.17 Restorative justice is a growing international movement within the field of criminal justice, particularly with regard to children accused of crimes.²⁰ Restorative justice is a notion of justice which focuses on reconciliation and restitution rather than on retribution and punishment. It views criminal wrongs as conflicts between the offender and victim and sees the appropriate resolution of that conflict to be a healing of relationships. Restorative justice lays emphasis on compensation to the victim by the offender. The compensation may either be monetary or symbolic - such as a letter of apology or a token of some sort. Its objective is the successful integration of both victim and offender as productive members of safe communities.²¹

8.18 From a procedural perspective, restorative processes place emphasis on the active participation of victims, offenders and communities, often through face to face meetings with one another in order to determine what went wrong, and to find ways of putting things right, as well as planning future actions to prevent re-offending.

8.19 Restorative justice approaches can include restorative processes (such as victim-offender reconciliation or family group conferences) and restorative outcomes (such as community service

18 1995 (3) SA 632 (CC) at 653.

19 1994 (1) SACR 206 (Tk).

20 D van Ness 'Legislating for Restorative Justice' Paper presented at the SA Law Commission/UNDP International Conference on Drafting Juvenile Justice Legislation Gordon's Bay 1997.

21 D van Ness and K H Strong *Restoring Justice* Cincinnati OH: Anderson Publishing Co 1997.

or victim compensation).

8.20 There is a close connection between restorative justice and indigenous and informal responses to crime. The notion and practice of restorative justice is not alien to African custom, as the African response to crime prior to colonisation was based on the notions of reconciliation, restitution and healing.²² There has in recent years been much experimentation in countries with indigenous populations such as New Zealand, Australia, Pacific Islands, and Newfoundland.²³

8.21 New Zealand has led the way by following a restorative justice approach in legislation in the 1989 Children, Young People and Their Families Act.²⁴ Australia, Canada, England and some states in the USA are presently developing restorative justice approaches, particularly in the field of diversion.

8.22 Much reference has been made in recent times to the concept of restorative justice in South African Policy Documents. Restorative justice approaches have been advocated in the *Welfare White Paper*,²⁵ the *National Crime Prevention Strategy*,²⁶ *Justice Vision 2000*,²⁷ and the *Interim Policy Recommendations for the Transformation of the Child and Youth Care System*.²⁸

22 A Skelton 'Restorative Juvenile Justice' Paper presented at a Conference on Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa in Swaziland 1996.

23 J Considine *Restorative Justice, Healing the Effects of Crime* 1995 as quoted by A Skelton 'Developing a juvenile justice system for South Africa' (1996) *Acta Juridica* 180 in note 70.

24 See Chapter 4.

25 Section 148 to 163.

26 At 59 *et seq.*

27 At 42.

28 At 17.

Comment on Issue Paper 9

Written responses

Assessment

8.23 In the Issue Paper, the question was posed as to whether there should be a distinct procedure prior to charge, to ensure diversion decisions are taken, and comment was invited on how this distinct step should be legislatively framed. Most respondents endorsed the insertion of such a step, which in accordance with developing practice, was termed 'assessment'.

8.24 Most of the respondents were of the view that assessment of all children prior to a decision being made regarding detention should be mandatory.

8.25 The Natal Law Society advocates the mandatory assessment by an appropriately qualified officer (possibly a police person above a certain rank where some more suitably qualified official is not available) on the day of the arrest, but not later than the following day. The Tshwaranang Legal Advocacy Centre contends that the mandatory assessment requirement fits in with their recommendation that there should be an ombudsperson and 'child care' team. The Centre also raises the concern that the mandatory assessment of the child should involve a pro-active assessment of the child's overall welfare and a consultative decision-making process which involves social workers, health care workers and law enforcement agents, as the home environment is often a factor contributing to delinquency. The Law Society of the Cape of Good Hope is of the view that the mandatory assessment of all children is the correct option and considers it to be a long term solution.

Referral

8.26 The central question posed in the Issue Paper was who should be involved in the referral process. The following options were put forward for consideration:

- (a) The prosecutor could continue to be the key decision-maker concerning the referral of child cases for diversion.
- (b) The court itself or a presiding officer could be the chief role-player in referring cases for diversion.
- (c) Referral could be done on a multi-disciplinary basis, involving role players such as the police, prosecutors, social workers and potentially even victims.
- (d) A specially trained official, using a process and/or instrument developed by a multi-disciplinary team and subject to monitoring by such a team, could undertake referral of cases for diversion.

8.27 There was no apparent preference, in the written comments, for any particular option as to which agency would best attend to the referral process.

8.28 The Association of Law Societies proposes that children be dealt with in specialist courts, staffed with experienced personnel, in the belief that such structures will resolve problems relating to assessment of appropriate matters for diversion. The Natal Law Society suggests that legislation should provide for the handing in of a certificate from the prosecutor certifying that a decision has been taken that the trial should proceed. The Society submits that this certificate should provide reasons why diversion was not regarded as an option in the particular case.²⁹

Legislating for diversion options

8.29 Two overlapping issues arise in regard to legislation on diversion. The first is the extent to which details regarding diversion programmes need to be included in proposed legislation.³⁰ Two possible approaches were put forward for consideration in the Issue Paper:

29 The preliminary inquiry, proposed in Chapter 9, takes this idea forward.

30 The second issue relates to the mechanism for selection of cases for diversion, discussed in par 8.31.

- (a) Details of any kind about types of diversion programmes could be excluded from legislation, leaving diversion to the discretion of the officials concerned.
- (b) In order to ensure the delivery of appropriate programmes, some detail, at least about the “levels of intensity”, could be spelt out. Also, specific reference to restorative justice processes should ensure that this option will be developed and will be used by the system.

8.30 Whilst most of the respondents supported diversion as an option, there was varied opinion on whether or not it should be regulated. The Association of Law Societies reflected the view of the majority of respondents that a specific framework is required for an effective diversion process and suggests that such a framework be set out in legislation or in guidelines. Both Professor Davel and the Natal Law Society were of the opposite view that favoured leaving details to a multi-disciplinary team. The Natal Law Society lauded the services of NICRO in this context and was of the view that the formalisation of the process would not be of any benefit.

Mechanism for selection of cases for diversion

8.31 Another issue in relation to diversion and legislation concerns the mechanism for the selection of cases for diversion. The following options were presented in the Issue Paper:

- (a) The example of enabling provisions such as section 254 of the Criminal Procedure Act which currently allows a form of 'diversion' through the conversion of criminal cases under certain circumstances to a Children’s Court inquiry could be followed. The proposed legislation could include specific provisions detailing a range of different diversion options.³¹
- (b) Proposed legislation could include a mandatory consideration by a court as to whether a matter should have been diverted. This could be an addition to option (a) providing a further protection against advancement further into the criminal justice process, where this

31 Compare the wording of section 297 of the Criminal Procedure Act which allows a number of options such as attendance at programmes, restitution to victims etc. See the discussion on sentencing in Chapter 11.

is not necessary and where diversion would be appropriate.

- (c) Specific legislative indications (for example in a schedule of offences) could be provided for as to when and in which circumstances diversion is mandatory, discretionary or excluded.
- (d) Diversion could be regulated in detailed guidelines to be used by police, probation officers, prosecutors and other officials. These guidelines could have the status of directives or standing orders or could be gazetted as regulations to the proposed legislation.

8.32 The written responses reflect no particular preference for any of the four different options. The Natal Society of Advocates suggests that the decision should be made by the public prosecutor or another specially trained official approved by the Attorney-General, based upon information gathered by the investigating officer, probation officer, parents or guardians or any other person who has an interest in the matter (such as the victim). The responses to the questionnaire support a specially trained official using a process developed by a multi-disciplinary team. It is not clear from these responses whether this official would be someone other than the probation officer who conducts the assessment.³² It may not be feasible to introduce a new role-player into the system due to resource constraints in both the Departments of Justice and Welfare. Consideration of the responses overall leads to the conclusion that the weight of opinion expressed does not favour any particular party and leans, rather, towards supporting the idea of a range of role-players being involved in the referral decision.

Responses to questionnaire

32 See par 8.26.

REFERRAL	RESPONDENTS SUPPORTING
i) the prosecutor	6
ii) the court	3
iii) a multi- disciplinary team	13
iv) a specially trained official using a process developed by a multi-disciplinary team	108
v) other	7
vi) no response	6

LEGISLATING FOR DIVERSION OPTIONS	RESPONDENTS SUPPORTING
i) legislation should not include details of types of diversion programmes	13
ii) some detail of the programme should be spelt out	100
iii) other	16
iv) no response	14

MECHANISM FOR CASE SELECTION	RESPONDENTS SUPPORTING
i) conversion of cases to a Children's Court inquiry	20
ii) the court to consider whether the matter should have been diverted before it reached court	17
iii) specific guidelines as to when and in what circumstances diversion is compulsory, discretionary or excluded	44

MECHANISM FOR CASE SELECTION	RESPONDENTS SUPPORTING
iv) diversion could be regulated in detailed guidelines to be used by police, probation officers, prosecutors and other officials	42
v) other	12
vi) no response	8

Evaluation and recommendations

Diversion and restorative justice as central factors of the proposed legislation

8.33 Having regard to the consultation processes undertaken by the Commission, world wide developments³³ in the field of child justice and the spirit underlying the relevant international instruments, it is evident that diversion of child offenders away from the criminal justice system where it is appropriate to do so needs to be a central objective of the proposed new system. In order to achieve this, referral mechanisms will have to be built into the system from arrest right through the trial and up to the finding of guilt. Diversion may even be possible after conviction.³⁴ All officials dealing with a child will be required to consider the possibility of diverting the child away from the criminal justice system.

8.34 It is important that police, probation officers, prosecutors and presiding officers take an imaginative and innovative approach to diversion. It is unlikely that there will always be an armoury of specially designed programmes available country wide. The responsibility resting on all people dealing with children who are to be diverted is to examine how existing resources in the community can be used. It is interesting to note that in New Zealand the state does not always

33 Also see 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.

34 Such as the present option to convert a matter to a Children's Court inquiry after conviction. See section 254 of the Criminal Procedure Act 51 of 1977.

provide programmes for children, but requests the family group conferences made up of the family of the child, the victim and other concerned parties to come up with their own “plans”.³⁵ These 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). These activities can be supervised by community members rather than by professionals. In South Africa a similar approach could provide that in a rural area where there are few formal facilities for programmes, the child could be required to carry out tasks such as carrying water from the river for neighbours or tending animals. There is also much to be said for brokering services which already exist. If there is a branch of SANCA (South African National Council for Alcoholism and drug dependency) in a town, for example, attendance at counselling might be an excellent diversion programme for a child accused of possession of drugs. In addition, NICRO has expanded its diversion programmes (the number, range and provincial spread) in recent years, and there are strong indications that government will provide more diversion options in the future.³⁶

8.35 The project committee is therefore of the view that it is both realistic and feasible to include diversion as a central feature of the proposed legislation.

8.36 In the Issue Paper the question was raised as to who should make the decision regarding diversion. Overall there was a recognition in the responses of the fact that there are different levels of diversion, and that whilst some decisions to divert might be able to be taken by police³⁷ or by probation officers, the decision should in some cases be taken by the prosecutor, or by a presiding officer. Cognisant of these views, the project committee has developed and recommends a multi-level approach which will ensure that the possibility of diversion is considered as the first resort at every stage of the process. To this end, diversion runs as a theme through the child justice system proposed in this Discussion Paper, and, at different levels or stages, is reflected in different

35 See Chapter 4.

36 See in general the *National Crime Prevention Strategy*, the *Welfare White Paper*, and the IMC *Interim Policy Recommendations*.

37 Discussed in Chapter 7.

parts and chapters. One part of the proposed model is set out here, and the remainder in Chapter 9. The possibility of diversion after the trial has already commenced is referred to in Chapter 10.

Assessment and role of probation officer

8.37 Several questions arise in the debate about the role of the probation officer in the new juvenile justice system, such as whether probation officers should continue to have merely recommendatory functions. It now seems clear that effective diversion, and correct channeling of children's cases, depends on the intervention of probation services before first appearance in court, and that there should be statutory provision for this.

8.38 An important role that the probation officer should play at this early intervention stage is the assessment of the child. It is proposed that this assessment will form a vital aspect of the pre-trial management of children. The assessment is aimed at obtaining information about the child which will assist in the probation officer's decision or recommendation to divert the case and about whether the child can go home to parents or guardians, and where he or she cannot, what an appropriate temporary placement would be. The IMC has piloted a model of "developmental assessment" which focuses on the strengths of children and families.³⁸

8.39 In urban areas, the development of court or police station based assessment offices or centres on a permanent basis is progressing already. However, in rural areas, where there are fewer cases, the establishment of dedicated assessment offices with permanent staff might be less feasible. Probation officers would nevertheless be available on call to assess a child in a rural area. It is suggested, therefore, that legislation should provide that, wherever possible, a child accused of a crime should be assessed by a probation worker as soon as possible after contact with the police, or after arrest, but that assessment may be dispensed with where this is not in the best interests of the child (for example, if it became clear that the child was going to remain in detention without assessment having taken place). Thus, a clear step in which the decision is taken that

assessment is not going to occur, needs to be put in place during the pre-trial stage.³⁹ In addition, legislation should be widely framed to allow persons other than probation officers employed by the state to conduct assessments, specifically to ensure access to services in rural areas. It is recommended that probation officers be defined so as to include social workers and other suitably qualified persons who are designated as probation officers.

Referral and role of probation officer

8.40 It is recommended 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 other factors militating against such a decision.⁴⁰ Several senior prosecutors have expressed support for diversion decisions being taken by probation officers at assessment stage, in petty or non-serious cases.⁴¹

8.41 One compelling reason for enabling diversion decisions in petty cases to be finalised by probation officers at assessment is to save time and costs for all involved in the child justice system: even after assessment by a probation officer, a child frequently has to spend time waiting for an experienced prosecutor to decide whether to follow the recommendation on diversion, or for a court appearance in order to have the charges withdrawn.⁴² At times, the period between assessment and acceptance of the recommendation may even be spent in detention either in a place of safety or, as in some instances in the past, in police cells. In order to obviate the unnecessary

39 This supports the need for a preliminary inquiry, discussed in Chapter 9, which would focus on whether assessment can be dispensed with.

40 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.

41 These prosecutors are, in the main, those who have been involved with assessment centres in areas where there have already been a high level of probation/prosecution co-operation. Compulsory assessment of children (especially before a decision is taken to detain a child) was widely supported in the responses to the Issue Paper.

42 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).

step of requiring formal ratification of the recommendation of the probation officer in non-serious cases, it would be much more effective to simply grant the probation officer these limited powers, subject to review by the local child justice committee.⁴³

8.42 It is proposed that the legislation should clearly delineate by means of a schedule of offences, those matters in which the probation officer could, in consultation with the proposed child justice committee, divert cases where appropriate and indicated. This would enable, but not compel, diversion decisions in non-serious matters at the earliest possible opportunity. It is recommended that the proposed draft Bill should include the following proposed schedule for this purpose:

Assault where grievous bodily harm has not been inflicted.

Malicious injury to property where the damage does not exceed R1000.

Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed 25 grams.

Theft, where the value of the property involved does not exceed R100.

Any statutory offence where the maximum penalty determined by that statute is a fine of less than R300 or three months imprisonment.

Conspiracy, incitement or attempt to commit any offence referred to in the proposed schedule.

8.43 It is further recommended that the probation officer should have a bank of possible diversion and finalisation options to draw on. These could include:

- Police caution without conditions;
- police caution with conditions;
- referral to the Children's Court (if there are grounds to suspect that the child is in need of care);⁴⁴

43 Proposed in Chapter 12.

44 Referral to a Children's Court inquiry is obviously only suitable in cases where the assessment reveals that the child is possibly in need of care. Once a decision has been made to refer the matter to the Children's Court, the criminal matter falls away. Children's Courts are discussed further in Chapter 10.

- diversion to a suitable programme recommended by probation officer;
- diversion to a family group conference or other restorative dispute resolution process,⁴⁵
- a supervision order;
- a reporting order;
- counselling;
- issuing a compulsory school attendance order;
- a family time order;
- a positive peer association order.

8.44 In order for diversion to be effective, the project committee considers it to be essential that there should be consequences for non-compliance with diversion conditions. The consequences of failure or non-compliance 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 is 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 and/or family, the child should be given an opportunity to complete the diversion, with the necessary support. The conditions or content of the diversion plan may be altered. In cases where the failure is due to lack of co-operation or negligence on the part of the child, the criminal charge may be re-instated.

8.45 The project committee recommends that probation services should keep a record of each diversion decision made, and that such information should be kept on the child's file. It is hoped that in the future, with the introduction of the integrated criminal justice information system⁴⁶ this information will be computerised. However, until such time as this becomes possible, a paper

45 By granting a probation officer the power to recommend a family group conference or other dispute resolution process such as a community court or a victim/offender mediation, it must be pointed out that these are "processes" rather than "programmes" and need to be differentiated as such. The Issue Paper raised for debate the question whether or not specific reference to restorative justice processes should be made in the legislation, in order to ensure that this option will be developed and will be used by the system. There have been no negative responses to this issue. Those responses stressing the need to balance the rights of offenders with the rights of victims indicate support for a more restorative approach. Therefore the project committee is of the view that it is necessary to specify restorative justice in the list of diversion options.

46 A programme of the *National Crime Prevention Strategy*.

record needs to be kept.

8.46 After assessment, if the matter is a matter listed in the proposed schedule and the probation officer is of the opinion that the matter can be diverted, this should be explained to the child (and family members if present) and he or she should be asked whether or not he or she is acknowledging responsibility for the offence of which he or she is accused. This needs to be done in a manner which fully protects the child's due process rights, as the child is entitled to proceed to trial if he or she wishes to plead not guilty.⁴⁷

8.47 It should be understood, however, that although it is envisaged that the probation officer will be making the decisions with regard to diversion in non-serious matters on a day to day basis, the probation officer will be guided and supported by the proposed child justice committee,⁴⁸ a legislated inter-sectoral committee which will exist in every district. The decisions of the probation officer will be reviewed by the committee from time to time, and although decisions of probation officers already made will not be capable of being over-turned, the committee may observe the trends and provide guidance to the probation officer in the execution of his or her duties.

8.48 In more serious cases, not included in the proposed schedule, the probation officer should make recommendations regarding diversion, and pass such recommendations on to the prosecutor.

Role of the prosecutor

8.49 It is envisaged that prosecutors will continue to play a key gate keeping function in regard to diversion and can therefore support the recommendation of probation officers and finalise diversion decisions where they agree.⁴⁹ When the prosecutor is of the opinion that diversion is appropriate, but not recommended by the probation officer, he or she would still be able to divert, as is the case at present. Only where the prosecutor is of the opinion that the matter is not suitable

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

48 See Chapter 12.

49 Save in specific non-serious matters, when the probation officer can finalise the decision as set out above.

for diversion, would it proceed to the next phase, the preliminary inquiry. The prosecutor can, of course, in any event decide to withdraw the case. This proposal supports the present prosecutorial practice with regard to accepting or not accepting recommendations by probation officers.

Legislation on diversion options

8.50 A question was framed in the Issue Paper relating to the extent to which legislation should include details concerning the regulation of diversion. Most respondents favoured the inclusion of some level of detail going beyond the regulation of the mechanics of the referral process itself. This was evident both in the responses to the question, and in individual submissions. For example, Dr Beenhakker of the National Council of Women of South Africa suggests that some level of detail, including the levels of intensity of diversion options, do need to be spelt out in legislation. There are also principles applicable to the choice of diversion options, which would be useful to those involved in the referral process. The main principles highlighted for incorporation and recommended in the proposed legislation are:

- In making a decision whether to refer a child for diversion, consideration must be given to whether, where this would be in the best interests of the child, no action should be taken.
- In selecting a diversion option, due regard must be given to a child's cultural, religious and linguistic context, the child's community of origin and the child's age.
- No child must be unfairly discriminated against on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion programme, process or option and all children must have equal access to diversion options.

Levels of diversion

8.51 The fact that different diversion programmes and options such as community service embody different levels of intensity, can be addressed through the incorporation in the proposed legislation of a list of possible diversion options, which would be similar, though more detailed, to the present section 297 of the Criminal Procedure Act which provides for alternatives to sentencing.⁵⁰

8.52 The project committee recommends, therefore, that a list of diversion options at varying levels be set out in the proposed legislation as follows:

Level 1:

- (a) A verbal or written apology to a specified person or persons or institution;
- (b) referral to a commissioned officer of the police for purposes of the administration of a police caution without conditions;
- (c) referral to a commissioned officer of the police for purposes of the administration of a police caution with conditions;
- (d) placement under a supervision and guidance order for a period not exceeding three months;
- (e) placement under a reporting order for a period not exceeding three months;
- (f) issuing of a compulsory school attendance order for a period not exceeding three months;
- (g) issuing of a family time order for a period not exceeding three months;
- (h) issuing of a positive peer association order in respect of a specified person or persons or a specified place for a period not exceeding three months;
- (i) issuing of a good behaviour order containing one or more conditions;
- (j) issuing of an order prohibiting the child from visiting, frequenting or appearing at a specified place;
- (k) compulsory attendance at a specified centre or place for a specified purpose and for a period not exceeding five hours each week, for a maximum of eight weeks;
- (l) symbolic restitution in respect of a specified object to a specified person, persons, group or institution; and

50 See Chapter 11.

- (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.

Level 2:

- (a) Placement under a supervision and guidance order for a period longer than three months but not exceeding six months;
- (b) placement under a reporting order for a period longer than three months but not exceeding six months;
- (c) issuing of a compulsory school attendance order for a period longer than three months but not exceeding six months;
- (d) issuing of a family time order for a period longer than three months but not exceeding six months;
- (e) issuing of a positive peer association order in respect of a specified person or persons or a specified place for a period longer than three months but not exceeding six months;
- (f) compulsory attendance at a specified centre or place for a specified purpose for a period not exceeding five hours each week, for a maximum of 12 weeks;
- (g) 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 proposed child justice committee for a maximum period of 25 hours, and to be completed within a maximum period of three months;
- (h) restitution or payment of compensation to a maximum of R300 to a specified person, persons, group or institution;
- (i) referral to appear at a victim-offender mediation, a family group conference or other restorative dispute resolution process at a specified time, on a specified date and at a specified place; and
- (j) one or more of the options set out in paragraphs (a) to (i) or in paragraphs (a), (i) or (l) under level 1 used in combination, with due regard to the age of the child concerned, the circumstances of the child and his or her family, and the nature of the offence.

Level 3:

- (a) Placement under a supervision and guidance order for a period longer than six months but not exceeding one year in duration;
- (b) compulsory attendance at a specified centre or place for a specified purpose for a period of no more than 20 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 and control of an organisation or institution, or specified person or group identified by the probation officer effecting the assessment, or by the proposed child justice committee for a period exceeding 25 hours but not exceeding 100 hours to be completed within a maximum period of six months;
- (d) referral to appear at a victim-offender mediation, a family group conference or other restorative dispute resolution process at a specified time, on a specified date and at a specified place;
- (e) restitution of property or payment of compensation of no more than R600 to a specified person, group or institution;
- (f) referral to a programme with a residential element, where the duration of the programme does not exceed three months, and no portion of the residence requirement exceeds 21 consecutive nights with a maximum of 35 nights; and
- (g) one or more of the above options used in combination, or combined with one or more of the orders referred to in paragraphs (b),(c),(d), or (e) under level 2 or in paragraph (a) under level 1.

Level 4:

- (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 nights with a maximum of 60 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 proposed child justice

committee 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 contemplated in the South African Schools Act 84 of 1996, and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified purpose for a maximum period of no more than 35 hours per week, to be completed within a maximum period of 6 months; and
- (d) any of the options referred to in paragraphs (a), (d), (e) and (g) under level 3 in combination with any of the options referred to in this level.

8.53 The fourth level is intended to provide for the most serious cases involving children over 16 (or 14) years of age, where diversion is nevertheless desirable. The IMC Family Group Conference Pilot Project, held during 1996 and 1997, found that one of the problems in obtaining referrals to the pilot programme, was that family group conferences are viewed as a soft option, and that 'the police see retribution as the only form of justice'. Prosecutors, too, tended to feel that 'no punishment equals no consequences' and that 'nothing' is thus being done to a child if the case is diverted, and that diversion is a 'soft option' that is not effective.⁵¹ The danger of a fourth tier as envisaged here is that harsher sanctions may be imposed that a child would have received if he or she had been sentenced by a court. Also, there may be a tendency to utilise options at the highest tier too readily, rather than first attempting options at a lower level of intensity. But a countervailing consideration is that unless quite tough diversion alternatives are available, diversion may not be sufficiently utilised, and too many children will be remanded to court as they are deemed not to qualify.⁵²

Principles relating to the actual content of diversion

51 IMC *Report on the Pilot Projects* 1998 at 40.

52 Judge M Corriero 'Proposals for a Youth Justice Act' Paper presented at the SA Law Commission/UNDP International Conference on Drafting Juvenile Justice Legislation Gordon's Bay 1997 tells of cases in his court where matters were remanded on the roll for two years, whilst the child is in an intensive programme, in order to be able to eventually divert the child from prosecution.

8.54 Many respondents agreed that some principles applicable to the actual content of diversion programmes themselves should be drafted in legislation. This would assist communities, NGOs and government involved in the presentation of diversion options to develop appropriate programmes, which are consistent with international human and children's rights principles,⁵³ and would also prevent inappropriate use of diversion, or sanctions and outcomes which contravene essential human rights principles. This section of the proposed legislation, then, would apply to those presenting diversion programmes, rather than to those involved in the referral process.

8.55 The project committee recommends the inclusion of the following principles in the proposed legislation to guide the creation and selection of diversion programmes:

- Diversion programmes should promote the dignity and well-being of the child, and the development of his or her sense of self worth and ability to contribute meaningfully to society.
- Corporal punishment and public humiliation may not be elements of diversion.
- A child under the age of 13 years must not be required or permitted to perform community service or other work as an element of diversion.
- Programme content, programme conditions and periods of time that a child is required to attend a diversion programme should take account of the age and maturity of the child.
- Diversion programmes should not be exploitative, harmful or hazardous to a child's physical or mental health, and no child should be required to pay for admission to a diversion programme.
- Diversion programmes should include a restorative justice element which aims to heal relationships, including the relationship with the victim.
- Programmes should, where possible, 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.
- Where possible and appropriate, diversion programmes should impart useful skills.
- Diversion programmes should not interfere with a child's schooling.

53 For example, the project committee would not like to see the introduction of corporal punishment or similar inappropriately harsh penalties under the guise of 'beneficial' diversion options.

- Diversion programmes should be presented in a location accessible to children, and children who do not have the means to afford transport in order to attend a selected diversion programme, should be provided with the means to do so.

Mechanism of selection of cases for diversion

8.56 The respective roles of the probation officer and the prosecutor in selecting cases for diversion has been mooted above. The role of the preliminary inquiry in ensuring that diversion is considered as an option before the matter is placed on the court roll, is discussed further in Chapter 9. In framing the questions in the Issue Paper, respondents were requested to give comment on whether legislation should incorporate specific guidelines as to the circumstances in which diversion is compulsory,⁵⁴ discretionary or excluded, or whether there should be guidelines for use by the police, prosecutors, and other officials, and schedules of non-serious offences. This question related, not to the person who will make the referral decision, but rather to whether there are particular offences for which diversion should or should not be contemplated. The respondents were more or less evenly split on this issue, as appears from the table given in this chapter. In Scotland, for example, certain cases do not qualify for diversion: treason, murder, rape and other serious crimes, offences committed by a child together with an adult, or offences committed by a child who is the subject of a supervision requirement. New Zealand legislation excludes murder and manslaughter cases from the compulsory Family Group Conference requirement. Uganda seems to approach diversion from a different angle, as the first tier village committees (which may make only reconciliation orders, compensation orders, restitution orders, require an apology, or caution the child) do appear to represent a form of diversion from the Family and Children Court, which is the primary criminal court for children in conflict with the law. Village committees are granted the power to make “reliefs” in matters including: affray (fighting in public), idle and disorderly, common assault, actual bodily harm, theft, criminal trespass and malicious damage to property. In other words, the Ugandan Statute gives a list of offences where diversion seems indicated, rather than a list of offences where diversion is excluded.

8.57 The project committee is of the view that the weight of views expressed during workshops

54 Provided, of course, that the child admits responsibility.

held by the Commission, supports the latter approach, rather than the approach which excludes diversion in some instances.⁵⁵ This is further supported by the policy initiatives and responses supporting an individualised approach to each child who is in conflict with the law: excluding a child from diversion opportunities on the basis of the seriousness of the offence would go against the individualised approach that has been proposed. The proposed draft Bill in Annexure A therefore does not preclude diversion from taking place in the case of serious offences, but leaves the question as to whether diversion is a possibility in the discretion of a judicial officer, namely the proposed preliminary inquiry magistrate. Comment is specifically invited on this issue.

8.58 A problem in relation to diversion at present is that both informal and formal constraints apply with regard to children below the age of 15 years. The formal constraint is to be found in the Criminal Procedure Act 51 of 1977, in the alternative sentencing provisions in section 297, which provide that community service orders at sentencing stage may be imposed on a person of at least 15 year of age, and for a minimum total period of 50 hours. Although this provision is, of course, one relating to sentencing, it has proved in practice to be a barrier to diversion too, as community service can be, and is frequently, used as a diversion option. As regards other diversion options, such as referral to a programme, programme officers have expressed concern when young children are required to attend, as they may be less liable to comply with attendance requirements, and because they are, by virtue of their age, more reliant on adult supervision. Moreover, the constitutionality of community service as a component of sentencing and by implication, diversion, has been questioned, both insofar as it may violate the constitutional ban on forced labour,⁵⁶ as well as the specific provisions which relate to child labour.⁵⁷ Obtaining the consent of the offender as a pre-requisite is a possible way of eliminating the forced quality of the labour,⁵⁸ but especially as regards the consent of children, it may be dubious whether such consent is in fact voluntary.

55 See too the results of the IMC *Report of the Durban Pilot Assessment, Reception and Referral Centre*, where respondents, including social workers and prosecutors, were asked whether there were offences categories for which they would not allow diversion.

56 Section 13 of the Constitution. See also the discussion in par 11.88.

57 Section 28(1).

58 NC Steytler *Constitutional Principles of Criminal Procedure* 1998 citing Van Zyl Smit (1993) *European Journal of Crime, Criminal Law and Criminal Justice* 309.

However, community service which includes light⁵⁹ work may be regarded as a reasonable and justifiable limitation of the constitutional prohibitions. In respect of other diversion programmes, NICRO statistics show that children as young as eleven years of age have been successfully referred to their life skills programme.⁶⁰ The project committee is therefore of the view that all children should be entitled to benefit from diversion options, and that legislation should make it clear that youthful age is not a barrier to referral. However, in accordance with the ILO Minimum Age Convention and Recommendation, children under the age of thirteen years should not be required or permitted to perform community service or other work as an element of diversion. Moreover, the principles applicable to diversion also clarify that, in selection of both the programme content and its duration, age should be a mitigating factor which should be reflected in the content of the diversionary process.

59 See the ILO Minimum Age Convention and recommendation no 146 of 1973 which permits employment of persons 13 - 15 years of age for certain "light work".

60 L Muntingh (ed) *Perspectives on Diversion* NICRO 1996.

9. PRELIMINARY INQUIRY

Introduction

9.1 The idea of a preliminary inquiry or hearing was not specifically raised in the Issue Paper, hence no comment on this issue was received. The Attorney-General, Grahamstown, did however 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 is placed before the magistrate by the prosecutor. The magistrate should then make a rule 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. The Natal Law Society suggested that legislation should provide for the handing in, at the commencement of each criminal trial where there is an accused under the age of 18 years, of a certificate from the prosecutor (or a specially trained official) certifying that a decision has been taken that the trial should proceed, as diversion is not an option. Apart from these proposals, the Commission's thinking in developing a model for the preliminary inquiry proposed below was influenced by the need to ensure the creation of a child justice system which is distinct, locally appropriate, and practical. The project committee was further informed by the unique yet apparently successful mechanisms designed for the New Zealand system and the panel system prevailing in Scotland (as detailed in the previous Chapters). There was also the reality that the creation of completely new structures for South Africa may prove to be far too expensive, and ultimately unrealistic. Therefore, the project committee has chosen to propose a model which entails adapting existing structures, and utilising the current infrastructure and available human resources, while at the same time maximising the potential for the use of diversion and restorative justice.

9.2 Submissions were received from NGOs in the child justice field advocating for a more inquisitorial system for children in conflict with the law. An approach based on an inquiry procedure is consistent with the inquiry procedure for children who are in need of care and protection in the present Children's Court system. The idea of an inquiry procedure to be used in

child justice courts has been proposed in the past in South Africa.¹ In conceptualising such a procedure for a new child justice system, the project committee has also been influenced by the present reality that children frequently appear in criminal courts without legal representation, and that an adversarial system then does not provide sufficient protections for young people. It has been cogently argued that systems based on an inquiry procedure² provide opportunities for directly involving young people and their families in the legal process, rather than the more limited scope for involvement where the child speaks “through a lawyer” only.

9.3 In addition, the project committee is of the view that the steps outlined in Chapters 7 (police powers) and 8 (assessment and referral) which include diversion measures during the pre-trial phase, will be limited to the extent that the powers of police and probation officers to divert without reference to the justice system will be confined only to non-serious matters. As stated before, this will be spelt out in the legislation. Thus, a “new model” of child justice is not going to emerge from the intervention of probation officers (in petty cases) alone. This means, too, that the assessment step cannot of itself be the “thread” that binds a new system together, because, save in non-serious cases, the probation officer or assessment officer’s views will remain recommendations which the prosecutor and magistrate may or may not accept. In view of the need to include in legislation provisions that will guarantee the application of international and human rights principles to the maximum extent, the project committee has been persuaded that a further procedure prior to appearance in court should be provided for. The key aim will be to place the responsibility for ensuring that diversion is used as often as is appropriate and possible, in the hands of one role player with final decision making powers; this person will also be able to ensure that detention of children is limited to situations where it is a last resort and for the shortest possible period of time.³ To this end, the project committee recommends that specially trained

1 See Community Law Centre *Report of the International Seminar on “Children in Trouble with the Law”* UWC 1995 at 52, also see IMC *Interim Policy Recommendations* at 52.

2 A Morris ‘Legislating for the Effective Involvement for Young People, Families, Victims and the Community in the Juvenile Justice System’ Paper presented at the SA Law Commission/UNDP International Conference on Juvenile Justice, Gordon’s Bay, November 1997 at 3 - 4 (hereafter A Morris *Conference Paper*).

3 “The ideal legislation would **compel** magistrates/ judges to consider alternatives before resorting to judicial proceedings **while leaving to their discretion** the decision as to what alternative would be most appropriate” (bold in the original text) Judge Renate Winter ‘Drafting juvenile justice legislation’ Paper presented at the SA Law Commission/UNDP International Conference , Gordon’s Bay, November 1997.

magistrates, acting as “inquiry magistrates” should fulfil this primary function in relation to the administration of a new child justice system.

9.4 Until now, the decision to divert has rested with the prosecution, with the bench playing no role in channeling cases away from criminal courts. However, placement decisions - pending plea, trial or other resolution of a matter - are made by the judicial officer. The proposed inquiry links these two key pre-trial decisions to one role player, the inquiry magistrate, to form the cornerstone of the new child justice system.

Features characterising the proposed preliminary inquiry

9.5 In the envisaged new child justice system, there would be two distinguishing elements: first, the introduction of an inquiry prior to the noting of the plea and prior to charge; and second, the identification of the child justice magistrate as the person on whom the primary duty rests to ensure that diversion is promoted wherever possible and that pre-trial detention is used as a measure of last resort. It is therefore suggested that if a matter involving a child has not been diverted by the probation officer in the first instance in the non-serious cases mentioned above, or diverted or withdrawn by the prosecutor, that before plea, the magistrate attached to the child justice court should hold a preliminary inquiry.

Functions of inquiry magistrate

Ascertaining whether assessment has taken place

9.6 The initial purpose of the inquiry would be to ascertain 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.⁴

4 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

Establishing whether matter can be diverted

9.7 Once the assessment has been completed, or if there are compelling reasons why it can be dispensed with, the second purpose of the preliminary inquiry is to establish whether the matter can be diverted. Here the inquiry turns on the views of the child and family, probation officer (if a report has been deemed necessary), and prosecution. Morris, citing Hackler, describes the process in France thus:⁵

It is rare for cases to reach the juvenile courts (*tribunals pour enfants*): the police or prosecutors may screen it out and in some cases may be dealt with by way of mediation or reparation. When a case is referred to a judge, judges are most likely to deal with the matter informally in their office. Hackler (1991) describes this as ‘the primary scene of activity for juvenile court judges’ and Humphris (1991) says that these meetings resolve around 70% of all juvenile cases.

9.8 In New York, the Youth Part⁶ has adopted a similar way of working:⁷

After a juvenile’s case first appears in the part, the court schedules an ‘in chambers conference’ ... designed to explore the issues in a relaxed setting rather than during a hectic calendar call. In addition to the prosecutor and defense counsel, program representatives, victims and other interested parties are asked to attend. At the conference, the facts of the case, the legal implications and the lawyers’ proposals for disposition are discussed. If agreement is reached, the case is disposed of on the next adjourned date.

9.9 It appears that, despite the obvious severity of these matters, 60 % of young offenders appearing in the Youth Part have been placed successfully in programmes during the last five years, without the need for criminal trials.

where social workers in a region serve more than one court centre, on a circuit basis.

5 A Morris *Conference Paper* at 3.

6 A division of the adult criminal courts of New York, which hears juvenile criminal cases which by statute are not heard in the juvenile court: that is, matters involving 13 year olds charged with murder, and 14 and 15 year olds charged with murder and other serious and violent crimes specified by the relevant statute.

7 Judge MA Corriero ‘Proposals for a Youth Justice Act’ Paper presented at the SA Law Commission/UNDP international conference on drafting juvenile justice legislation, held at Gordon’s Bay, November 1997 at 8.

9.10 It is therefore envisaged that the proposed preliminary inquiry would serve as a final check that diversion of the matter is not possible. It is envisaged that diversion would not be possible in a range of circumstances:

- where the child does not admit responsibility for the offence;
- where the child is not a suitable candidate for diversion as he or she has previously been in conflict with the law and the case was diverted.

9.11 Further, diversion options may not be appropriate -

- given the history of the child and the availability of more intensive programmes;⁸
- where the matter is regarded as too serious, and warrants a court intervention.⁹

9.12 The preliminary inquiry is not intended simply to be an additional “hoop” through which children accused of having offended should pass before proceeding to trial court: international examples show that this kind of procedure can provide the opportunity for innovative and imaginative intervention by specialised and trained judicial officers, to establish the exact nature of the circumstances of the child and offence, and to devise a solution that obviates the need for the child to proceed to court. It is thus conceived as a last barrier before a criminal trial ensues.

9.13 As magistrates already fulfil an inquisitorial role in the present procedure in the noting of

8 This does not mean that once a child has been diverted once, no further diversion is possible: the availability of diversion programmes and options with different levels of intensity implies that a child may nevertheless be diverted more than once, albeit to an option at a higher level of intensity. So, a child who has previously attended a life skills programme, may benefit by intensive supervision, with conditions, and a community service sanction.

9 Any case in which the likely outcome is a residential care order is a possibility, similar to (for example) a sentence to reform school, cannot be dealt with by the inquiry magistrate as diversion, and can only be imposed by a child justice court. (See Chapter 10 below). The reasoning behind this is that all residential orders will be subject to automatic review, and the proceedings of the inquiry will not be subject to review. See further appeal and review of the decisions of the inquiry magistrate below.

plea,¹⁰ the project committee is of the view that this role in a preliminary hearing before the case proceeds to court would be one that magistrates would find familiar, and would be able to fulfil effectively. Also, magistrates specialising in children's issues have become a possibility with the impending advent of the Family Court, as specialised training in relation to child and family law will be a pre-requisite for appointment to positions in these fora. There will, in other words, be a likely pool of judicial officers interested in matters pertaining to children and their families, who are willing to undergo specialised training in this regard.¹¹ Prosecutors, on the other hand, have far less potential as a group with regard to the main responsibility for ensuring diversion and application of further international law principles. This is because prosecutors are frequently rotated and promoted, and it is therefore difficult to identify a fixed group of people who can be effectively trained to carry responsibility for the new system. Also, as mentioned above, some decisions crucial to implementation of the system are judicial decisions (for example placement or release whilst awaiting trial), which can only be made by judicial officers.

9.14 Similar considerations apply to other optional role players, such as probation officers. In sum, the project committee is convinced that the key role should be accorded to a judicial officer acting as inquiry magistrate.

Determining release or placement whilst awaiting trial

9.15 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

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

11 There would possibly be career development opportunities in regard to promotion from the child justice court to the family court, which is attractive in view of the fact that acting as magistrate in the "juvenile court" has in the past often been seen as a posting senior only to traffic court, and not beneficial to a longer term career path.

reasons for introducing an inquisitorial approach to this critical phase of the proceedings, namely the decision about release, placement or pre-trial detention, as it enables the presiding officer to solicit as broad a range of evidence and submissions as necessary to enable the most appropriate placement decision to be made.¹² In addition, it has been highlighted before that bail hearings have a *sui generis* nature, and recent legislation has confirmed and extended the inquisitorial character of these proceedings.¹³ The function of the inquiry magistrate in regard to aspects of the preliminary inquiry, namely the decision on release, placement of detention, will therefore be entirely familiar.

9.16 Questions about the limitation of the use of pre-trial detention were included in the Issue Paper, and the question as to whether monetary bail was appropriate for children was also raised.

9.17 The legislative history of section 29 of the Correctional Services Act, which in recent years has regulated when and if children awaiting trial may be remanded to prison, has already been documented in Chapter 2. The Correctional Services Bill 65 of 1998 contains no similar provision to replace the current section 29, as the drafters advised that "[t]his Bill provides for what happens to children who are detained in prison. It does not, however, determine when children, either sentenced or unsentenced, may be held in prison. That question should properly be dealt with in the Criminal Procedure Bill or in more specialised juvenile justice legislation." Cabinet has announced its intention to effect interim amendments to the Criminal Procedure Act for the time when the principle Correctional Services Act is repealed and replaced. These amendments will apply pending the legislative recommendations of the Commission in the present investigation. A first Bill containing the amendments, called the Criminal Procedure Amendment Bill 59 of 1998, was published, followed by a second, Bill 132 of 1998. Neither has yet been passed.

12 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 project committee intends to ensure that the burden of showing the necessity of pre-trial incarceration lies with the state.

13 See M Chaskalson *et al Constitutional Law of South Africa op cit* at 5B-44.

9.18 The Issue Paper pointed out that both the 1994 and the 1996 amendments to legislation concerning the holding of awaiting trial children in prison included limitations on magistrates' discretion to remand children in custody.¹⁴ The Act included a schedule of offences for which a child could be remanded to prison, but also left the option open of a discretionary referral where the offence was committed in circumstances so serious as to warrant such detention. The legislature attempted to include further safeguards, such as the requirement that oral evidence be led pertaining to the risk (of re-offending, of danger to other children, or of absconding) that the child may pose before a detention decision is taken, and that the detention must be necessary and in the interests of society. The detention was subject to review every 14 days.

9.19 There were numerous interpretation problems, however, and monitors found breaches of its provisions. Approximately half the children in detention between May 1996 and May 1998 were remanded, not for offences enumerated in the schedule, but for other offences under the category "offences committed in circumstances so serious as to warrant such detention". Some of these have been found to be serious, whilst in many instances investigation showed the matters to be petty (theft of minor items and shoplifting). Statistics from the Department of Correctional Services indicated approximately 1 300 children in prison awaiting trial in February 1998. *Project Go* was launched by the Department of Welfare to expedite the movement of children from prisons to alternative facilities, and to ensure that as secure care becomes available, children are no longer detained in prison. By the end of April 1998, it was indicated that there were approximately 1 300 children still awaiting trial in prisons. Given that it is not clear when alternative secure care facilities will be complete, it is uncertain to what extent children awaiting trial will still be placed in prisons by the time the child justice legislation proposed in this Discussion Paper is passed by Parliament.¹⁵

9.20 One question that arises from the experience with section 29, and which was consequently posed in the Issue Paper, is how child justice legislation can limit child detention, in accordance

14 These are described in J Sloth-Nielsen 'Pre-trial detention of juveniles revisited: Amending section 29 of the Correctional Services Act' (1996) *SACJ* 61.

15 The Western Cape has only recently announced plans to create a secure care facility, which should be ready in a year and a half: see *Cape Argus* 8 May 1998.

with the Constitution, without being inflexible or unworkable. There was a varied response to the retention of a schedule of offences to determine whether or not a young person may be detained, be it in a prison, secure care or other residential facility. The Natal Law Society had reservations that schedules might prove to be rather inflexible in cases where detention might be warranted, despite the offence being listed as a non-detention one. The Society raises the concern that once detention is a permitted option for certain offences, it might become the norm, being the easier course to follow. The Law Society of the Cape of Good Hope held the view, as did many other respondents, that individual assessment¹⁶ (see Chapter 8) is preferable to lists of schedules.

9.21 With respect to bail, most respondents favoured the proposal which excludes monetary payment of bail. The Law Society of the Cape of Good Hope argues, however, that bail should be retained as an option for those children who are in a position to afford it. The Natal Law Society concurs with the latter view, expressing doubts about whether the present system can cope with the additional burden that will be brought about by conditional release options.

Responses to questionnaire

16 As respondents have indicated in their responses to the questionnaire, assessment of children will be compulsory in all cases, unless there is reason to dispense with an assessment. The legislation will provide, in accordance with the responses, that if the child risks detention in residential facility in the pre-trial phase, assessment cannot be dispensed with.

PRE-TRIAL DETENTION	RESPONDENTS SUPPORTING
i) there should be compulsory assessment of each child before a decision is taken to detain him or her in an institution	74
ii) a schedule of offences should determine when a child offender may/may not be detained	41
iii) alternatives to money bail	yes: 83 no: 27
iv) other	31

9.22 The Commission's evaluation of these responses, and recommendations in respect of how best to structure limitations on pre-trial detention and the possible elimination of monetary bail, is dealt with below.

Preliminary indication of evidence sufficient to support a prosecution

9.23 The fourth function of the inquiry, namely an initial assessment as to whether the evidence supports continued prosecution, is discussed below in paragraph 9.44.

Role of inquiry procedure in promoting diversion

9.24 If, after the conclusion of the preliminary inquiry, the presiding officer cannot find reasons to divert the matter, and finds that there are no reasons justifying the conversion to a Children's Court inquiry, or the child does not accept guilt, and there is a clear indication that the evidence in the hands of the prosecution will sustain a prosecution in criminal court, the matter can then be set down for plea and trial in the proposed child justice court.¹⁷ It is envisaged, based on studies conducted thus far where statistics have been made available, that assessment coupled with the

17 See Chapter 10.

inquiry procedure could have the effect of diverting as many as 50% of all child offenders.¹⁸ A significant additional percentage, at least 10%, would be appropriately transferred to the welfare system through the existing mechanism of the Children's Court process; available research shows that far more children are referred to the welfare system after early intervention by probation officers, because social history reports are available to decision-makers at a much earlier stage of the proceedings, before the matter even proceeds to court. In addition, a further group of cases, probably at least 10%, would in all likelihood be withdrawn by the prosecution due to insufficiency of evidence, or for other reasons. Thus, the project committee predicts that only 30% (or a lower percentage) of cases where children have been arrested for offences, would eventually proceed to trial, and with the development of further programmes (especially more intensive programmes) and other options such as supervision orders, family group conferences and victim/offender mediation, this percentage may decline further. In New Zealand, statistics showed that after introduction of the new system based on family group conferences, rates of appearance in the Youth Court declined from 67 per 1 000 in 1988, to 16 per 1 000 in 1990. In addition, rates of incarceration dropped dramatically.¹⁹

9.25 However, the project committee cautions that this optimistic assertion that the inquiry magistrates will be effective in promoting diversion depends on the necessary human resources infrastructure being made available in support of the proposed system.

Evaluation and recommendations

18 A key goal of the Durban Assessment Centre pilot project was to divert 50% of all juvenile cases in the year during which the research was conducted. The figures reveal that 171 cases (5% of the overall sample and 10% of the completed cases in the year) were converted to Children's Court inquiries; a further 549 (20% of the overall sample and 33% of finalised cases) of matters were assessed as suitable for diversion, and around 712 cases were withdrawn (26% of the cases in the sample overall, or 43% of completed cases.) These figures indicate a dramatic increase in the use of diversion and conversion procedures as a result of the assessment centre. Only 118 children pleaded guilty or were found guilty in the entire year, whilst in 21 cases a finding of not guilty was recorded. Of the total sample of approximately 2 700 cases, more than 1000 had not been finalised at the conclusion of the study.

19 G Maxwell and A Morris 'The New Zealand Model of Family Group Conferences' in C Alder and J Wundersitz (eds) *Family Group Conferencing and Juvenile Justice: The Way Forward of Misplaced Optimism?* Canberra: Australian Institute of Criminology 1994.

Holding of the proposed preliminary inquiry

9.26 It is recommended that the proposed preliminary hearing should develop as follows:

- The inquiry magistrate will convene the inquiry in chambers, in an office or other suitable room, but not in a court.²⁰
- The more informal and inclusive nature of the inquisitorial procedure would imply that the presiding magistrate would at the outset have access to 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). Thus, if this has not already been recommended by the probation officer, it would be immediately obvious if a matter is of the nature that it should also be referred to the Children's Court for an inquiry under the Child Care Act. If, in fact, the probation officer has recommended such conversion, the inquiry magistrate, as a judicial officer, would then be empowered to effect the conversion, without any further appearance in a criminal court for the child.
- The requirement that the inquiry magistrate needs information concerning the child, family, and circumstances of wrongdoing, implies that the inquiry should at least involve the child, a family member or another suitable adult who is prepared to take responsibility for the child, and the prosecutor. The probation officer should ideally also be present to explain the assessment report if necessary, and to defend recommendations in that report. The arresting or investigating officer should not be required to attend, but should be free to do so if he or she wishes. Additionally, if the child has a legal representative, this person would also be present.
- The inquiry magistrate should begin the hearing by inquiring 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 needed, the magistrate would instruct the prosecutor to

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

arrange for this to be done immediately.²¹

- With an assessment report available, the inquiry magistrate would proceed to establish whether the case can be diverted, and after hearing from the prosecutor and the probation officer, where the probation officer wishes to be heard, as well as interviewing the child and the family, will make a decision whether or not diversion is a possible option. It will be remembered that the probation officer will be granted limited powers to divert a matter where it is not serious and the child accepts responsibility (see Chapter 8). In other matters, where a probation officer recommends diversion, the child accepts responsibility and the prosecutor agrees with the recommendation, that matter, too, can be diverted without the necessity of an inquiry. Where the probation officer does not recommend diversion or where the prosecutor does not agree with a recommendation, the inquiry will be required. The factors relevant to the inquiry magistrate's decision are spelt out in various parts of the proposed legislation and include factors such as the following: whether the child has been previously diverted or convicted,²² the nature of the offence, the attitude of the victim and of the child's family, and acceptance of responsibility for the alleged offence by the child.
- A question that arises concerns the nature of the evidence that may be presented at a preliminary inquiry, and whether the evidence can include such matters as the child's previous convictions, or evidence of previous diversion. In a traditionally adversarial system, of course, the judicial officer who is required to decide eventually on guilt or innocence may not be appraised of this evidence before conviction. Constitutional rights of accused persons to be presumed innocent must also be factored in.

But, recently, the new legislation on bail (the Criminal Procedure Second Amendment Act of 1997) requires²³ that an accused or his or her legal advisor is "compelled to inform the court whether the accused has previously been convicted of any offence", or "whether

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

22 Although this will not preclude diversion in the present case.

23 In a new section 60(11B).

there are any charges pending against him or her, and whether he or she has been released on bail in respect of those charges” in respect of certain hearings. A bail hearing can be compared to the proposed preliminary inquiry to the extent that it deals with matters *in limine*. There is therefore already some precedent for allowing a judicial officer to be appraised of the existence of previous offences. However, as discussed below, the inquiry magistrate will not be the person who is also required to preside at the trial that eventuates, save in the instance where a child has indicated at assessment that he or she does not accept guilt and wishes to plead not guilty. In these cases, no information prejudicial to the child will have been allowed at the inquiry, and there is no possible conflicting role for the inquiry magistrate.

Although it is possible to prevent the admission of previous convictions or previous diversion at the inquiry proceedings through this legislation, the absence of this information may act as a disincentive to diversion, as this information is often central to the decision as to whether or not diversion is possible. On balance, therefore, it is in the interests of both the administration of justice and individual child accused that this evidence be allowed to surface²⁴ in order to maximise the effectiveness of the inquiry procedure.

- The matter may be postponed for a limited period for the purposes of obtaining further information which may assist the court in deciding whether or not to divert, such as the attitude of the victim. However, the victim’s permission that the case may be diverted, or willingness to participate in victim/offender mediation or in a family group conference, should not be regarded as a prerequisite for diversion.
- If a magistrate cannot divert a case and the matter proceeds for trial in the proposed child

24 Note that this preliminary evidence would be presented by probation officers, prosecutors, police or family members, and not on the basis of SAP 69’s; waiting for formal police records to be presented would negate the whole preliminary nature of the inquiry, as at present considerable delays can be experienced in attempting to acquire the official records from Pretoria. However, as the Integrated National Justice Information System becomes established, official information in this regard will be more easily procured by relevant officials at a very early stage in the process. (This information system is a programme of the NCPS, and is being implemented for Government by the Motswedi consortium.)

justice court, he or she must record written reasons for referring the matter to that court.

- If the magistrate is informed, at the outset of the proceedings, that the reason why diversion cannot take place is because the child does not acknowledge responsibility for the offence, and intends to plead not guilty, the magistrate will not investigate the possibility of diversion, in deference to the presumption of innocence. Rather, the inquiry magistrate will proceed to explain to the child his or her rights and will request the prosecutor to set the matter on the court roll as soon as possible, if the child is in residential care, or at the earliest convenient date, if the child is to be released into the care of an adult, or released on warning.
- In making the decision about possible diversion, the inquiry magistrate should have regard to formal and informal diversion possibilities, as detailed in Chapter 8, as well as the different levels of available programmes and options. The inquiry magistrate will have an important role to play in ensuring the innovative development of diversion options which are appropriate for local conditions, and will not simply be tasked with selecting from a predetermined list of programmes. Nor will the inquiry magistrate be able to abdicate his or her role on the grounds that no formal diversion programmes are available in the district: this is where the magistrate will reach out to community organisations and structures in attempting to maximise diversion opportunities.
- The second task of the inquiry magistrate, if the matter is not to be diverted, is to investigate the possibility of release of the child on warning, or into the care of a parent, guardian, family member or other responsible adult.²⁵ It is submitted that the categories of persons into whose care a child may be released should be broad. Thus the magistrate will be empowered to release a child on his or her own recognisance, or into the care of a parent or guardian, or other suitable person nominated by the child such as an educator, relative, shelter worker and so forth.

25 See the discussion in Chapter 7 concerning the proposed broadening of the categories of persons into whose care a child can be released.

- In order to ensure the application of the principle of detention as a measure of last resort to the maximum extent possible, the project committee proposes a number of measures designed to assist the inquiry magistrate to give practical effect to the principle. The magistrate should be required to have due regard to the recommendations of the probation officer regarding placement of the child as set out in the assessment report. In developing this proposal, the project committee has had regard to the responses to the Issue Paper concerning the suitability of using schedules of offences to determine whether residential placement may be considered. In view of the fact that most respondents were wary of schedules, and preferred individual assessment as the basis for the decision, the project committee has adopted the approach that schedules would not be desirable. This conclusion pertains generally to residential placement, and is in line with emerging developments in the child justice field in practice.²⁶ In other words, individual assessment will be the main criteria governing admission to a place of safety, secure care facility or similar residential facility.

If, however, placement in prison awaiting trial is to be a possibility, different considerations come to the fore, and the project committee is persuaded that extremely strict criteria need to be included in legislation. Given the stated intention of Government to achieve a situation where no child need be detained in a prison, yet mindful of the fluidity of the present situation concerning the actual development of alternative facilities, the project committee proposes two options here: First, the proposed legislation could outlaw any pre-trial detention in a prison. Second, the legislation could embody strictly limited conditions for such detention in prison, which could be repealed if it was clear that sufficient alternative facilities were available. The project committee favours the second approach and recommends the following criteria to limit the detention of children awaiting trial in prisons: Children of 14 (or 16) years of age or older charged with 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 Drug Trafficking Act 140 of 1992, if it is alleged that the value of the dependence producing substance in

26 Such as the training that has been conducted nationally on “developmental assessment” and the policy that admission to a secure care facility can only be effected after an individual assessment.

question is more than R50 000 or any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, will be able to be detained in prison awaiting trial, if there is no vacancy in an available alternative secure residential facility within a reasonable distance from the court or if there is a substantial risk that such a child will cause harm to others in a residential facility. In addition the child should be brought back to court regularly for reconsideration of the need for detention.

9.27 The setting of monetary bail was rejected by the majority of respondents, with alternatives to money bail being the preferred route. The project committee endorses this view, as the setting of monetary bail discriminates against children who themselves do not have money, as well as families who are too poor to pay.²⁷ However, the issue of bail must be considered as a last resort where a child would otherwise remain in detention. The project committee also proposes the incorporation in the legislation of a number of conditions which can be imposed when a child is released pending trial, namely:

- The condition to appear before a court on a certain date and at a certain time;
- the obligation to report to a specified person or place, and
- the prohibition not to interfere with witnesses, tamper with evidence or associate with specified persons.

9.28 It is also recommended that -

- after the preliminary inquiry, if the matter has not been diverted, the inquiry magistrate should request the prosecutor to refer the matter for charges to be instituted in the proposed child justice court or any other court; and
- where a child fails to complete an undertaking, such as not completing community service,

27 See Chapter 11 for similar concerns about monetary fines. The approach here is consistent with the approach of the project committee regarding the suitability of fines as a sentence for children.

or attending a programme intended for diversion, the matter should be placed again on the roll of the preliminary inquiry for the purposes of investigating why the child has not fulfilled the set conditions. From this second inquiry, a further diversion may be arranged if appropriate, or the matter can be referred to the child justice court for criminal proceedings to ensue.

Diverse aspects of the proposed preliminary inquiry

Previous convictions and previous diversion

9.29 The issue of previous convictions or previous diversion has been raised in paragraph 9.26 above. It has been pointed out that it would be in the interests of both the administration of justice and individual child accused that evidence of such convictions or diversions be allowed to be presented in order to maximise the effectiveness of the inquiry procedure.

Presence of adult co-accused at preliminary inquiry

9.30 A further issue that arises is the situation where there are co-accused in a case, and especially where there are adults who are co-accused with a child. The crisp question is whether all parties should be involved in the inquiry procedure, even though the purpose is to determine whether or not the child accused can be diverted, or whether the matter should be converted to a Children's Court inquiry in the welfare system. The view favouring the inclusion of adult co-accused in the inquiry procedure is based on the fact that it would enable the inquiry magistrate to fully explore the child's role in the offending,²⁸ as the child may be under the influence of adult offenders, or, as many respondents have pointed out, may have been used by adults to commit offences. This may be relevant to determining whether a child is in fact in need of care or supervision, or whether conditions should be formulated²⁹ to separate the child from the

28 It must be remembered that the inquiry proceeds only where the accused child admits responsibility for the offence: where the child denies responsibility, the inquiry adjourns the matter for trial, and the only remaining question for the inquiry magistrate to determine would be where the child will be placed in the pre-trial phase.

29 Such as curfews, or orders requiring the child not to associate with certain identified people or groups.

criminogenic environment.

9.31 However, it is also arguable that these facts may be established without the presence of adult co-accused, who should not be included in the child justice system or in the inquiry procedure, as it will divert attention from the child accused and possibly unduly clog the child justice system. The *de facto* consequence of introducing the inquiry system for children only, is that trials will then be temporarily separated, and different processes will be followed in respect of child accused and adult accused at the initial stages.

9.32 An officer presiding at an inquiry will be empowered to conduct the inquiry separately and where a finding is made that the matter cannot be diverted, he or she should order that the matter proceed to trial.³⁰ As is pointed out in Chapter 10 (Court procedures), the project committee recommends that the separation of trials should be mandatory, provided that any person should be able to make an application to the proposed child justice court for a joinder of trials on the basis that a substantial injustice would otherwise occur. It would therefore be possible to assess the child separately and to hold an inquiry without the adult co-accused, and then to re-join the matter where an application to join the trials is successful.

Place where inquiry is to be held

9.33 Many submissions received by the project committee argued for the need for a more accessible child justice system; however, concrete recommendations in this regard were confined

to suggestions such as using a “round table” approach rather than the traditionally alienating physical court room structure, and less formal procedural rules, which tend to act as a disincentive

30 As is pointed out in Chapter 10 (court procedures), the project committee recommends that the separation of trials should be mandatory, provided that any person should be able to make an application to the proposed child justice court for a joinder of trials on the basis that a substantial injustice would otherwise occur. It would therefore be possible to assess the child separately and to hold an inquiry without the adult co-accused, and then to re-join the matter where an application to join the trials is successful.

to the participation of the child and his or her parents or family. The project committee is aware of the financial constraints facing the Department of Justice, and is of the opinion that it would be unlikely that the government would be financially able to embark on a programme to rebuild, or to refurbish all facilities in every magisterial jurisdiction in order to physically create a new system of child friendly courts. The project committee recommends, though, that where courts are to be built afresh, or existing buildings refurbished, those charged with implementation of the proposed monitoring system should be consulted prior to the finalisation of such plans.

9.34 The introduction of the proposed inquisitorial step at a preliminary inquiry would, the project committee believes, go a long way towards addressing the concern that child friendly courts are a pre-requisite in the absence of an extensive building project. Such inquiry can be held in far less formal surroundings than the traditional court room, the most obvious being in an office, the venue that is used for the Children's Court or family court, chambers or the place set aside for an assessment centre, if one exists.

Time factors

9.35 The inquiry should be held as soon as possible, and no later than 48 hours after the arrest of a child. This accords with the present Constitutional rule regarding appearance in court after arrest within 48 hours.³¹ 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".³² The question arises whether appearance before the preliminary inquiry constitutes appearance before a court for the purposes of section 35(1)(d) of the Constitution. This is important as it affects not only the necessity of appearance within 48 hours, but also the possibility of remanding a matter for further information to be placed before the inquiry magistrate. The project committee proposes, therefore, that the legislation should define the proposed child justice court structure to include (a) the preliminary inquiry before a

31 If the child was not arrested because an alternative method to ensure attendance at assessment, the preliminary inquiry should be held within 72 hours of the alternative method being employed.

32 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.

judicial officer and (b) the adversarial trial itself.

9.36 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 within this period of time,³³ 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).³⁴

9.37 One difficulty might be that both the person conducting the assessment and the inquiry magistrate would need to be able to ascertain whether diversion options are possible, and this too would ideally have to be done within the initial 48 hour period; so, if admission to a programme, such as the NICRO *YES* programme is a possibility, any qualifying interviews should be effected as soon as possible, ideally within the first 48 hours, immediately after assessment by a probation officer, and before the holding of the preliminary inquiry, in order to obviate the need to convene the preliminary inquiry only for the purposes of postponing it for this qualifying procedure held by organisations offering programmes. Ideally, general agreements regarding diversion would have had to be made previously and approved by the proposed child justice committee.

Limited power to remand the preliminary inquiry

9.38 In order to allow scope for alternatives to pre-trial residential placement to be found, or in order to enable further investigation or gathering of information which may further the goals of diversion, the legislation should provide for limited powers to remand the preliminary inquiry. However, the project committee is of the view that the inquiry should be postponed for a maximum of 2 days only, and for a maximum of two postponements after the initial opening of the inquiry, whereafter the case must be transferred to the child justice court.

9.39 In arguing that remanding the preliminary inquiry should be possible, the project committee

33 The actual time taken to complete an assessment varies according to practice and circumstances, but appears that on average, it does not take longer than an hour.

34 Local magisterial child justice committees in more remote or rural areas would have to ensure a register of possible persons who could be called upon to effect an assessment and attend the inquiry.

has been struck by the fact that delaying transfer to the criminal court for short periods of time promotes the use of diversion. For example, it may lead to the development of an effective plan by the role players,³⁵ thereby allowing the matter ultimately to be resolved without the necessity of a formal criminal trial. This is the approach of many role players in the Children's Court system, where hearings can be postponed in order to allow social workers who are seized with a child in need of care to work with families to prepare a plan for the future of the child. In many juvenile courts at present too, matters are postponed while assessments for diversion are effected by programme managers. Similarly, the intervening period could be used to explore the possibility of victim/offender mediation, to address problems relating to the child's family situation, to interview a teacher or school, to arrange a family group conference or to explore a community based diversion possibility.³⁶ The ability to postpone a matter at the inquiry stage for periods not exceeding 2 days, with a maximum of two postponements, is intended to further the notion that diversion should be a cornerstone of the future child justice system, and that even where formal diversion programmes are not available or are not suitable, there may well be other diversion possibilities that can be devised by probation officers, magistrates, families or community structures in order to obviate the need for taking a child through the formal child justice system.

Children's Court conversions

9.40 The project committee recommends that there should be certain clearly defined circumstances where a Children's Court inquiry is indicated where children are in conflict with the law. These may be echoed in an equivalent legislative provision in the proposed new Children's Act³⁷ to regulate when a Children's Court inquiry should be opened, and a child justice case transferred to the welfare system. Thus, the legislation proposed in this Discussion Paper, in addition to the criterion that a child appears to be in need of care, should add further criteria.³⁸

35 The idea of working towards the development of a *plan* for the child's diversion, placements, convening of a family group conference and so on is not new: it is found in other jurisdictions, such as New Zealand, and has also been included in the IMC *Draft Policy on Transformation of the Child and Youth Care System*.

36 Such as referral of the matter to a street committee, tribal court or court of traditional leaders, or similar.

37 The investigation into a new children's statute for South Africa is being undertaken by the SA Law Commission project committee on the Review of the Child Care Act (Project 110).

38 Listed in par 10.52 and 10.53 of Chapter 10.

9.41 Where the presence of one of these criteria is noted by the assessment officer or the inquiry magistrate, transfer of the case to the Children's Court should be considered. The inquiry magistrate would have to note reasons for *not* converting the case to a Children's Court inquiry. In other circumstances not covered by these explicit criteria for conversion, transfers of children's cases from the criminal system to the Children's Court system should be optional.

Opening of docket, charge, and sufficiency of evidence

9.42 The current South African criminal procedure does not necessarily require that an arrest on a charge must result in a charge sheet being drawn up: after arrest,³⁹ the police can decide not to open a docket, (for example, where investigation prior to first court appearance shows that there is insufficient evidence to sustain a charge), and the arrested person can be released without the involvement of a prosecutor to formally withdraw the charges.

9.43 There is thus a precedent for an interim period during which further investigations can take place, before an arrested person is formally charged. It is envisaged that child justice legislation will provide that the child is deemed not to be formally "charged" until assessment has taken place (save in the exceptional circumstances where this procedure is waived), and until the preliminary inquiry has been conducted. The preliminary inquiry would therefore serve the additional purpose of checking that there is a minimum sufficiency of evidence to sustain a prosecution.⁴⁰ Only 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, will the child be formally charged. This is intended to ensure that even if the inquiry is postponed in attempts to find a satisfactory diversionary option, that the child, when diverted thereafter, will not have "entered" the criminal justice system. The idea that the child is not formally charged until after

39 Which is for the purposes of bringing an accused person to court.

40 The statistics from the Durban Assessment, Reception and Referral pilot project show a high proportion of cases that were withdrawn (see footnote 18 above, where it is recorded 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.

conclusion of the preliminary inquiry stage promotes true diversion, in a similar fashion to the various measures in the New Zealand legislation, which also allow for alternative resolution of cases without the child acquiring a record.

9.44 The question then arises as to how the inquiry magistrate will ascertain that there is in fact sufficient evidence to sustain a prosecution, and, in particular, what the nature of the submissions that will be required from the state in order to give the presiding officer enough information on which to judge, should be. The second question is what the proposed powers of the inquiry magistrate should be if the evidence seems too paltry.

9.45 The first issue could be addressed in two possible ways: first, by allowing the inquiry magistrate access to the police docket, so that he or she can review the sufficiency of the documentation contained therein: witness statements, evidence on identification etc. It must be born in mind though, that the person most likely to accompany the child to assessment, and possibly to the subsequent preliminary inquiry, may be the arresting officer, rather than the person charged with eventually gathering all of the evidence, ie the investigating officer. It could be argued that even at this preliminary stage, there is usually sufficient documentation in the docket on which to make an initial judgement as to the adequacy of evidence.

9.46 Alternatively, the inquiry magistrate could rely on *ex parte* submissions from the prosecution. The prosecutor would then summarise the nature of the evidence supporting the case against the child, whereupon the inquiry magistrate could ask further questions if necessary, from either the prosecutor or the arresting officer, if present. There would not be an opportunity for cross examination, but the magistrate would at least be able to make an initial judgement in this regard. The adequacy and strength of the state's case has been held by courts to be a factor that may influence the granting of bail, and it would seem important here too, especially as the inquiry magistrate is also tasked with deciding on release of the child (or the alternative of some form of residential placement). It is also important to establish that children to be transferred for trial to the child justice court, are facing charges that have sufficient basis for taking the matter further.

9.47 The advantage of requiring the prosecutor to apply his or her mind to the adequacy of the

evidence in the docket, and to present a statement summarising the adequacy of the material for the purposes of supporting a charge, is that it not only provides an additional protection for the child accused, but also places the prosecution in the position of controlling and directing the progress of the investigation, in the interests of shortening the period of time that a child spends in the criminal justice system. In other words, if the necessary supporting material is not available to the prosecution, and the inquiry is then remanded (for a maximum period of 2 days, and at most 2 postponements), this could have the effect in practice of ensuring that investigations of criminal cases where children are accused are dealt with as speedily as possible.⁴¹

9.48 Since the aim of the preliminary inquiry is to create a further pre-trial mechanism to avoid the necessity of cases proceeding to trial, it seems important to allow the inquiry magistrate some powers to inquire into the adequacy of the State's case in order to ensure that a child is not taken unnecessarily through the criminal process. As mentioned before, where a child intends pleading not guilty, this aspect of the preliminary inquiry will not arise, except insofar as the likelihood of conviction may, in the ordinary course of events, be relevant to the decision whether to release a child from custody.

9.49 Having considered the above options, the project committee is of the view that the magistrate should not be handed the docket, but should instead request the prosecutor, the investigation officer or any other relevant person to provide a report concerning the sufficiency of evidence to sustain a prosecution. If the evidence is insufficient, the magistrate should close the preliminary inquiry and order that the child, if in detention, be released.

Recording of proceedings of inquiry

9.50 It is envisaged that, as with other judicial process (such as bail hearings) the substance of the inquiry should be noted, either in writing, or on tape. There is some disadvantage in that the fact of recording can increase the formality of such an interim procedure, but it is undesirable that these proceedings are not recorded. Recording of the results and outcomes will also provide

41 See the Beijing Rules.

important criteria which could be used to monitor the new child justice system. In instances where the matter proceeds no further, there will be no charge sheet, which is the usual source of information about children's criminal cases. All that will be available are the results of the preliminary inquiry, which will be useful indicators of the implementation of the proposed legislation nationally. Further, it is important to keep records in the event that a child does not comply with the agreed programme, or any other conditions that may have been agreed to. Obviously, in the event of non-compliance, a further inquiry will have to be convened, to establish whether there are good reasons for failing to comply, whether further conditions can be set, or whether the matter should be remitted to the criminal court.⁴²

No appeal against finding of a preliminary inquiry

9.51 As an interim procedure, it is not envisaged that appeals (with one exception) should lie from the finding of the inquiry magistrate: the remedy for the child lies in the fact that the matter will either be diverted, without having reached the formal stage of charge, or will proceed to an adversarial trial, in which case all the constitutional and procedural benefits of ordinary adversarial proceedings apply. It is envisaged that only magistrates who specialise and are trained in child justice will preside at a preliminary inquiry, which is intended to further protect the child. In the ordinary course of events, administrative review would be possible if the presiding officer acted *ultra vires*.

9.52 The exception alluded to above, where an appeal should be possible, is in respect of a decision to detain a child pending trial. This decision should, in the view of the Commission, be appealable, in the same way that a bail decision can be appealed against.

Introduction of preliminary inquiry not to the detriment of child's procedural rights

9.53 The procedural rights enshrined in the Constitution for all persons accused of having committed an offence are, in the system set out above, upheld in all respects. As pointed out

42 See in general for the operation of this type of system in New York, Judge MA Corriero's conference paper *supra*.

above, the child who exercises the right to plead not guilty, is simply referred to the child justice court, without consideration of the merits of diversion, and the only decision to be made is whether the child can be released pending appearance in court. Similarly, as will be explained in Chapter 10 (Court procedures), the actual trials in such courts, although more informal in character, will preserve the essentially accusatorial nature of the proceedings, which seems to be required by the Constitution.

9.54 Neither could it be correctly said that the proposed new model introduces either a “welfarist” leaning model (compare Scotland) or a justice oriented model, as the proposed system has elements of both and is in fact a hybrid. However, the system is distinguished by vigilance for due process rights, even in the assessment and inquiry stages of the procedure.

9.55 The only difficulty that could be posed by the introduction of the new model pertains to the person who will conduct the preliminary inquiry. To the extent that the evidence presented (albeit informally) at a preliminary inquiry might include evidence with a tendency to incriminate the child, or to prejudice the issue, the inquiry magistrate would not be able to act as impartially as is usual in our courts. The inquiry magistrate may have heard evidence on previous diversions, or previous convictions, or relating to the content of the evidence, which would in ordinary circumstances lead to a recusal. The Commission, aware of this potential flaw, is of the opinion that the solution lies in disallowing the participation of the inquiry magistrate in any child justice trial other than a trial where the child indicated from assessment phase onwards that he or she was not accepting guilt. In these matters, the “inquiry” would not have occurred in the normal sense, as the inquiry magistrate would have been obliged only to decide on release, and would have immediately remitted the matter for trial in the child justice court. There would, in other words, have been no evidence produced which could be to the detriment of the child’s case, and which could (in ordinary circumstances) have given rise to recusal. In all other matters where the inquiry has been held, and the matter not diverted, the danger exists of prejudice to the rights of the child to a hearing before an independent and impartial bench, and thus the trial will have to take place before a different judicial officer.

10. COURT PROCEDURES

Current South African law

Juvenile court

10.1 There is no separate criminal court for children in South Africa.¹ In some urban areas where there are sufficient numbers of accused persons under the age of 18 years to warrant it, a court is set aside to deal exclusively with such cases and these courts are referred to administratively as juvenile courts. In areas where there is a lower population all criminal cases are channelled through the same courts. Trials of children are required by law to be held in camera, regardless of which court they are appearing in.²

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

10.3 It would appear that the courts have neither succeeded in promoting the dignity and worth of children appearing before them, nor their proper growth and development and their reintegration into society, as is required by the international instruments. Some problems relate

1 Cf 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 172.

2 Section 153 of the Criminal Procedure Act 51 of 1977.

to the physical appearance of court rooms, with elevated benches and an absence of a child friendly environment. In addition there are a number of specific concerns which have been noted by academics and activists in the field. These relate to procedural problems such as the lack of legal representation of children in the criminal courts,³ long delays in the finalisation of trials involving children and problems with the separation of young offenders from adult co-accused persons. In addition personnel working with young offenders are not specially qualified or trained for this work and there is a high turnover of staff.⁴

Children's Court

10.4 The Children's Court is a creation in terms of the Child Care Act 74 of 1983 and as such does not form part of the criminal process. The Children's Court proceedings take the form of an inquiry, not of a trial, and no conviction or sentence is given at the end of it. After the inquiry the court is empowered to make an order placing the child, normally with parents under supervision, with foster parents, in a children's home or in a school of industries. Every magistrate is automatically a Commissioner of Child Welfare in terms of section 6 of the Child Care Act.

10.5 There is an inter-face between the criminal court and the Children's Court in that in certain circumstances children arrested on charges can be transferred to the Children's Court. There are at present three ways in which this can occur. Firstly, the prosecutor may decide that a matter should be heard in the Children's Court rather than in a criminal court. The case is then referred by the prosecutor withdrawing the charges against the accused child and instructing that the case be referred. The grounds upon which prosecutors tend to base the decision to withdraw the charge would generally include one of the following: that the offence with which the child has been charged is of a less serious nature; that the child appears physically to be in need of care; that the motive for the crime is of a less serious nature, or because the prosecutor knows the child from previous appearances and feels that he or she is merely mischievous or still too young to deserve

3 Also see Chapter 13.

4 Community Law Centre *Law Practice and Policy: South African Juvenile Justice Today* Cape Town: University of the Western Cape 1995 at 53 *et seq.*

the possibility of a criminal conviction.⁵

10.6 Secondly, section 11 of the Child Care Act provides that if it appears to a magistrate during the course of proceedings or on the grounds of any information given under oath that the child does not have a parent or guardian or that it would be in the interest of the safety or welfare of the child to be taken to a place of safety, the magistrate may order that the child be taken to a place of safety and brought as soon as possible before a Children's Court. Thirdly, section 254 of the Criminal Procedure Act provides that if it appears to a magistrate at the trial of any person under 18 that the accused may be a child as referred to in section 14(4) of the Child Care Act, the trial may be stopped and the court may order that the accused be brought before a Children's Court. If conviction has already occurred before the court decides to stop the proceedings, the verdict shall be of no force and the court may refer the case to the Children's Court. Currently the option of referring or converting a criminal matter involving a child charged with an offence is under-utilised, with only an estimated 5% of cases being referred.⁶

10.7 In Issue Paper 9 certain problems were pointed out in making proposals regarding possible models of a children's justice court for South Africa. These relate to jurisdiction, the separation of children from adult co-accused and rural and urban differences. For the sake of convenience the discussion of the problems in the Issue Paper are repeated below.⁷

(i) Jurisdiction.

A fundamental question to be considered is whether multi-level jurisdiction should be preserved in a juvenile justice court structure. The alternatives are a specialised court which manages all juvenile cases, or a juvenile court which handles the majority of cases, but which refers certain matters on to superior courts. The process of transferring young people charged with more serious offences out of the juvenile court to other levels is common in the USA. This approach, however, may render pointless the creation of a separate juvenile justice system, especially if significant proportions of juveniles are no longer subject to juvenile court jurisdiction.

(ii) Separation of juveniles from adult co-accused

5 Cf *Law Practice and Policy: South African Juvenile Justice Today* *supra* at 29 *et seq.*

6 *Ibid.*

7 *Issue Paper 9* at 45 - 46.

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

(iii) Rural and urban differences.

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

Solutions will need to be provided by the proposed legislation to ensure equality of services for young people. One possible solution may be a circuit court system for juvenile cases, as long as this does not cause unreasonable delays or necessitate the unnecessary holding of young people in custody. Another possible solution would be widespread specialised training of all prosecutors, magistrates, interpreters and social workers. The role of indigenous law systems in dealing with young offenders needs to be considered, including the possibility of fusing the two systems or keeping them separate but ensuring that in either situation the rights of children are protected.

10.8 The following options with regard to a proposed new children’s justice court system were raised for discussion:

- (a) A completely separate children’s justice court which does not form part of the current district, regional and high court structure.
- (b) A specialised children’s justice court at district level with increased jurisdiction, but with an additional capacity to refer certain serious cases to the regional or high courts.
- (c) No separate division or special court but special rules and procedures set out in the legislation binding any court before which an accused person under 18 appears.

- (d) A children's justice court which operates chiefly as a mechanism to refer child matters to other community based fora such as family group conferences⁸ or sentencing circles.⁹

10.9 In addition to the above-mentioned 4 options, two further proposals relating to the appointment of lay assessors and to probation officers or social workers, were put forward:

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

- * There should be a state appointed probation officer or social worker based at or connected to every children's justice court who would be involved in a number of functions relating to the child, including the preparation of social enquiry reports on children appearing in the court.

10.10 With regard to the present Children's Courts, the Issue Paper set out two options for consideration:

- (i) All children under the age of 12 or under the age of 14 should be referred to the Children's Court;

- (ii) there should be discretionary referral of children under the age of 12 or 14 to a Children's Court - while retaining other options such as police cautioning or family group conferencing, which are diversion options to channel cases out of criminal courts.

10.11 The Issue Paper also pointed to the current debate regarding a family court model for

8 In New Zealand.

9 In Canada.

South Africa. A proposal was made that the debate should include a discussion of the suitability of incorporating the children's justice court in the structure of a future family court.

Comment on Issue Paper 9

Written responses

Jurisdiction

10.12 The Natal Society of Advocates is of the view that a juvenile court would correctly belong to the Family Court structure. Magistrate McMahon advocates that a multi-level jurisdiction should be preserved in a child or young person's justice court structure which handles the majority of cases, but which refers certain matters on to a higher court. The Association of Law Societies share this view and is not persuaded that the retention of the system of referral of certain matters to the High Court undermines the operation of a special court for children accused of crimes.

10.13 Superintendent Nilsson contends that 'juvenile courts' should rather be called 'juvenile hearings', and that these hearings should be held in an office with a desk and chairs and not in a court. Many respondents raised the issue of a child-friendly atmosphere in which matters should be heard.

10.14 The Crime Prevention Division of the Department of Welfare holds the view that all children under 12 or 14 years should be referred to the Children's Court. It is contended that children older than 14 should go before the Juvenile Court and that the Family Court structure is the ideal home for the Juvenile Court which should be based on the Scottish model. Peter Pitcher of the Legal Aid Clinic of UND, Pietermaritzburg, is in favour of a separate juvenile court which should have jurisdiction to try all cases; be bound by statutory and common law provisions regarding criminal law and procedure and which should be presided over by a senior magistrate or other judicial officer who has been specially trained.

Separation of children from adult co-accused

10.15 The Society of Advocates of Natal holds the view that children who are co-accused with adults should be tried in the adult system and, upon conviction, be referred back to a children's justice court for an appropriate order to be made. The other respondents that did respond to the question of separation of adults from children were of the view that there should be a separation.

Rural and urban differences

10.16 The submission by the Association of Law Societies reflects the view of the majority of respondents. The Association recommends that specialised children's justice courts be established in urban areas with suitably qualified personnel and accepts that in rural areas this might not be achieved in the short term. It is recommended that personnel at magistrates courts be trained to handle matters involving children.

Models for a new children's justice system

10.17 Most of the respondents failed to respond to this issue separately. Reference can be made to the comments under the discussion of jurisdiction above.

Lay assessors

10.18 Magistrate McMahon is of the view that the courts should not use lay assessors and recommends that one of the assessors should be a person with a background of social work. Professor Davel appears to share this view as he supports the appointment of a probation officer or a social worker who might replace the need for an assessor. The Natal Law Society does not support the appointment of lay assessors and argues that specialisation and complete understanding of the intricate procedures are imperative.

Probation officers or social workers

10.19 Most respondents agree that the appointment of additional probation officers or social workers to be based at the court would be essential in a future child justice court. Some of the respondents express concern at the availability of resources to ensure equality of services in urban and rural areas.

Children's Courts

10.20 Magistrate Rothman, in a very detailed input, has outlined the four ways in which a child may currently be referred to the Children's Court:

- (i) Section 11(1) of the Child Care Act 74 of 1983 provides that *any* court, during the course of *any* proceedings may order that *any* child be brought before the Children's Court.
- (ii) Section 12(1) of the Child Care Act requires a social worker, policeman or authorised officer to establish grounds in terms of Section 14(4) of the Act in order to justify an inquiry. When a prosecutor withdraws a charge against a child, such prosecutor does not have the power to refer the matter to the Children's Court. Magistrate Rothman submits that one solution would be for the Commissioner of Child Welfare to designate the prosecutor as an 'authorised officer' for this purpose but cautions that it would require the undivided attention of the prosecutor to facilitate the transition. Another solution would be to amend the legislation to provide for the prosecutor to be able, upon withdrawing a charge against a child, to refer that child to the Children's Court.
- (iii) Section 254 of the Criminal Procedure Act 51 of 1977 empowers the court to stop the trial at any time, even after the conviction, if it becomes apparent that the matter should be referred to the Children's Court.

- (iv) Section 13(2) empowers the court assistant to the Children's Court to issue a notice to the parent to appear in court and bring the child with.

10.21 The majority of respondents favoured the discretionary referral of children under 12 or 14 years who find themselves in trouble with the law to the Children's Court although some cautioned against discretionary referrals that may be arbitrary and/ or inconsistent in the absence of statutory guidelines.

Family courts

10.22 Those respondents that did respond to this issue were of the view that the children's justice court does belong to the family court structure.

Responses to questionnaire

MODELS FOR A NEW CHILDREN'S JUSTICE COURT SYSTEM	RESPONDENTS SUPPORTING
i) a completely separate children's justice court with increased jurisdiction to try all child cases	30
ii) a specialised children's justice court at district level with increased jurisdiction, but with additional capacity to refer certain cases to the high or regional court	30
iii) no special court but special rules and procedures (legislated) binding any court before which an accused under 18 appears	55
iv) a children's justice court which operates chiefly as a mechanism to refer matters to community based options	15
v) other	7

LAY ASSESSORS	RESPONSES
i) 2 lay assessors to sit with presiding officer	agree: 66 disagree: 53
iii) other	12
iv) no response	12

PROBATION OFFICERS OR SOCIAL WORKERS	RESPONSES
i) probation officers or social workers at every children's justice court	agree: 131 disagree: 2
iii) other	3
iv) no response	7

FAMILY COURTS	RESPONDENTS SUPPORTING
i) the children's justice court should be included in the family court structure	80
ii) the children's justice court should not be included in the family court structure	38
iii) other	10
iv) no response	15

CHILDREN'S COURT ENQUIRY	RESPONDENTS SUPPORTING
i) all children under 12 or 14 should be referred to Children's Court	27
ii) discretionary referral of children under 12 or 14 to Children's Court	100
iii) other	6
iv) no response	10

Evaluation and recommendations

A model for a new child justice court

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

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

10.25 It would seem therefore, that in order to give effect to the international standards, the proposed legislation should provide for some form of differentiated court for dealing specifically with children accused of crimes. The project committee therefore proposes the establishment of a child justice court with a particular identity. It is proposed that the atmosphere of such a court, and the roles of the officials serving in this court should be defined by legislation. It will be less formal and less adversarial than a standard criminal court, involving greater participation by the child and family, although bringing this about rests to a greater extent on the attitude and training of the court officials than it does on legislative provisions.

10.26 In order to develop more specialisation it is envisaged that in areas where there are the numbers to warrant it, a special court at district court level will be set aside as the child justice court,¹⁰ and its staff will be specially selected and trained. The reason for proposing a district level jurisdiction is to promote accessibility of child justice courts to parents, families and communities:

10 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.

this might be sacrificed if a court of regional court jurisdiction were to be contemplated.

10.27 In the rural areas, dedicated and more permanent child justice courts will probably not be required, due to the fact that there are far fewer cases where children are accused. However, a measure of specialisation will still be possible in the view of the project committee. The court must still be presided over by a magistrate who has been properly trained, and those magistrates must, of course, comply with the legislated requirements relating to proceedings in the child justice court. In addition, those magistrates who have been trained can provide services on a circuit basis to more than one magisterial jurisdiction, where the need for a permanent child justice court is very infrequent.¹¹

10.28 Since it is the project committee's view that it is desirable to keep as many cases as possible in the child justice court, where they can benefit from the specialisation referred to above, it is proposed that this court, despite its status as a district court, should have increased sentencing jurisdiction. Increasing the sentencing jurisdiction of this district court *vis-a-vis* child justice cases will reduce the need for transfer to superior courts, as the reason for transferring cases to superior courts is generally linked to the increased sentencing powers of those courts. The project committee proposes that the child justice court should have sentencing jurisdiction of a maximum of 5 years imprisonment. It is proposed that referral of certain matters to regional or high courts will still be possible in some specified circumstances. This aspect is discussed separately below.

10.29 The process, procedures and conduct of the proposed child justice court are included in provisions of the draft Bill. One difficulty encountered by the project committee, regarding both procedural and substantive matters, is that, to provide fully for all aspects of the criminal trial and evidentiary questions, the Criminal Procedure Act would to a great extent have to be re-enacted in this proposed legislation. This is, in the view of the project committee, both unnecessary and

11 Obviously, every magisterial district will have to have a magistrate able to conduct the preliminary inquiry proposed in the previous chapter. This person will require training in order to become acquainted with the procedures and processes envisaged in the draft Bill. However, whilst in some instances that person will also be able to preside in the Child Justice Court, this will not always be the case: for instance, where the magistrate has during the course of the preliminary inquiry been appraised of information prejudicial to the child which would provide grounds for recusal. Then the services of another officer for the purposes of the trial would be required.

undesirable. It would result in legislation which is extremely long and unwieldy, thereby diluting the ease of application of the principles and procedures specific to child justice. In any event, many of the provisions under discussion (for example plea procedures, leading of evidence and competent verdicts) are already well known to magistrates, prosecutors and lawyers, and arguably should not be repeated in this legislation. Therefore, the approach of the project committee will be to cross refer in the proposed draft Bill to chapters of the Criminal Procedure Act 51 of 1977 unless the circumstances demand or require different provisions. This will then be clearly stipulated. An example of this approach is that with regard to plea procedure, the project committee does not propose deviating from the present formula in sections 112, 113 and 115 of the Criminal Procedure Act, but regarding the holding of proceedings in camera, sentencing and review procedures, different provisions will be contained in the proposed Bill. This approach, in the project committee's view, is compatible with the responses to the Issue Paper, as the majority of respondents who addressed questions about juvenile courts and trials raised in the Issue Paper, agreed that special rules and procedures should be written into the law, binding any court before which an accused under the age of 18 years appears.

10.30 Further, in accordance with the recommendations of respondents, it is proposed that some legislative rules should cover the conduct of proceedings in the child justice court. First, the legislation should require 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. The child must be permitted to speak in his or her own language, and the presiding officer must ensure that the child is addressed in language that he or she understands. The presiding officer bears a responsibility for ensuring that the conduct of all proceedings and of all court personnel (for example court orderlies and interpreters) is conducive to the well-being of the child.

10.31 Second, it is proposed that a legislative provision be included 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. The duty of the presiding officer to play this kind of role has in fact been advocated over the years by our high courts, especially where accused persons have appeared in court without the benefit of legal

representation, are illiterate or are very young. A more inquisitorial role is therefore envisaged for the officer presiding in pleas and trials in the child justice court, in furtherance of the same goals as those set out in relation to the preliminary inquiry. In addition, it is proposed that this duty to ensure the protection of the best interests of the child during the proceedings, should not be confined to proceedings where the child is without the benefit of a legal representative, or without parental assistance or that of a guardian or family member. Because of the problems that have been identified with regard to effective legal representation in the present legal aid system which is described in Chapter 13, the presiding officer should be empowered to intervene wherever it appears to him or her that this would further the child's best interests. The intention is not to supplant the role of the legal representative in this regard, but to ensure that the best interests of the child are in practice considered as paramount.

10.32 Third, regarding the trial in the child justice court, the project committee recommends the preservation of an essentially accusatorial trial procedure, which the project committee regards as important in the protection of the child's due process and constitutional rights. However, measures are included to ensure that children's trials are finalised speedily.

10.33 Fourth, it is proposed that the magistrate should be empowered to stop the trial at any stage, even after conviction, if it appears to him or her that either 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. But, because of concern about the need to be vigilant about protecting due process rights of children, the option of diversion would only be available if the child appears or indicates that he or she is prepared to accept responsibility for the offence. The intention is that the availability of this power will increase the flexibility of the child justice system to divert cases out of the criminal justice system where possible, whilst protecting the child's right to a fair trial. The legislation will therefore include a provision modeled on the present section 254 of the Criminal Procedure Act, authorising the presiding officer to stop proceedings if, at any time before sentence, the child accepts responsibility for the offence, and there are substantial grounds for believing that the matter is appropriate for referral to a diversion option, family group conference or alternative dispute resolution process. This is intended to give effect to the idea that diversion should be possible at every stage of the proceedings, and to ensure that a child can

benefit from the advantages of diversion, in the same way as if diversion had occurred at the preliminary inquiry stage. In particular, the child will then not have a conviction and record. In this way, the fact that a child initially intends to plead not guilty (which would mean that the case would not be eligible for diversion), but at a later stage acknowledges responsibility, would not then disqualify that child completely from the benefits of diversion. Otherwise, children who initially say that they do not accept responsibility are liable to unequal treatment (by virtue of the fact of a criminal record if convicted) by comparison to children who from the outset indicate acceptance of responsibility. Last, the ability to stop the proceedings in order to test the feasibility of a diversion option is an important way in which restorative justice practices can be promoted.

10.34 Provisions are proposed to the effect that where children are tried in the child justice court, the proceedings should be held in camera, along much the same lines as the provisions currently to this effect in the Criminal Procedure Act. As regards special evidentiary provisions, it has already been referred to in Chapter 7 that a proposed requirement is the presence of either a parent, guardian, family member or suitable other adult or a legal representative where confessions, admissions and identity parades are held during the investigation phase. In this proposed Bill, the project committee proposes that a provision be included to indicate that evidence obtained from a child where such persons were not present, shall be inadmissible at a subsequent trial. The child justice committees referred to in Chapter 12 will have the task of identifying persons who could act as suitable adults for the purposes of these pre-trial procedures where parents, guardians or family members have not been traced or are not available.

10.35 Child justice courts are required to review cases where children are detained pending trial every 14 days, and to inquire into whether detention remains necessary.

Referral of serious cases to regional or high court

10.36 The responses to Issue Paper 9 show strong support for separate rules and procedures set out in legislation which bind any court dealing with cases involving children accused of crimes. The project committee is of the view that this general approach can be enhanced by the notion of a specialised child justice court at district court level with increased sentencing jurisdiction, as mentioned above. Where district courts lack jurisdiction in terms of the provisions of the

Magistrates' Courts Act¹² the matter cannot be tried by a child justice court, but should be transferred to another court having jurisdiction after conclusion of the preliminary inquiry. The project committee proposes that the Regional Court should have jurisdiction to try all offences, except treason, if the likely sentence will exceed the proposed jurisdiction of the child justice court; if there are adult co-accused and a separation of trials will result in a miscarriage of justice or prejudice to the victim of the alleged offence, or if there are multiple charges and one or more of those charges relate to murder and rape. It is further recommended that the Attorney-General should be empowered, if the mentioned circumstances exist, to refer a matter for the institution of charges to a Regional or High Court.

10.37 However, the protections accorded children in terms of the provisions of this proposed legislation should still apply to such children after referral to a higher court, and therefore it is proposed that the Bill provides that a Regional or High Court seized of a matter in which a child is accused should be required to observe the same objectives, principles and procedures as those set out in relation to the child justice court above.

10.38 So, for example, the proceedings should still be held in camera, the presiding officer should be empowered to intervene to ensure the active participation of the child and family, and the provisions relevant to sentencing proposed in Chapter 11 would be applicable to higher courts. With these protections, it cannot be averred that children in these situations would fall outside the provisions of the proposed draft Bill, only to be tried as adults.

Children co-accused with an adult

10.39 A more difficult question is the question of what must be done in cases where a child is co-accused with an adult. The project committee has considered the advantages and disadvantages of compulsory separation of trials. The submissions from the public in this regard are mixed, but it appears that it may not be advisable to make a blanket provision to separate trials, as the evidentiary risks may result in the adult accused being able to divert responsibility onto the child.

12 Section 89 of the Magistrates' Courts Act 32 of 1944 grants the district court jurisdiction over all offences save for treason, murder and rape.

It is considered that this may increase the risk of instrumentalisation of children to commit crimes with or on behalf of adults. However, as mentioned above, it is proposed that the preliminary inquiry procedure will be restricted to children only, which implies a *de facto* separation of trials at that stage. Further, if a child is diverted at the preliminary inquiry, separation will have taken place. Where this does not happen, and the child's case is entered on the roll of a child justice court, regional or high court, the following recommendations are proposed:

10.40 A separation of trials should occur in all cases involving children who are co-accused with adults. However, it is proposed that any person (child, adult or prosecution) may bring an application for joinder of the trials which should be argued before the court in which the adult is to be tried prior to the commencement of the trial. It is further proposed that a court may order a joinder of trials where it is shown by the applicant on a balance of probabilities, that a separation of trials will not be in the interests of justice and that without joinder, substantial injustice might occur.

10.41 Where such application succeeds, it is proposed that the child will "follow" the adult to the court in which the adult would normally be tried. This could be a district court, regional court or high court, depending on the nature of the offence. However, as has been stated above, any court before which a child is tried must proceed in terms of the proposed draft Bill. The reasoning behind this proposal is partly practical ease of administration, and partly to preserve as far as possible the exclusive child oriented nature of the child justice court. A further protection is that the court in which the child is tried may, after conviction, remit the matter to the child justice court for imposition of sentence where this would be in the best interests of the child.

10.42 Where two or more children are jointly accused, the trial would ordinarily be held in the child justice court, and it is proposed that the usual rules pertaining to separation of trials be included in the draft Bill.

10.43 The project committee does not recommend the appointment of lay assessors in the child justice court, or other courts acting in terms of the provisions of this legislation, such as regional or high courts. Because of the envisaged specialisation that will accrue to the child justice courts, it would detract from the specialist nature of the system to provide for lay assessors. However, the project committee is of the view that meaningful community involvement has been provided for in other, possibly more appropriate, ways in this particular proposed legislation, especially through the diversion options, the possibility of referrals to family group conferences and alternative dispute resolution procedures where communities may be involved. Finally, the involvement of the community is envisaged in the monitoring system, and especially with regard to the composition of the child justice committee, which is discussed in Chapter 12.

Probation Officers

10.44 The suggestion that there should be a state appointed probation officer or social worker based at or connected to every child justice court met with overwhelming support. This is in accordance with the enhanced role of the probation officer which the new model envisages. However, in view of the central role that the proposals accord to the probation officer at assessment and other pre-trial stages, the project committee does not propose that a probation officer also be appointed to the court at trial stage. The project committee has, however, proposed that probation officer reports play a role at sentencing, and this is discussed specifically in Chapter 11.

Family Court

10.45 The Family Court concept is still under development in South Africa. The Hoexter Commission Report (1997) recommends the establishment in South Africa of a specialised Family Court which will operate at High Court level. This report recommends the inclusion of the Children's Court, but not the juvenile criminal court into the Family Court. The previous Hoexter Commission Report (1983) did include the juvenile court in their model of a Family Court. The 1997 report does not explain why the juvenile court has been excluded from the new vision. The Department of Justice Task Team on Family Courts has been involved in the setting up of six

Family Court pilot projects, and at present these do not include the Children's Court or the "juvenile criminal court". However, neither the Hoexter Commission model nor the general model being tested by the pilot projects are necessarily reflective of what the final model for a family court in South Africa will be like. The Family Court Task Team is exploring ways to develop a comprehensive model and the necessary legislation.

10.46 Interestingly, the response to the question in Issue Paper 9 with regard to whether the child justice court should be included in the Family Court drew a very strong positive response. The project committee is of the view that the new model of the child justice court, as contemplated in this document, is probably more compatible with the Family Court idea than is the current juvenile court. The child justice court will be informal and more inquisitorial in style. The involvement of welfare support and the requirement of assessment of children coming into the system may make it advisable to link these courts with the future Family Court. However, the project committee is faced with the difficulty that the development of the model of the Family Court will in all likelihood not be finalised until after the finalisation of this investigation, and no assumptions can therefore be made about inclusion. Suffice it to say that the structure of the child justice court is flexible enough to be included in any new system and it is hoped that the inclusion of the child justice court will be seriously considered when the final model of the Family Court is being developed.

Children's Court inquiry

10.47 The advantage of a Children's Court inquiry for children in trouble with the law who also have care needs is that a full assessment is made by a social worker relating to the child's circumstances, and also the fact that the criminal matter falls away, thereby giving the child a chance of avoiding a criminal record. There are, however, problems associated with the Children's Court inquiry process. The procedure of conversion is not frequently used. Research¹³ involving a specific sample of 970 cases found that only 11 cases were routed to the Children's Court.¹⁴

13 Community Law Centre *Law Practice and Policy: South African Juvenile Justice Today supra.*

14 For further discussion of problems impeding the use of Children's Courts see *Law Policy Practice: South African Juvenile Justice Today supra.*

10.48 The idea that referral of children from the criminal justice system to the Children's Court is a suitable mechanism is premised on an assumption that children's rights will be fully protected within that system. The Commission's issue paper on the Review of the Child Care Act raises a number of concerns about the Children's Court and its operation under current law. The issue paper raises the fact that Children's Courts are not as specialised as they sound and that magistrates receive no specialised training for Children's Court work. The issue paper goes on to point out that children are not generally legally represented in the Children's Court, and yet the outcomes of these courts often include placement away from home for a number of years. Another concern is the fact that the maximum period for which a Children's Court order can remain in effect is two years. The Minister has the power (which power may be delegated) to renew placement orders, and in practice this is a purely administrative function which allows officials to renew placement orders without a real examination of what is in the child's best interests in each particular case. A further serious deficiency of the operation of the Children's Court under our current system is that no appeal lies against a Children's Court's finding that a child is in need of care or against any placement order made by that Court. The matter can be taken on review but this then limits scrutiny to gross irregularity in the proceedings.

10.49 In making suggestions that children should in certain circumstances be referred to the Children's Court, the project committee is assuming that the present defects in the operation of the Children's Courts will be cured in the revised Child Care Act.

10.50 As has been mentioned in the introduction, the history of juvenile justice shows the importance of ensuring that children's due process rights are not put at risk. It also should never be assumed that the welfare system is more benign. The Children's Court has previously made many inappropriate placements into residential care,¹⁵ and as this results in separation of children from their families, it is a very serious inroad into their rights.

10.51 Accordingly the project committee is of the view that the referral of children below the minimum age of prosecution to the Children's Court should not be mandatory. Such referrals

15 *IMC In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* 1996 at 19.

should be discretionary (in the opinion of the probation officer) and should only take place in cases where the circumstances indicate that the child may be in need of care.

10.52 With regard to all children between the ages of 10 and 18 years, the referral of a case to a Children's Court should be possible in all cases, as contemplated in the current Child Care Act and the Criminal Procedure Act. Referral should be able to take place immediately after assessment and before plea, but a provision to allow for conversion of a matter to a Children's Court inquiry after the plea at any time up to sentencing (as currently provided for in section 254 of the Criminal Procedure Act) should remain applicable.

10.53 In addition to this general provision, it is proposed that the legislation should highlight certain criteria which, in addition to the normal "child in need of care" test indicate that a child should be transferred to the Children's Court.

10.54 The project committee recommends that these factors should be the following:

- That the child has previously been assessed on more than one occasion in regard to offences committed to meet the child's basic need for food and warmth, and is on this occasion again suspected of such an offence;
- that the child is the subject of a current order of the Children's Court;
- that the child has a problem with drug or alcohol abuse; and
- that the child does not live at home or in appropriate substitute care or does not have adequate adult supervision, and is alleged to have committed an offence, the purpose of which was to meet the child's basic need for food and warmth.

10.55 When these specified factors come to the attention of the probation officer, he or she should recommend transfer and this should be effected unless substantial reasons exist for not doing so.

11. SENTENCING

Introduction

11.1 Sentencing is inextricably linked to the overall principles and values underlying a child justice system. These include restorative justice, respect for human rights and dignity, proportionality and limitations on the restriction of liberty.

11.2 Despite the centuries old discussion about what are ordinarily called the “aims of punishment”, it has been pointed out that “there is a large gap between the general normative theorizing about punishment in which philosophers typically engage”,¹ on the one hand, and sentencing policy and sentencing practice, on the other. The connections between the philosophy of punishment, sentencing policy and sentencing practice are neither straightforward nor close.² The Commission is of the view that it is important to propose a sentencing framework for child justice legislation in which both the aims of sentencing and practical issues are addressed in a workable way.

11.3 Three factors have influenced the Commission's approach to sentencing. First, of particular importance in this regard, is the development of restorative justice as a primary objective of criminal justice, and the bearing that restorative justice approaches to healing relationships and breaches in social harmony has on traditional debates about the aims of punishment. Restorative justice has been described as a theory of reconciliation, rather than a theory of punishment. Encompassing a range of options, it focusses on repairing harm done to the victim or to society, rather than on retribution exacted by the state. As a model, no system can be entirely restorative, yet it is possible to include restorative processes as part of continuum of sanctions. Restorative options are, in other systems, not necessarily confined to petty offences, given the time and resources required to implement negotiated agreements with victims and/or other role-players.

11.4 A second factor influencing the approach to sentencing is the Constitution and the values

1 A Duff and D Garland (eds) *A Reader on Punishment* Oxford University Press 1994 at 19.

2 *Ibid* at 18.

and principles espoused in the Constitution which have a bearing upon sentencing. 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.³ The cornerstones of the constitutional principles applicable to sentencing are legality, equality and proportionality.⁴

11.5 The Constitutional Court's approach to sentencing has thus far been revealed through two seminal decisions (*S v Makwanyane* and *S v Williams*) and it has been said that the Court's reasoning with respect to the traditional purposes of sentencing did not herald a radical break from the current approach of South African Courts.⁵ The Constitutional Court recognised the validity of retribution as a proper purpose of sentencing but noted that it traditionally had carried less weight than deterrence.⁶ The importance of retribution has diminished further, following the entry into force of the Constitution with its emphasis on *ubuntu* rather than victimisation, understanding rather than vengeance, and reparation rather than retaliation.⁷ Rehabilitation featured prominently in the Constitutional Court's decision in *S v Williams*⁸ as an important purpose of sentencing. According to Madala J, this concept carries with it the ideas of humaneness, social justice and fairness.⁹

11.6 The third factor is the approach to sentencing that can be gleaned from the international

documents on child justice. In the international documents, references to *rehabilitation* have been

3 'The Law of Criminal Procedure and the Bill of Rights' in *Bill of Rights Compendium* Durban: Butterworths (looseleaf with updates) 1996.

4 'Sentencing and Punishment' in M Chaskalson *et al Constitutional Law of South Africa* Cape Town: Juta 1996.

5 NC Steytler *Constitutional Principles of Criminal Procedure* Durban: Butterworths 1998.

6 *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 129.

7 Par 130, 131.

8 1995 (7) BCLR 861 (CC).

9 *S v Makwanyane supra* par 237.

overtaken by an emphasis on *reintegration* of the child into society as a founding principle of sentencing. The Commentary to the Beijing Rules notes, in regard to sentencing of children, that the conflict between rehabilitation / just desserts, assistance / punishment, and general deterrence / individual loss of liberty, is more pronounced than it is with regard to adults.¹⁰ The Commentary acknowledges that the Beijing Rules do not attempt to prescribe the preferred approach beyond setting out basic principles such as the principle of proportionality¹¹ and the limited use of deprivation of liberty. Van Bueren¹² 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.¹³ The author continues:

Society's needs are viewed as being satisfied if the child is shown how to re-integrate and assume a constructive role in society. The emphasis in the Convention on the Rights of the Child is on the 'promotion of the child's sense of dignity and worth', and this cannot be undertaken where a State Party is adopting a policy which is characterised as being of general deterrence and punitive.

...

International law requires that any reaction to the juvenile offenders should 'always' be in proportion to the circumstances of both the offenders and the offence.

Current South African law

Constitutional framework

11.7 The 1996 Constitution mirrors international law - section 28 contains the presumption against institutionalisation referred to above, and at the same time, holds that a detained child

10 G van Bueren *The International Law on the Rights of the Child* Dordrecht: Kluwer Academic Publishers 1995 at 183.

11 Proportionality in sentencing is clearly required by the Constitution. See *Constitutional Law of South Africa op cit* at 28-5.

12 *Op cit* at 183.

13 CRC article 40. 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.

should be "treated in a manner, and kept in conditions, that take account of the child's age."

11.8 The most prevalent sentence for child offenders, whipping, was abolished by the South African Constitutional Court in *S v Williams*.¹⁴ Prior to its abolition, whippings were imposed on approximately 35 000 child offenders annually. Although it was argued that whipping served as a deterrent, the court held that society's greater concern was with the form of punishment, which must be consistent with the values in the Constitution. Although it was mooted that the abolition of whipping would lead to an increase in imprisonment for children, the court, after considering current sentencing options and trends in child justice, and penology, endorsed the development of alternative sentence and diversion possibilities, citing examples of a non-custodial nature.¹⁵

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

11.10 Until now, there has been no distinctive approach to child sentencing. As a general principle, children are sentenced more leniently than are adults.¹⁶

Current sentencing options in the Criminal Procedure Act 51 of 1977

11.11 The Criminal Procedure Act provides for a range of sentences which may be imposed upon children (or those who, at the time of commission of the offence, were below the age of 18 years). They include:

- * Discharge with a caution and reprimand (section 297);
- * postponement of sentence, unconditionally or with one or more conditions (section 297);
- * suspension of sentence, with or without conditions;

14 1995 (3) SA 632 (CC).

15 See J Sloth-Nielsen 'Juvenile Justice Review 1994 - 1995' (1995) *SACJ* 331 at 341.

16 T Geldenhuys and G Joubert *Criminal Procedure Handbook* Cape Town: Juta 1994.

- * placement under the supervision of a probation officer or correctional official (section 290, as amended);
- * placement in the custody of any suitable person designated by court (section 290(1)(b));
- * a fine, which the court may suspend or allow to be paid in instalments (section 297(5)(a) and(b));
- * correctional supervision (section 276A);
- * sentence to a reform school (section 290(1)(d));
- * imprisonment, including periodical imprisonment.

11.12 According to statistics supplied by the Department of Correctional Services, there is a daily average of almost 1 400 children under the age of 18 serving sentences of imprisonment. This average has increased from approximately 600 three years ago.¹⁷ Figures from the Department reflecting the number of children in prison on a single day, show a 51,9% increase in the number of children sentenced to terms of imprisonment from 896 in July 1996 to 1361 in September 1997.¹⁸ Of the children serving sentences of imprisonment on 6 August 1997, almost half (48%) were serving sentences for economic offences.

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

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

17 According to a personal communication with the Department of Correctional Services.

18 Community Law Centre *Children in Prison in South Africa: A Situational Analysis* 1998 at 5.

- * good conduct;
- * any other matter.

11.14 With respect to the community service order, however, the present legislation does not permit its imposition on a young offender below the age of 15 years. It has been alleged that sentencing officers do not utilise the above range of options creatively, and tend to rely on a formalised programme (such as correctional supervision or the NICRO life skills course) being available as a referral option. This problem means that in rural areas, where formalised agencies do not operate, a much narrower band of sentence alternatives are used.

11.15 The sentence of correctional supervision has been described not so much as a sentence, but as a collective term for a wide variety of measures which have in common that they are all applied outside prison.¹⁹ These measures can include monitoring, house arrest, community service and placement in employment. Correctional supervision can only be imposed on a child after a report by a probation officer and can be imposed for any offence. In *S v Williams*, the Constitutional Court described correctional supervision as a “milestone in the process of *humanising* the criminal justice system”. In the draft Correctional Services Bill, a separate chapter on community corrections serves to emphasise the vital role that these sentences are destined to play in the development of a new South African correctional system.

11.16 The current sentencing provisions in the Criminal Procedure Act, as outlined above, are regarded as being quite wide.²⁰ The Constitutional Court, too, regarded the present penalties as permitting of a more flexible but effective approach in dealing with child offenders.²¹

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

11.17 After conviction, it is still possible to convert a criminal matter into a Children's Court inquiry in terms of section 254 of the Criminal Procedure Act. The criminal conviction then falls

19 *S v R* 1993 (1) SA 476 (A).

20 IMC *Interim Policy Recommendations* at 54.

21 *S v Williams and Others* 1995 (7) BCLR 861 (CC) at 883.

away, and a range of outcomes as provided for in the Child Care Act 74 of 1983 becomes available. These include:

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

Recent policy and law developments on sentencing

Residential care

11.18 Recent developments in relation to child and youth care in South Africa emphasise that no residential care facility should offer only custodial care, and that, in addition, programmes and activities to promote and maintain healthy development of children are required.²² In keeping with international trends in this regard, there has also been a change in terminology and, with regard to facilities for children (including those in conflict with the law), rather than referring to custodial facilities, or prison and penal institutions, the appropriate term is residential care facilities. These might range from more open facilities (such as places of safety), to secure care facilities, to reform schools or other educational facilities to prisons or Youth Centres.²³ The words “residential facilities” are less stigmatising than terms connected to “institutionalisation” and have therefore been adopted for the purposes of this Discussion Paper, and most particularly in relation to the proposals concerning sentencing. Apart from the above reason, the project committee is also of the view that by describing the range of residential sentences more widely, would provide a basis for development of innovative sentences in the future, for example, sentences involving the programmes offered by secure care facilities or other residential possibilities, and the use of a generic term will provide greater flexibility in the application of these kinds of sentences. It is foreseeable that residential sentences may become more multi-dimensional, including weekend

22 IMC *Interim Policy Recommendations*, especially at 59 *et seq.*

23 The present policy of the Department of Correctional Services is indeed to create more Youth Development Centres, such as the one at Brandvlei (see Community Law Centre *Children in Prison in South Africa* 1998).

treatment, five day care,²⁴ or short term programmes with a residential component. It has been suggested that the secure care facilities which have been developed through the IMC for awaiting trial children, may offer diversion or sentence options in the future as well, as there may well be appropriate programmes offered there which can be used for intermediate sentence options.²⁵ Therefore, in developing the recommendations for legislation on sentencing below, the terms ‘residential facility’ and ‘residential element of a sentence’ have been used.²⁶

Minimum sentences

11.19 It would have seemed as if any proposed legislative enactment of mandatory minimum sentences would be met by severe opposition from sentencers in this country. In *S v Toms; S v Bruce*²⁷ the former Chief Justice remarked:

... the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce grave injustice.

11.20 Despite these reservations, prescribed minimum sentences²⁸ have recently been introduced in South African law by the Criminal Law Amendment Act 105 of 1997. Section 51 of this Act provides for minimum sentences ranging from a minimum of 5 years to life imprisonment in respect of a series of offences listed in Schedule 2 to the Act, which can be imposed by a Regional Court or a High Court. The offences include murder, rape, robbery, certain offences under the Drugs and Drug Trafficking Act, 1992, offences relating to possession and smuggling of and dealing in arms, ammunition, explosives or armament, offences relating to exchange control,

24 IMC *Interim Policy Recommendations* at 59.

25 As long as the rights of sentenced children to be separated from unsentenced children whilst in detention are respected.

26 In order to avoid confusion, the term “reform school” has been used in clause 76 of the proposed draft Bill, but this should not be regarded as support for the term for the reasons expounded above.

27 1990 (2) SA 802 (A) at 817 C - D.

28 In *S v Vries* 1996 (12) BCLR 1666 (Nm) the Namibian High Court held that a statutory minimum sentence was not *per se* unconstitutional, but it could be held unconstitutional if it provides for a punishment which will be shocking in the circumstances of the specific case before court.

corruption, extortion, fraud, forgery, uttering or theft, indecent assault on a child under the age of 16 years, assault with the intent to do grievous bodily harm, and any other offence committed while using a firearm. Provision is also made for differentiating between the sentences to be imposed on first, second, third and subsequent offenders.

11.21 The provisions containing mandatory minimum sentences in the Criminal Law Amendment Act of 1997 are, however, only temporary. Section 53(1) of the Act provides that these provisions cease to have effect after the expiry of two years from the commencement of the Act (in operation since 1 May 1998), with the proviso that they may be extended by the President, with the concurrence of Parliament, for one year at a time.

11.22 In a memorandum to the Portfolio Committee on Justice during the debates on the (then) Bill, members of the present project committee argued that children should be excluded altogether from the ambit of its intended operation, in view of the pending Law Commission investigation and development of a new juvenile justice system. Possibly as a result of the memorandum, the Bill was changed to exclude children below the age of 16 years from the ambit of the legislation, and to incorporate the differing standards of application of the legislation in the case of adults over 18 (where substantial and compelling reasons must be given before a sentence other than a prescribed sentence may be imposed), and in the case of those aged 16 and 17 (which entails the noting of reasons if the provisions of the Act are to be used in sentencing of young offenders of 16 or 17). Clearly, the legislature supports the concept of differing sentencing principles being applied in the case of children below the age of 18. In view of the fact that the Criminal Law Amendment Act is intended to apply only for a limited period of time, the fact that it excludes certain children altogether, and requires explicit justification for the use of the prescribed sentences in relation to other children, as well as the fact that its provisions apply only to Regional or High Courts, the Commission is of the view that new child justice legislation (to be applied mainly by child justice courts), should not include similar provisions. Further, where minimum sentences are set by other pieces of legislation, the project committee nevertheless recommends that only sentences available to the proposed child justice courts should be available when children are sentenced.

11.23 In the course of the Commission's investigation into arbitration, an issue paper on alternative dispute resolution was published for comment in 1997.²⁹ The investigation is still under way and no final recommendations have yet been made. That issue paper raised the relevance of alternative dispute resolution mechanisms, normally restricted to disputes of a civil nature, to the field of criminal law. Reference was inter alia made to the role of community courts and victim/offender mediation, which could be relevant to sentence and implementation of restorative justice in sentencing.

(i) Community courts³⁰ and community participation in the sentencing process

11.24 Community courts, which were discussed in the above-mentioned issue paper, have become the contemporary term used when referring to popular justice structures such as street committees and yard, block or area committees operating outside the formal justice system in urbanised 'African' townships and informal settlements. In most stable, organised communities in South Africa there are at present street committees and civic structures that are functional. In contrast to a legal system based on retributive justice, where the object is to establish blame and administer punishment, these informal courts identify responsibilities to meet needs and to promote healing and enforce values by using social pressure. Restorative justice and re-integrative shaming are two of the most important tools of the enforcement process.

11.25 In view of the fact that community courts are a fact of life, the issue paper also raised the question whether, and to what extent, the state should administer and regulate the courts, or lend its support to private initiatives in the field. The Commission is still engaged in a process of consultation on the issue.

(ii) Victim/offender mediation³¹

11.26 The issue paper on alternative dispute resolution also addressed the value of

29 SA Law Commission 'Alternative Dispute Resolution' *Issue Paper 8*.

30 *Ibid* at 24 - 29.

31 *Ibid* at 30.

victim/offender mediation. In this type of mediation the primary goal is seen as compensating the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for making good this loss. The current system does not have this personal focus in that the offender is made accountable by paying a fine or promising to be of good behaviour. These punishments do not relate to the personal loss of the victim. The programme gives the victim an opportunity to tell the offender how the crime affected him or her. The offender has the opportunity to apologise, explain his or her behaviour and make some reparation.

11.27 Victim/offender mediation is at present being investigated by the Commission under its investigation into sentencing, which is not yet finalised. However, programmes concerning victim empowerment are an important facet of the National Crime Prevention Strategy, and there has recently been a resurgence of interest in the role of the victim in the criminal justice process. For example, several high level victimisation surveys have been conducted in the past few months, and the introduction of victim impact statements in courts has been mooted. Restorative justice too emphasises that allowing for victims' participation in restorative processes is a key outcome, and that victims and communities have been major beneficiaries of family group conferences,³² victim/offender mediation and the like. Issue Paper 9 on Juvenile Justice spelt out the concern to ensure the protection of victims rights, and therefore some of the principles and options proposed in relation to sentencing take account of the role of victims and communities.

Procedures related to sentence and review

11.28 The normal rules relating to restrictions placed on the sentencing powers of district and regional courts apply to magistrates dealing with child offenders, as do the rules pertaining to automatic review procedures, with the addition that for the purpose of automatic review *imprisonment* includes detention in a reform school. Automatic review is not a true review as it encompasses principles of both appeal and review and is therefore a broader notion. In brief the rules are as follows: Where the magistrate has held the substantive rank of magistrate for less than seven years, any sentence longer than three months will automatically be reviewed by a judge of

32 J Hudson, A Morris, G Maxwell and B Galloway *Family Group Conferences - Perspectives on Policy and Practice* The Federation Press (Australia) 1996.

the provincial or local division of the High Court. Where the magistrate has held the substantive rank of magistrate for longer than seven years, however, only sentences of over six months imprisonment will automatically be reviewed. Regional Court sentences are not subject to automatic review, and when an accused has been legally represented, the automatic review procedure is also not applicable.³³ Limits are also applicable in relation to fines: only fines over a defined amount are subject to review.

11.29 In Issue Paper 9 various options were presented with a view to improving current sentencing practices. The options were put forward under the following headings:

(i) Sentencing guidelines

11.30 It has been argued that there is a trend towards over-use of imprisonment as a sentence for children,³⁴ even where non-violent offences are involved. The Issue Paper raised the need to introduce more community-based sanctions and restorative justice options at the sentencing phase, and posed for comment issues such as whether sentencing guidelines, limitations on the imposition of certain sentences or some other limiting mechanism should be incorporated in proposed legislation. Respondents were requested to indicate preferences for any of the following options - singly or in combination:

- (a) Sentencing guidelines, based on international rules and accepted sentencing "best practice" could be drafted to assist sentencers in the exercise of their discretion. For example, guidelines could indicate that imprisonment should not be imposed for offences other than serious and violent offences.³⁵
- (b) A further option would be to exclude the use of certain sentences in certain instances, for example, no imprisonment for children below the age of 14 years.

33 Section 302(3) of the Criminal Procedure Act, 1977. It is not clear whether this means legal representation throughout the trial, or legal representation at a particular stage, for example sentencing.

34 Community Law Centre *Children in Prison in South Africa: A Situational Analysis* 1998 at 5, 73 and 74.

35 In compliance with the Beijing Rules.

- (c) Sentencing could be done according to current procedure, but improved monitoring and review of sentences could be built into proposed legislation.

(ii) Reform schools

11.31 A number of court decisions provide directions as to the procedure to be followed when the possible referral of a child to a reform school is imminent.³⁶ These can be summarised as follows:

- * Referral to a reform school should only take place after consideration of a probation officer's report, giving details that will enable the court to comprehend the child's problems and to determine an appropriate punishment.
- * The probation officer's report is merely an opinion destined to assist the court and should, if necessary, be tested and critically evaluated. The presiding officer should take the initiative in obtaining such further evidence as may be deemed necessary.
- * The presiding officer should ensure that the accused child's parents, or at least the mother, is present in court and should note if they are absent, though warned.
- * It should be ascertained from the probation officer -
 - which services and supervision could be supplied to the child in his or her present environment to provide the necessary guidance and discipline and to build up his or her confidence;
 - to what extent such services and supervision will benefit the child;
 - what facilities are present at the reform school to cater for the particular

36 *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).

- needs of the child; and
- the nature of any negative influences that may be found at the reform school and in what way they may impact upon the child.
- * The child's parents should be given the opportunity to question the probation officer on his or her findings and recommendations. It is insufficient to request an undefended, illiterate and youthful accused, after the probation officer's report has been read, whether he or she has any comment. The child and his or her guardian should specifically be asked whether they admit the factual allegations in the report or whether they disagree, and whether they desire the probation officer to appear in person for purposes of questioning.
- * The parents should be given the opportunity of giving evidence or calling witnesses.
- * The child's age should be determined properly unless there can be no doubt as to his or her being an adult.
- * The nature of the institution should be mentioned, although a particular institution should not be prescribed. The allocation of an institution rests with the Director-General of the Department of Education. The sequence of events is as follows: (i) the forming of an opinion by the court; (ii) referral to the Director-General; (iii) designation of an institution by the Director-General, and (iv) an appropriate court order, which also determines the temporary placement of the child. At present children awaiting transfer to reform schools are frequently held in prison pending the necessary official designation of a place.
- * A child may only be referred to an *industrial* school by the Children's Court under the Child Care Act.
- * The ultimate decision in regard to the way in which the child should be dealt with has to be made in the light of all the relevant circumstances and in the knowledge

that referral to a reform school is a drastic measure.

11.32 The Issue Paper drew attention to the IMC investigation into places of safety, industrial schools and reform schools³⁷ which revealed numerous problems with respect to these institutions. Reform schools are not evenly spread throughout the country, and of the nine existing institutions, six are in the Western Cape. Some institutions are under-utilised. Children are frequently sent to distant reform schools from other provinces, which does not promote reintegration and maintenance of family contact. Additionally, it is observed that children sometimes serve longer sentences in reform schools than they would if imprisonment were imposed. This results in unequal sentencing.

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

11.34 In view of these considerations as well as the recent findings of the IMC investigation report, the Issue Paper invited comment on the need for a thorough review of the sentencing option of reform schools including an exploration of possible alternatives and the minimum period of time that a child spends in such institution.

(iii) Fines

11.35 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

37 *IMC In Whose Best Interests? Report on Places of Safety, Schools of Industry and Reform Schools* July 1996.

the possibility of payment of money as an aspect of reparation or restorative justice options. This suggestion was based on the fact that children are in most instances non-earners who cannot pay fines, and that a fine penalises their parents. In the case of the many children who cannot pay fines either personally or through their parents, this sentence leads to the alternative prison sentence being imposed.

(iv) Alternative sentencing

11.36 At present, most sentences that would be described as alternative sentences (for example compensation, community service, attendance at courses or treatment at specified centres) cannot be imposed on their own. They can only be imposed as conditions of suspension or postponement of sentence. Conversely, all suspended sentences in present legislation must have conditions attached (including the negative condition not to re-offend) in order to be legally enforceable. 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. The sentencing debate is, of course, also about the inclusion of further intermediate sentences in legislation, so as to provide sentencing officials with a wider number of available options, and to assist them to comply with the constitutional injunction that detention be used as a matter of last resort, and for the shortest appropriate period of time.

(v) Correctional supervision

11.37 Correctional supervision, introduced in 1993, is also a community based sentence composed of various measures, such as house arrest and attendance of programmes.³⁸ 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.³⁹ As a sentence in terms of section 276(1)(h), 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

38 See M Chaskalson *et al Constitutional Law of South Africa op cit* at 28 -3.

39 VG Hiemstra *Suid Afrikaanse Strafproses* 5th edition by J Kriegler Durban: Butterworths 1993 at 673.

correctional supervision.

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

11.39 However, many would argue that correctional supervision is nevertheless preferable to imprisonment,⁴⁰ and may even be preferable to a reform school sentence which frequently removes the child offender from his or her home province⁴¹ and therefore from any access to his or her family. In addition, reform school sentences at present are two years in length, whereas correctional supervision is far more flexible with respect to the minimum period⁴² for which it can be imposed. The Issue Paper invited comment on the suggestion that correctional supervision might provide an alternative to a two year residential sentence in a reform school, especially where children are to be removed to another province. It was further suggested that restrictions could be placed upon the maximum length of time for which correctional supervision may be imposed, which differ from those presently in place with regard to adults.

(vi) Pre-sentence reports

40 That is, where it is imposed as an alternative to imprisonment, and not in addition to imprisonment, or in the form of imprisonment from which the accused may be placed under correctional supervision (see section 276A(2) read with section 276(i)).

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

42 The Criminal Procedure Act presently makes provision for a maximum period of three years (in the case of correctional supervision under section 276(1)(h)) and five years (in the case of correctional supervision under section 276(1)(i), for more serious offences). Hiemstra *supra* points out that not every component of the sentence must be of equal duration.

11.40 Monitoring of children in detention, and children serving sentences has revealed that many children serve terms of imprisonment without a pre-sentence report having been requested or provided. It was therefore proposed, in line with the international rules⁴³ and also with South African court decisions,⁴⁴ that pre-sentence reports should be mandatory before any residential sentence can be imposed, and a principle of sentencing should reiterate the international rule in this regard. In addition, a sentencing officer who dispenses with a probation officer's report should be required to note the reasons (such as the non-serious nature of the conviction) on the record.

(vii) Evidence relevant to sentence

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

11.42 The Issue Paper pointed out that the advantage of allowing this evidence would be that it would give the diversionary sanctions some "teeth". In addition, it would have the practical effect of exposing the fact that a child has previously attended a particular programme, which also might be available to a sentencer, which has not benefited the child. The disadvantage, however, is that the previous diversion would have been predicated on an "acceptance of guilt", which is not a previous conviction, and admission of this evidence therefore poses the spectre of prejudice to the rights of the child.

Comment on Issue Paper 9

Written responses

43 Beijing Rule 16, which 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.

44 *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).

11.43 The Association of Law Societies is not convinced that the comments concerning the lack of a coherent sentencing policy is a correct reflection of the current system, which it claims is based on judicial precedent. The Association strongly believes that the sentencing discretion of judicial officers should not be fettered in any respect.

11.44 The Society of Advocates of Natal, whilst appreciating the difficulty arising from disparities, emphasises the need to retain discretion and flexibility in passing sentence. The Society further cautions against guidelines that may fetter the discretion of the judicial officer in any way. Both professional bodies also raise arguments in favour of the retention of fines as a form of punishment. The Association of Law Societies concedes that in general the imposition of monetary fines on children is not an effective sentence but suggests that this option not be excluded from the range of sentences provided in the new legislation. The Society of Advocates of Natal are of the view that children do obtain employment and may well be able to pay fines. Professor Davel cautions that the exclusion of monetary fines should not preclude the possibility of payment of money as an aspect of reparation or restorative justice option.

11.45 Most of the respondents favour the use of alternative sentences and compulsory pre-sentence reports before a residential sentence can be imposed on a person under 18 years.

11.46 The Association of Law Societies is of the view that evidence of previous diversions should be admissible at the sentencing stage and that records of previous convictions be maintained.

Responses to questionnaire

SENTENCING GUIDELINES	RESPONDENTS SUPPORTING
i) the use of sentencing guidelines	33

SENTENCING GUIDELINES	RESPONDENTS SUPPORTING
ii) the exclusion of certain sentences in certain instances - in direct provisions or through a schedule of offences	16
iii) present system with improved monitoring and review procedures	49
iv) all of the above	19
v) other	16
vi) no response	10

REFORM SCHOOLS	RESPONSES
i) Should the option of reform schools be reviewed, including an exploration of possible alternatives?	Yes: 93 No: 11
ii) other	22
iii) no response	17

FINES	RESPONSES
i) Should monetary fines be excluded from sentencing options, retaining payment of reparation?	Yes: 63 No: 42
ii) other	23
iii) no response	17

ALTERNATIVE SENTENCING	RESPONSES
i) Should alternative sentences be imposed independently, rather than linked to suspended or postponed sentences?	Yes: 66 No: 53
ii) other	12
iii) no response	12

CORRECTIONAL SUPERVISION	RESPONSES
i) Is limited correctional supervision preferable to a reform school or prison sentence?	Yes: 77 No: 46
ii) other	18
iii) no response	12

PRE-SENTENCE REPORTS	RESPONSES
i) Should pre-sentence reports be compulsory before a custodial sentence can be imposed?	Yes: 52 No: 39
ii) other	25
iii) no response	27

EVIDENCE OF PREVIOUS DIVERSION	RESPONSES
i) Should evidence of previous pre-trial diversion be allowed at the sentencing stage?	Yes: 73 No: 45
ii) other	15
iii) no response	10

Evaluation and recommendations

Sentencing guidelines

11.47 Responses to the questionnaire appear to indicate support for the option that sentencing should be carried out according to the current procedure, but with improved monitoring and review of sentences built into the proposed legislation. There was, however, also substantial

support for the establishment of sentencing guidelines. In the course of the Commission's investigation into the reform of sentencing in South Africa, an issue paper on mandatory minimum sentences was published.⁴⁵ The issue paper raised the following possibilities:

- * The setting up of a sentencing commission to develop sentencing guidelines in respect of certain offences.
- * The development of sentencing guidelines which are not required by law to be followed, but which simply guide the courts in the exercise of their discretion.
- * The adoption of legislative guidelines which assist in determining the choice and length of punishment.
- * The enactment of principles of sentencing including guidelines which determine the imposition of imprisonment.
- * The enactment of presumptive sentencing guidelines to guide the imposition of custodial and non-custodial sentences.
- * The enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions.

11.48 South African courts have often been criticised for adopting an intuitive approach to sentencing. There is a perception that most officials in the magistrates' courts pass sentence on an unscientific basis.⁴⁶ The view that many magistrates impose sentences on the basis of a 'feeling', was to a certain extent borne out by the decision in *S v Makhele*,⁴⁷ where the court ruled that it is unsatisfactory that responses to queries from reviewing judges regarding sentence amount to a mere repetition of the trite principles of sentencing together with the well known cases without

45 SA Law Commission 'Sentencing: Mandatory Minimum Sentences' *Issue Paper 11* 1997.

46 *Issue Paper 11 supra* at 20.

47 1994 (1) SACR 7 (O).

the facts of the case and the personal circumstances of the accused having been determined. In similar vein Hutton contends that it is generally accepted that the personality of the sentencing official plays a very important role in the eventual sentence, which complicates matters.⁴⁸

11.49 At present, South African judicial officials enjoy wide ranging discretion in sentencing, and interference on appeal would only be justified if a lower court's sentence was "shockingly or startlingly inappropriate". This has led to criticism that the principles upon which a superior court will interfere with a sentence imposed by a court of first instance are vague and that the lower courts are in desperate need of a comprehensive set of principles which can be used as basic guidelines in sentencing.⁴⁹

11.50 It has been alleged that the range of sentencing options available to presiding officers in sentencing child offenders is quite wide. Despite this, there is evidence of a current trend to make more use of prison sentences. This criticism has also been raised in respect of a country such as Canada, where it is said that there is too much use of custodial dispositions for young offenders, particularly for non-violent crimes.⁵⁰ In Canada this is described as both expensive and counterproductive. The suggestion is made that youth court judges should be given more flexibility and responsibility to impose non-custodial dispositions. It can be argued that presiding officers in South Africa should likewise be urged to make more use of the other sentencing options presently available. However, one should not lose sight of the limitations that do exist and that sentencers do not have an unlimited discretion as is sometimes alleged. In the sentencing process the sentencer is required to make a number of decisions and the freedom to do so differs, depending on the circumstances of the case, the particular legislative framework and the principles developed by the courts.⁵¹

48 N Hutton 'Sentencing in the New South Africa: The Prospects for Reform' (1997) *International Journal of the Sociology of Law* at 320.

49 *Issue Paper 11* at 21 - 22. It has been suggested, since a coherent sentencing policy appear to be lacking in South Africa, that a Sentencing Commission would be an appropriate institution to draw up such policy "which complies with the emphasis on human rights of the constitution and which uses the language of rehabilitation and community within the framework of 'limiting retributivism'." (Hutton *op cit* p 332).

50 The criticism is raised by N Bala and is summarised in P Niemczak *Summary of Provisions Prepared for the House of Commons Standing Committee on Justice and Legal Affairs* Library of Parliament November 1996 at 157.

51 See S A Law Commission 'Sentencing: Mandatory Minimum Sentences' *Issue Paper 11* at 13.

11.51 Although there appears to be merit in the establishment of a sentencing commission for South Africa, which may ultimately develop a coherent sentencing policy also applicable to young offenders, the project committee - with due regard to the criticism at present levelled against sentencing policies, disparities in sentencing due to judicial discretion and the apparent over-use of imprisonment as far as children are concerned - has not recommended any measures, such as sentencing guidelines⁵² to be incorporated in the proposed child justice legislation at this point.⁵³ Although such guidelines may promote equality with respect to the use of imprisonment and other residential sentences for children, and may be able to assist in implementation of the constitutional requirement that detention be used only as a last resort and for the shortest appropriate period of time, the project committee has taken the approach of setting out sentence options along the lines of the effect of that sentence (residential, non-residential and so forth), and retained a large degree of discretion for sentencing officers. Although some clear sentencing parameters have been proposed, such as a restriction on the sentence of imprisonment of children below a certain age,⁵⁴ the retention of wide sentencing provisions is intended to promote the use of a range of sanctions in an innovative way. In this way, it is hoped that the legislative provisions on sentencing may encourage the development of alternative sentences, including restorative and community based sentencing options. For purposes of clarity it is proposed that the available sentences be set out in order of severity and intrusion or restriction of liberty. Although 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,⁵⁵ this approach has not been followed in relation to the proposed draft legislation, although the approach of differentiating

52 The New Zealand Children, Young Persons and Their Families Act 1989 contains a section detailing certain guidelines which have to be taken into account by the Youth Court in coming to a decision whether to make any of the range of disposals set out in section 283 of the Act. The Children (Scotland) Act 1995 similarly embodies a number of principles that have to be taken into account when decisions pertaining to children who have committed offences are made.

53 The concept of a statutory framework for sentencing is finding increasing support. See in this regard C Kelk, L Koffman and J Silvis 'Sentencing Practice, Policy and Discretion' in C Harding, P Fennell, N Jörg and B Swart (eds) *Criminal Justice in Europe: A Comparative Study* Oxford: Clarendon Press 1995 at 321.

54 Which enables the principle of detention as a matter of last resort to be realised in a more direct way.

55 C Cunneen and R White *Juvenile Justice: An Australian Perspective* Melbourne: Oxford University Press 1995 at 220. New South Wales and Victoria, for example 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.

levels of intensity is proposed in relation to the selection of diversion options.

Principles specific to certain forms of sentence:

11.52 Some principles that have been developed by courts in relation to specific sentences have been included in the proposed draft legislation, inasmuch as they are relevant to all who may be involved in the sentencing process, including probation officers who may be required to prepare pre-sentence reports. As these are already standards applicable in courts, their inclusion in proposed legislation should be relatively uncontroversial. So, for example, the project committee recommends that where a magistrate imposes any sentence involving a period of residence or referral to a residential facility, the criteria on which that sentence is based as well as the reasons why he or she believes that those criteria have been satisfied, should be noted on the record. This is important in the light of the fact that these sentences will be subject to automatic review, as is presently the position with sentences to a reform school, and with sentences of imprisonment which meet the criteria for automatic review specified in the Criminal Procedure Act.

11.53 The project committee further recommends that the criteria for imposition of a sentence which involves a period of residence or referral to a residential facility, should be indicated in the proposed legislation, in keeping with the principle of detention as a matter of last resort, and in line with international rules to this effect. Criteria for admission of children to prison while awaiting trial have already been placed in the statute book in the amendments to section 29 and the proposed amendment to section 71A of the Criminal Procedure Act, and the proposals suggested in regard to the use of imprisonment for children as a sentence draw on existing legislative enactments. 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. An alternative option in this regard would have been to propose a schedule of offences for which imprisonment may be imposed as a sentence. This was an option raised for comment in the Issue Paper, which did not receive significant support. Although a schedule of offences for which children may be detained in a prison while awaiting trial is a feature of current legislation, the use of schedules listing offences for which a child may or may not be imprisoned has been criticised as providing too narrow an approach, one which cannot

accommodate unusual situations, and can be unduly restrictive. Therefore, rather than proposing a list of offences to be specified in a schedule, optimal sentencing discretion has been retained.

Sentencing options

11.54 Judge Renate Winter, United Nations consultant on juvenile justice, avers that “[n]on-custodial measures represent an important step in increasing the effectiveness of society’s response to crime. They play a significant part in criminal justice in many different cultures and legal systems. Most penal sanctions imposed on convicted offenders are in fact non-custodial. One goal of the United Nations, therefore, is to emphasize the importance of non-custodial sanctions and measures as a means for dealing especially with young offenders.”⁵⁶

11.55 The project committee proposes a list of sentencing options, grouped more or less in related sections. The selection of specific sentence alternatives has been influenced by sentence forms that are presently available in South Africa, as well as the insertion of new possibilities that have proved useful options for young offenders in other jurisdictions. The legislation thus is intended to promote the use of as wide a range of alternative sentencing options as possible. Restorative justice options are specifically spelt out as possibilities, although the court retains the power to impose a sentence other than that recommended by a family group conference, victim-offender mediation or other alternative dispute resolution proceeding. Therefore a matter may, after conviction, be referred to such a process, but must be returned to court for the imposition of sentence. The list of available options also include restitution, compensation and reparation to the victim or victims of the offence, as well as orders that can be made to promote the child’s reintegration into his or her family or community and ultimately into society. Orders affecting parents can also be made, especially where there are social or parenting problems that might require the parents to attend counselling.

11.56 The well-known programmes offered by NICRO, which are suitable both for diversion and as sentence options, are included in the list of available sentences, together with community

56 ‘Drafting Juvenile Justice Legislation: Sentencing and Alternative Sentencing’ Paper presented at the SA Law Commission/UNDP International Conference, Gordon’s Bay November 1997.

service. However, provision has been made for more intensive programmes of longer duration which are beginning to be developed as alternatives to traditional incarceration. It is foreseeable that there may be programmes in future with a residential component, such as the Outward Bound type programme, wilderness experiences and so forth, and therefore flexible provision for these developments and the consequent expansion of alternative sentencing options has also been made within the range of available sentences. The possibility of skills and vocational training, a feature of the newly established “The Journey” programme piloted by NICRO, has been incorporated in the sentencing framework too.

11.57 In addition, the proposed legislation is intended to eliminate some of the difficulties that have been experienced in the implementation of community service. First, the existing minimum number of hours has not been included, as shorter terms of community service can be of benefit to children. Second, in order to address the fact that in rural areas there may be no identified programme of community service in which a child can be placed, the proposed child justice committee and the probation officer are mandated to take steps to identify suitable placement opportunities for this purpose.

11.58 Correctional supervision as contemplated in section 276(h) and 276A of the Criminal Procedure Act for a maximum period of three years will be able to be imposed in respect of children aged 14 years and older. The age is linked to the age at which imprisonment, it is suggested, may be imposed upon a child.⁵⁷ In addition the Commissioner of Correctional Services is empowered to convert a sentence of imprisonment into correctional supervision, as currently can be done in terms of the Criminal Procedure Act and other related legislation. As this procedure is available for persons over the age of 18 years, it would be anomalous not to retain it for children serving sentences of imprisonment, who would in fact then be subjected to the possibility of harsher treatment than their adult counterparts.

11.59 Postponement of the imposition of sentence is an option with which South African magistrates are familiar, especially in juvenile cases. The option of postponing the imposition of

57 It is contemplated that children below this age may nevertheless be sentenced to a different residential option, such as a reform school, and in exceptional cases for longer than the current two year period. This is discussed further below.

sentence is in some ways similar to diversion, as postponement of sentence has in the past been used when the child has been required to attend a programme, and on successful completion, to return to court for imposition of sentence. If the programme has been successfully completed, the sentencing officer will then often impose a caution and discharge, or similar sentence. Postponement of sentence has been described⁵⁸ as a useful inducement to engage a young person in a programme, as there is then a “Sword of Damocles” (ie the uncertainty of the eventual sentence) hanging over his or her head. Postponement of sentence can be used for minor cases, or where a more severe punishment is in the offing. Judge Corriero in the New York Court uses postponement of sentence for serious cases of murder and other violent crimes, where, save for intensive residential programmes for an extended period, a child accused would face adult prison sentences in terms of applicable legislation.

11.60 It is recommended that suspension and postponement of sentences should continue to form part of the sentencing options available to the judicial officer, save that a sentence to a reform school, as at present, cannot be suspended or postponed. In similar vein the project committee recommends that imprisonment, although it can be partially or fully suspended, should not be an alternative sentence to any other sentence. The Constitution requires detention as a matter of last resort, and it is arguable that imprisonment when used as an alternative to any other sentence at the time of sentencing, does not give effect to this principle. 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. Therefore, it is proposed that a child who fails to comply with conditions of a different (alternative) sentence would have to be returned to court for reconsideration as to whether imprisonment is warranted. Once again, this provision supports the optimal utilisation of the discretion of the sentencing officer, who can then make a finding as to whether imprisonment is indicated or whether other possibilities can be found to replace the original non-custodial sentence.

11.61 It is proposed that suspended sentences which involve a residential component should be

58 For example, by Judge MA Correiro at the SA Law Commission/UNDP International Conference on Drafting Juvenile Justice Legislation in Gordon’s Bay, November 1997.

subject to automatic review. However, it is proposed that a postponed sentence would not in the ordinary course of events be reviewable, even if reasonably severe conditions are attached to the postponement. The ultimate sentence which may eventually be imposed after conclusion of the period of time for which the matter is postponed may be reviewable if it meets the criteria spelt out for automatic review, but before the expiry of this period of time, there is no imposed sentence which is available for review purposes.

Specific sentences

Residential sentences

11.62 A factor militating against residential sentencing options is the shift in emphasis towards corrections within the community as is evidenced by developments elsewhere in the world,⁵⁹ and also by calls to this effect within our own society.⁶⁰ There have also been shifts in thinking about the way in which residential sentences are described (eg by reference to a “reform school”),⁶¹ which have, to date, not been resolved. It is foreseeable, though, that the names by which specific South African institutions are known may well change in the future, and it is with this in mind that the project committee prefers to refer to residential sentences wherever possible. However, for the time being, references to reform school sentences have also been retained.

11.63 To the project committee it is clear that the disposition of matters before the child justice court should reflect the best interests of children, the intention to promote and protect such interests, and the need to return such children back to society where they should lead constructive lives. In line with international law relating to children and our own Constitution, it is recommended that custodial sentences should be the last resort in children’s matters. Where such sentences are passed, they should be for a minimum period and should be conducive for the return

59 See Chapter 4; also see L Küpper-Wedepohl *Alternatives to Traditional Incarceration with Special Reference to Juveniles* Institute of Criminology, University of Cape Town 1980 at (vi).

60 In the Ministry of Justice and Community Peace Foundation’s report on the *Conference on Crime, Security, and Human Rights Proceedings* held in Cape Town in 1995, Mr Justice PJJ Olivier, at 168, stated: “I was deeply impressed by the message I got here of the need for the community to be much more involved in the sentencing procedure.”

61 Reports from the Education Summit, held in Cape Town from 29 - 31 July 1998.

of children back to the society. Non-custodial measures should be explored and used as much as possible, in line with IMC policy concerning residential care. In order to ensure that these principles are effective in practice, the project committee proposes including a bar on sentences of imprisonment of children below a certain age, implying that children below the age of 14 will not qualify for this sentence. This is in line with the trend already evidenced in our recent history to prohibit the admission of young children to prison,⁶² and in practice very few children below this age are admitted to serve prison sentences. There has been great public disquiet at the fact that the occasional young child of 12 or 13 has been admitted to serve a sentence in prison.

11.64 In addition, mindful of the Beijing Rules, the legislation will limit imprisonment as a sentence to children who have been convicted of serious and violent offences: 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”.

11.65 Finally, a social inquiry report will be mandatory before consideration of this sentence, as already pointed out. All prison and residential care sentences will be subject to automatic review.⁶³

11.66 The project committee is aware of the emerging trend to couple innovative programmes for young people with a residential component.⁶⁴ 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, and indeed wishes to encourage the development of suitable intermediate sentencing options. These may be offered by government (such as in secure care facilities or reform schools) or by non-governmental organisations. As mentioned above, in order to facilitate the development of these alternatives to formal incarceration, it is proposed that the draft legislation should be flexible enough to provide for more options with regard to periods of residence. However, unfettered placement of young people in

62 Section 29 of the Correctional Services Act regarding awaiting trial children, limited detention in prison to those children aged 14 years and above.

63 See Chapter 12 on Appeal and Review.

64 This is sometimes linked to the fact of a child’s being homeless or living in unstable family circumstances, and therefore unable to qualify as easily for an alternative sentence.

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.⁶⁵ Therefore, registration of programmes with the Department of Welfare or child justice committee or inquiry magistrate, inspections, monitoring and appropriate discipline and complaints procedures will be pre-requisites to the acceptance of any such programme as an alternative sentencing option.

Correctional supervision

11.67 The suitability of correctional supervision as a sentence for children has already been posed above. This intensive sentence may well not be appropriate for those below the age of 15, but no studies are available to the project committee which could bear this out. Therefore, it would be preferable to link the availability of correctional supervision as a sentence to the minimum age of admission to prison, in order for this to be a real alternative to imprisonment as was always intended. It would be logically difficult to defend the fact that a child of, say 14, must undergo imprisonment as he or she is too young for correctional supervision. It has further been mooted that correctional supervision as contemplated in section 276(1)(h) of the Criminal Procedure Act should be the form of community corrections primarily available in the child justice sphere. Since social inquiry reports will in any event be mandatory in these cases (which cannot be regarded as falling in the category of petty cases which the Beijing rules exempt from the pre-sentence report requirement), the background information necessary to enable sentencing officers to make effective use of this option will be at hand and readily available.

11.68 It is also important to note that where probation officers and NICRO programmes are not available, it might be possible to utilise local correctional officers for other community based sentences such as supervision and guidance orders.

Reform schools

11.69 Responses to the questionnaire indicate an overwhelming preference for a review of the

65 There have been unfortunate cases of modern day “Fagins” in South Africa, who, under the guise of assistance to youth, are actually involved in various forms of exploitation, including sexual exploitation. This is all the more dangerous where time in residence is concerned.

option of reform schools, which includes an exploration of possible alternatives.

11.70 Criticism such as the inadequate distribution of reform schools⁶⁶ in South Africa and the fact that reform school sentences are inevitably two years in length, has been pointed out above.⁶⁷ In addition, the Criminal Procedure Act provides no guidance to sentencers as to the circumstances under which the provisions relating to detention of children in reform schools should be exercised.⁶⁸ The present South African legislation, for example, contains no equivalent to the Ugandan provision requiring that, before making a detention order, the court has to be satisfied that a suitable place is readily available.⁶⁹

11.71 Referring a child to a reform school in terms of section 290(1)(d) of the Criminal Procedure, an option that can be exercised in lieu of punishment, 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 antisocial behaviour than the child himself or herself.⁷⁰ It has been suggested that this option presents a rather slim possibility for the child's reform, and that a child in need of discipline or control should rather be dealt with by way of correctional supervision or an appropriate order under the Child Care Act.⁷¹

11.72 Certain guidelines in regard to referring a child to a reform school under the Criminal Procedure Act do exist, although not contained in the legislation itself. What is uncertain, however, is the extent to which presiding officers have regard to these guidelines when exercising the option of referral to a reform school. It is submitted that if the option of reform schools is to be retained, the guidelines expounded above in paragraph 11.31 should be enacted and refined to

66 This necessitates placement of children away from their home provinces, which impedes family contact and reintegration of the child back into the community. Six of South Africa's eight reform schools are situated in the Western Cape Province.

67 See par 11.31 *et seq.*

68 Hutton *op cit* p 318.

69 Section 95(5) of the Children Statute 1996. Section 95(6) in addition provides explicitly that no child shall be detained in an adult prison.

70 Hiemstra *Suid-Afrikaanse Strafproses supra* at 715. Also see S Terblanche and J van Vuuren 'Wat gemaak met kindermisdadigers?' (1997) *SACJ* at 181.

71 *Ibid.*

further protect the interests of the child accused, and this has in fact been provided for in the draft legislation.

11.73 Since the publication of the Issue Paper, where concerns regarding the suitability of reform school sentences were raised, there have been some developments in practice. Some reform schools have allegedly improved some facilities, reviewed inappropriate disciplinary procedures, engaged with other role-players in the child justice sector (such as the IMC), all of which foreshadows a new approach to children serving these sentences and to these facilities. The National Department of Education's Commission on Learners with Special Needs, which included children in reform schools within its terms of reference, released a report following a two year investigation. This report, too, heralds a new educational approach in these schools. The recent education summit⁷² addressed the content of training and vocational programmes at existing facilities. At the same time, however, the numbers of children sentenced to reform school has declined dramatically,⁷³ for reasons that have not been adequately researched.

11.74 The project committee is of the view that dispensing with reform school sentences will not ultimately be in the interests of children, as the danger exists that the replacement will be sentences to imprisonment. In addition, abolition of the sentence might foreshadow a complete loss of the existing educational facilities and the subsidies and staff that are presently available for children in conflict with the law, to another group of children. This would put an end to the formal involvement of education departments in the child justice system, and it would be difficult to resuscitate such involvement later. It has been widely accepted that the education sector should have a key role to play in child justice, including in the realms of prevention of child delinquency and programmes, and therefore the project committee has felt it necessary to retain the option of reform schools.

72 Note footnote 60 above.

73 During May 1998, it was alleged that less than 100 children were in Porter School in Tokai, Western Cape, where the capacity is well over 400 pupils. Staff apparently established that there were at that stage few children, if any, awaiting transfer to a reform school, which appeared to indicate a declining use of this sentence alternative by courts.

11.75 Also, as raised in the Issue Paper, attention has had to be paid to the question of the length of these sentences, at present in effect a two year sentence (see section 291(1) read with section 290(1)(d) of the current Criminal Procedure Act), which can be extended by a further two years, as long as it is not extended beyond the 18th birthday of the child. It has been argued by educationalists that the sentence length is a reflection of the time needed to achieve the educational goals within the system. But the issue of equality in sentencing is of some concern, as 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. A countervailing argument, though, is that 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 which necessitate a proportionate response. A lengthy reform school sentence might then be the only way of ensuring that these requirements are met.

11.76 In sum, the project committee is of the view that both the concern about sentences being disproportionately long, and the concern that two years can be too short (either for educational or other reasons) can be accommodated in the scope of the proposed legislation. To this end, it is proposed that reform school sentences should (as a minimum period) not be imposed for less than six months. As a maximum, it should be possible, in exceptional circumstances, with reasons for this noted on the record, to refer a child to reform school until the age of 18, so that a child of, for example, 13 years, convicted of a serious, violent offence could serve this sentence as an alternative to imprisonment. The ordinary maximum term, where such exceptional circumstances do not exist, should remain two years.

11.77 However, additional monitoring requirements do need to be included in legislation, in view of the present legislative position that this sentence is serious enough to warrant automatic review, and in view of the serious abuses revealed by the IMC investigation.⁷⁴ Obviously, the present automatic review applicable to this sentence should be retained. In addition, no administrative

74 *IMC In Whose Best Interests: Report on Places of Safety, Schools of Industry, and Reform Schools* October 1996.

extensions of sentences should be allowed, and any extensions beyond the sentence envisaged by the initial sentencer should have to be considered by a court. The exceptional situation referred to above, where (for example) a 13 year old, who could not be sentenced to imprisonment had a lengthy alternative residential sentence imposed, would be accommodated within this framework as the sentencing officer would have to note the existence of exceptional circumstances at sentencing stage before imposing a sentence in excess of two years. These longer sentences, imposed by a court, can be distinguished from sentences which are able to be extended by administrative decree, and there would in any event be the question of confirmation on automatic review when a longer sentence than the normal maximum is imposed.

Fines

11.78 There was substantial support among respondents to the questionnaire that monetary fines should be excluded from the range of sentencing options. Opposition to the proposal came from the professional bodies in the attorneys' profession. The contention appears to be that not all child accused are unable to pay fines and that the option should thus be retained.

11.79 Hutton⁷⁵ makes the following remarks in regard to the payment of fines and poverty:

There does not appear to be any authoritative view on how the amount of the fine should relate to the means of the offender and to the seriousness of the offence. South African courts have not adopted the unit fine or day fine approaches used in a number of European jurisdictions such as Germany and Sweden and recently abandoned in England and Wales. There is authority to support the view that where a fine has been imposed as an alternative to imprisonment, it should not be set at so high a level that the offender is likely to end up in prison because he is unable to pay. However there is also authority to support the view that the fine should match the gravity of the offence regardless of the financial circumstances of the offender.

Geldenhuis and Joubert argue that the introduction of correctional supervision may overcome this difficulty. The use of the fine in South Africa is likely to be restricted by poverty. Many offenders have no incomes from which fines could be paid. Unlike the UK, for example, there is no provision of state welfare benefits from which court fines might be deducted.

75 N Hutton *op cit* p 321.

11.80 An important aspect raised in the quotation above is the notion that there is authority for the view that the fine should match the gravity of the offence irrespective of the offender's ability to pay. In the case of children, it should be borne in mind that it is usually the parents who eventually have to pay the fines imposed on their children. Thus it is not only the child's ability to pay that comes into play, but also that of his or her parents. It can therefore be argued that the punishment earmarked for the child is devolved upon people who are removed from the crime itself, and that substitution of the role-players involved actually takes place.

11.81 The Ugandan Children Statute 1996, in section 95, explicitly provides that the child's ability to make a payment should be taken into account by the court before ordering the child to pay a fine, and that the child shall not be detained upon failure to pay the fine.

11.82 The project committee is reluctant to deviate in any way from the view expressed by the majority of respondents that monetary fines should not be included as a sentence option, and can countenance monetary penalties only if they are within the means of the offender and, in addition, have some meaning for the child. Otherwise, wealthier parents can simply pay up, and the child himself or herself does not acquire any sense of accountability for his or her wrongdoing.

11.83 Most respondents agreed that restitution, reparation to the victim and compensation in monetary form should indeed be retained as valuable components of a restorative justice approach, which seeks to involve victims far more directly, including at sentencing stage. In addition, where a victim is unknown, does not participate in the proceedings beyond the stage of laying a complaint, or where a so called "victimless offence" has been committed, it would be entirely appropriate to include an option which furthers the restorative justice aims set out above, but does not fall into the trap of repeating the negative aspects of fines discussed above.⁷⁶ The project committee therefore proposes that a financial penalty could be imposed in the instance where the child can pay this, and where reparation to a specific identified victim is not possible, with the additional provision that the sum be payable directly to a charity or welfare organisation involved with children and identified, with motivating reasons, by the child who is thus sentenced.

76 Which, it is understood, are paid over to treasury.

Alternative sentencing

11.84 Responses to the questionnaire showed more support for the independent imposition of alternative sentences than for such sentences having to be inevitably linked to a suspended or postponed sentence. Most respondents who submitted written responses also supported alternative sentences as independent sentences without the necessity of them being imposed as conditions to suspended sentences.

11.85 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 for instance 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. The Ugandan Children Statute 1996 as mentioned before, provides, in section 95, that the child's ability to make a payment should first be taken into account before an order to pay compensation, restitution or the payment of a fine may be made.

11.86 It has been suggested that conditions such as the rendering of some specific benefit or service to the aggrieved person and community service in terms of section 297 of the Criminal Procedure Act, are very rarely used.⁷⁷ As far as community service is concerned, it is contended that this condition is seldom imposed in view of practical problems experienced with the execution thereof, mainly because a fixed structure has not been created by the authorities.⁷⁸ However, recent South African pilot projects exploring alternative dispute resolution through family group conferences have revealed that “fixed structures” are not necessarily a *sine qua non* for the imposition of community service orders in the looser sense of the word. Moreover, community and family dispute resolution fora can be very creative in devising appropriate, suitable and effective community service options for young offenders.

11.87 It may be argued by persons opposed to the idea of converting conditions into independent sentences that the conditions listed in section 297 of the Criminal Procedure are not “severe”

77 See Hiemstra *op cit* p 736 - 737. Also see Hutton *op cit* p 323 in regard to compensation and restitution.

78 Hiemstra *op cit* p 737.

enough if they were to be imposed in isolation. In regard to community service, it is pointed out in Hiemstra that although community service is mostly imposed in the case of less serious offences, it is by no means restricted to such offences.⁷⁹ In general, special circumstances are required, though, when the condition is to be imposed in respect of serious offences.⁸⁰ The advantages of community service as a sentence are significant. Apart from providing an alternative to a custodial sentence, the community may benefit from the provision of a service by the offender that may otherwise have entailed expenditure. In addition, community service can be a truly restorative option, in which the accountability of the offender for his or her wrongdoing is brought home publicly before the community from which the child comes, and in respect of which reintegration will take place. One of the main problems posed by community service, however, is - as has been pointed out earlier - that the accused should be at least 15 years of age. The service also needs to be provided for a total period of at least 50 hours.

11.88 The rationale behind the age limitation is probably founded upon the principle that children should not be subjected to forced labour.⁸¹ In elevating community service to the status of an independent sentence, this problem may still remain, unless a rationale can be devised that may obviate the objection. Steytler⁸² argues that the prohibition on forced labour in section 13 of the Constitution is inevitably violated by any sentence containing community service. The author points out that obtaining the consent of the offender as a prerequisite is a possible way of eliminating the forced quality of the labour. The constitutional validity of such a waiver is, however, suspect given the inherent lack of voluntariness of an accused's choice. Steytler concludes that compelled community services should simply be regarded as a reasonable and justifiable limitation of the prohibition of forced labour. In 1973 the International Labour Organisation adopted a convention that sets out requirements regarding child labour.⁸³ It is called the Minimum Age Convention. There are indications that South Africa will agree to this Convention during the course of 1998. The Convention requires of countries that agree to it to

79 *Ibid.*

80 *S v Lotter* 1991 (2) SACR 588 (NC).

81 Cf S Terblanche and J van Vuuren 'Wat gemaak met kindermisdadigers?' (1997) *SACJ* 184.

82 *Constitutional Principles of Criminal Procedure supra.*

83 Also see M Chaskalson *et al Constitutional law of South Africa op cit* at 33-9.

ensure that child labour is effectively abolished. An important principle of the Convention, however, is the concession 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 would appear, therefore, that there is limited scope for subjecting children below the age of 15 years to community service options, as long as the necessary guarantees are respected. Therefore, the project committee adopts the view that community service should be included in legislation as an independent sentence option, for children who are liable to criminal prosecution who fall within the parameters described above (ie from the age of 13). Clearly though, legislation will have to provide that the nature of the service be determined by the sentencing court; that it cannot be harmful to the child's health or development, nor can it prejudice school attendance. Further, the statutory minimum of 50 hours inhibits the use of this sentence for children, and may be inappropriate for younger children. There would appear to be no logical reason why the minimum cannot be dispensed with, which would allow for greater use of this sentence, especially by alternative fora such as community structures, and in the case of younger children.

11.89 A further problem identified in relation to the low use of community service orders is the absence of infrastructure for supervision of the execution of this sentence. Mindful of the Constitutional Court's approach in *S v Williams*,⁸⁴ the project committee is of the view that this should not be regarded as an impediment to the development of this option. Three proposals are put forward in this regard: first, that where difficulties in utilising this sentence are occasioned by the absence of formal structures, such as NICRO, the sentencing court should be empowered to refer to community organisations, local authorities, etc in order to investigate possibilities in implementing community service. Second, the proposed local child justice committees should, as one of their tasks, ensure that community service options are developed within their area of jurisdiction. Third, a presiding officer who is desirous of imposing community service, can refer the matter to a family group conference or alternative dispute resolution forum so that this community based structure can suggest an appropriate form of community service that is suitable for local conditions, provided that the recommendations are brought back to the court and considered for the passing of a suitable sentence.

84 *Supra.*

Pre-sentence reports

11.90 Beijing Rule 16 provides that in all except minor cases, the child's background and circumstances should be made known to the authority through social inquiry or pre-sentence reports. The commentary to the Rules maintains that these reports are an indispensable aid in legal proceedings involving children.

11.91 With regard to sentencing policy and practice in England and Wales, it has been pointed out that although pre-sentence reports are of considerable assistance to sentencers, the ultimate choice of either type or length of sentences is still a matter for the judge or magistrate.⁸⁵ This has led to criticism, though, that like cases have not always been treated alike and that judges have often pursued their own individual philosophies or theories of sentencing.⁸⁶

11.92 Previous chapters have already pointed to the development of probation services in the arena of juvenile justice over the past few years. This means that pre-sentence reports are now more widely available than was previously the case, as a consequence of the appointment of more staff, and the focus on child justice within the realm of probation work.

11.93 The project committee therefore recommends that the proposed child justice court, or any other court imposing a sentence in terms of the provisions of the proposed draft Bill, should require the preparation and placement of a pre-sentence report prior to the imposition of sentence. It is further recommended that a court should be able to dispense with a pre-sentence report where the conviction is for an offence prescribed in the proposed schedule,⁸⁷ or where the obtaining of such a report would cause undue delay in the finalisation of the case - prejudicing the interests of the child.

11.94 The project committee also recommends that a court sentencing a person under the age of 18 years should not impose a sentence with any period of residence or sentence a child to a

85 C Harding *et al Criminal Justice in Europe op cit* at 332.

86 *Ibid* at 333.

87 See par 8.42.

residential facility if a pre-sentence report has not been placed before the court. If the sentence involves detention in a residential facility, the presiding officer should certify on the warrant of detention that a pre-sentence report has been placed before him or her prior to imposition of sentence.

11.95 Extensive training of newly appointed probation officers on sentencing and the compilation of pre-sentencing reports is regarded as highly desirable by the project committee.

Post conviction strategies

11.96 An issue which has been canvassed by NGOs and academics in South Africa, and not presently directly accommodated in legislation, is the possibility of further post-conviction strategies, other than the imposition of sentence or conversion to a Children's Court inquiry. These might, for example, include referral after conviction to a family group conference or restorative justice process. It could be argued that the conviction should then fall away, as is currently the case with the conversion to a Children's Court inquiry. This would entrench the concept of diversion even after conviction. Thus, a child who exercises his or her choice to go to trial would benefit from diversionary procedures in the same way as the child who accepted responsibility in the pre-trial phase. 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. Also, it is noteworthy that this procedure is not confined to non-serious cases, but, rather, is viewed as an 'intermediate' option for more serious matters. It is proposed that the possibility of referral to a Family Group Conference (FGC) after conviction should be included.⁸⁸ This echoes the suggestions related to community service above and takes account of recent attempts to include communities in the administration of justice.⁸⁹

Victim involvement in sentencing

88 It should be noted that in the pioneering New Zealand child justice legislation, such referral after conviction is mandatory.

89 See SA Law Commission 'Alternative Dispute Resolution' *Issue Paper 8 supra*.

11.97 In line with recent strategies to involve victims to a greater extent in the criminal justice process, the project committee proposes that a court imposing a sentence in terms of the proposed draft Bill should consider the impact of the offence upon the victim as well as the imposition of a sentence in which compensation, reparation, or restitution to the victim is an option.

Evidence relevant to sentence

11.98 The central question raised under this head in the Issue Paper was whether evidence of pre-trial diversion should be admissible at sentencing stage. Most respondents felt that it should, and with this the project committee agrees. First, it means that diversion will have some “teeth”, and second, it can obviate referrals to programmes which have already proved unsuccessful in the past for a particular child. However, the project committee is mindful of the fact that evidence of a previous diversion is not in any way comparable to evidence of a previous conviction, and that it is based on voluntary acceptance of guilt. Therefore, the project committee proposes that a provision should be included in the proposed legislation to the effect that whilst evidence of previous diversion may be presented at sentencing stage, the evidence may not be used in aggravation of sentence.

12. REVIEW, APPEAL AND MONITORING SYSTEMS

Current position

12.1 At present, appeal and review form the only method of control over child sentencing. The present review criteria¹ do not protect children sufficiently. Sentences of imprisonment imposed by longer serving magistrates, and sentences falling below other thresholds set in the Criminal Procedure Act, frequently escape High Court scrutiny. For instance, monitors have found numerous cases of children serving prison sentences imposed as alternatives to paltry fines, which they cannot pay. This does not accord with the principles of detention as a measure of last resort.

12.2 In addition, sentences imposed by regional courts and sentences where the accused was legally represented are not reviewable.

12.3 In principle, all **residential** sentences imposed upon children should be reviewable.² The present automatic review system is limited to convictions, and then only where certain sanctions have been imposed. It has already been suggested that the proposed expansion of diversion should also be subjected to regular review and monitoring.³ In addition, 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 kept in a range of different institutions, has led to suggestions that the entire proposed system should be monitored to ensure effective implementation of the underlying principles. Several international instruments also support monitoring, inspections and complaints mechanisms.⁴ Such a system could supplement the present system of automatic judicial review of cases where custodial sentences are imposed.

12.4 The Issue Paper highlighted various options which singly or in combination would enhance effective implementation of the proposed legislation. The following possibilities with regard to

1 See par 11.28.

2 This echoes the suggestions offered in SA Law Commission 'Review of the Child Care Act' *Issue Paper 13*.

3 See par 8.45.

4 For example Rules 72 to 78 of the International Rules for Juveniles Deprived of their Liberty.

monitoring on both a local or provincial level and on national level were raised:

Local and provincial monitoring

- (a) A precedent for monitoring at the lower court level, in each magisterial division, is to be found in the assessment centre committees which were established in many jurisdictions in the Western Cape when pre-trial assessment of all children was implemented in 1994.⁵
- (b) Provincial monitoring has been implemented through the provincial IMC structures in various provinces. Provincial monitoring is important as it allows for the monitoring of institutions in a province (as welfare-run institutions, such as places of safety, or in future, secure care facilities, are provincially managed). Thus low occupancy levels of places of safety can be identified, or cases where children have been admitted without the required assessment.

National monitoring

12.5 A national monitoring body could be introduced to ensure effective implementation of the legislation. Several possibilities present themselves:

- * A department of government, located in, for example, the department of Welfare or the department of Justice. This could be called "the juvenile justice office" or other suitable name.⁶ It would have the task of monitoring and overseeing implementation of the legislation, as well as the collection of proper statistics. Since many issues in child justice are inter-sectoral and depend on co-operation from a variety of role players from within different departments, the national office would, in order to fulfil a meaningful role, have to be granted sufficient powers as to permit effective operation.
- * A child justice office could be located outside the relevant departments involved in child

5 See J Sloth-Nielsen 'Juvenile Justice Review 1994 - 1995' (1995) *SACJ* at 331.

6 There are Australian precedents for this.

justice, such as within the Deputy-President's office.

- * An advisory council on child justice could function independently of government departments, and report to the Minister (of Justice, Welfare, etc). The council would, however, need to employ a secretariat to fulfil the research and implementation tasks that will arise in relation to the proposed legislation.

- * The Draft Correctional Services Act, released for comment by the Department of Correctional Services in February 1997, proposes the concept of a Judicial Inspectorate. Headed by an inspecting Judge, functions include inspections of prisons, offices and other institutions concerned with community corrections, dealing with complaints (but not directly received complaints), reporting on inspections, holding enquiries, and reviewing specific correctional sanctions such as solitary confinement. It is proposed that this model may be suitable in the sphere of child justice as well and could be extended to cover all aspects of the system. It has the obvious advantage of independence from specific government departments who will be tasked with implementation of the proposed new legislation, as well as the benefit of judicial seniority in the form of the appointment of a judge of the High Court to lead the office.

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

monitored.

Comment on Issue Paper 9

Written responses

12.7 Most of the respondents agreed with the proposal that all custodial sentences should be reviewable.. Most respondents agree further that there should be a monitoring body with no particular clarity as to whether this should be conducted at a local, provincial or national level. The Association of Law Societies believes that a national monitoring body should not even be considered until “new legislation, and the structure for the implementation thereof is in place”. The Tshwaranang Legal Advocacy Centre argues for the creation of the office of an Ombudsperson on Children with multi-disciplinary teams to protect their interests.

Responses to questionnaire

LOCAL AND PROVINCIAL MONITORING	RESPONSES
i) Should monitoring take place on a local and provincial level?	Yes: 92 No: 33
ii) other	12
iii) no response	6

NATIONAL MONITORING	RESPONDENTS SUPPORTING
i) a government office located in the Department of Welfare or Justice	96

NATIONAL MONITORING	RESPONDENTS SUPPORTING
ii) an office located outside the Departments implementing child justice such as a unit within the Deputy President's office	22
iii) an advisory council independent of the Departments and reporting to the ministers concerned	12
iv) a judicial inspectorate as proposed by the Correctional Services Bill	10
v) other	3

Evaluation and recommendations

Appeal and review

12.8 It is proposed that the current law with regard to appeals from lower courts, as well as appeals from the local or provincial division of the High Court should be retained. Thus, any child convicted of any offence in a child justice court or other court acting in terms of the proposed Bill will be entitled to appeal against the conviction and/or any resultant sentence to the appropriate court. The powers of the court as described in the Criminal Procedure Act should apply. Similarly, the right of the Attorney-General (upon application) to appeal against any conviction or resultant sentence as set out in the Criminal Procedure Act should be provided for in the proposed Bill. The current provisions of the Criminal Procedure Act relating to further evidence on appeal should also be referred to.

12.9 The project committee agrees with the view expressed by most respondents 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 care component should be subject to the review procedure. 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. The project

committee is further of the view that decisions of regional courts should also be reviewed in the same way. Even though this may seem unnecessary, the weight of opinion points towards a system in which it would be in the best interests of the child not to provide for exceptions, in order to comply with the principle that detention be used as a measure of last resort. 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, mostly where they are in custody. This suggests 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.

12.10 In addition to the automatic review procedures, it is proposed that a superior court's inherent right of review of irregularities in proceedings of lower court should apply in the child justice system. After the passing of sentence on any child, it may be brought to the attention of the superior court having jurisdiction, or any judge of that court that the proceedings in such case were not in accordance with justice, and such court or judge may review the proceedings.

Monitoring

12.11 There was widespread support for the creation of a monitoring system in child justice legislation, to ensure the continued development of diversion and alternative sentencing options, to provide support for role players such as probation officers, to collate information for public dissemination about the workings of the legislation, and to ensure the protection of children's rights whilst they are subject to the child justice system. There was overwhelming support in the responses to the questionnaires for a system which is rooted at the district level, and the project committee proposes to provide in the legislation for a *child justice committee* to be formed in relation to each magisterial district, with a range of functions and duties which will be detailed in the legislation. As inter-sectoral and interdisciplinary committees of this nature have already been established in many magisterial jurisdictions, and have been required where assessment pilot projects have been established, the proposal to provide for these committees in the statute is building on an existing model. It is intended 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 in a region, delegate from NICRO or other organisations presenting diversion programmes, as well as lay persons from community based organisations or local communities or church or welfare organisations who have an interest in child justice. These last mentioned persons can contribute to the development of diversion options, assist with the identification of “suitable adults” to attend pre-trial investigatory procedures or assessments where needed, and fulfil a developmental role in relation to the implementation of this legislation. The committee as a whole would also be tasked with the collection of certain information relevant especially to the development of diversion options, such as the number of police cautions applied in terms of this legislation. The committee would have the function too of reviewing the diversion decisions of the probation officer in non-serious cases, and providing guidance to him or her at periodic intervals. The committee would not concern itself with the proceedings of the child justice court itself,⁷ save that children in detention would be of relevance. The committee would, as is the case at present, be able to play a crucial role in monitoring conditions of detention, including detention in police custody, the length of time that children spend in residential care, and ensuring the protection of children’s rights whilst they are in residential care through the child justice system.

12.12 The proposed child justice committee is intended to reflect the reality that role players from different departments and from outside the state are to differing degrees responsible for child justice at present, and that this will continue to be the case in future. It is thus necessary to provide a forum where problems with inter-sectoral co-operation can be raised, where problems affecting child justice at a local level can be discussed, and where innovation appropriate to local conditions can take place. The establishment of a child justice committee should provide a cost effective way of achieving this, as existing staff and interest groups are involved and no new appointments or funds are required.

12.13 There was substantial support in both the questionnaires and the written responses for one or other national monitoring system to be provided for in the child justice legislation. One respondent stressed the need for a multi-disciplinary approach, given the fact that implementation

of the child justice system does not rest with one department alone. In fact, given the emphasis in the proposed legislation on diversion, the responsibility for which, according to the *National Crime Prevention Strategy* falls to the Department of Welfare, coupled with the obvious involvement of magistrates and prosecutors in the child justice system, it would appear that a successful national monitoring system must at least be able to address the line functions of these two departments. If a monitoring system fell only within one Department, for example the Department of Justice, it would not be possible to ensure the proper development of probation services, diversion, or to monitor that portion of the residential care system which falls under the control of the Department of Welfare, including places of safety and secure care facilities. As the experiences with the implementation of successive amendments to section 29 of the Correctional Services Act has shown, the proper functioning of supporting institutions allied to the child justice system are integral to the successful functioning of the system as a whole.

12.14 Further, as the envisaged system places considerable weight on the proposed preliminary inquiry, to be staffed in the main by specially trained magistrates, it is clear that the Department of Justice will bear key responsibility for the effective administration of this legislation. Therefore, the project committee proposes that monitoring of the legislation should be shared equally between the Departments of Welfare and Justice, and that an office should be established with joint representation to give effect to this proposal. The office, called the office for child justice, would therefore have permanent staff appointed by the Departments of Welfare and Justice. It would mean in practice that the Justice staff would fall under the human resources department of that Department, while Welfare would second and fund the salaries of staff from its own department, who would also attach to a directorate within the Department of Welfare. Since a key function of the office would be the investigation of the efficacy of the legislation, keeping up with, analysis of, 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. This officer would be responsible for the research functions (as opposed to interacting with line function officers at district and regional level), in much the same way as the New Zealand Commissioner for Children has an explicit research function to ensure adequate implementation of the legislation.

12.15 Although it may seem as though other departments relevant to the implementation of this legislation may be excluded for the monitoring system proposed above, this is addressed through

the notion of a regular meeting of all representatives from all departments concerned with the implementation of aspects of child justice legislation. The joint meeting of all departments concerned would be named the inter-sectoral child justice committee. This grouping, which would mirror the child justice committee meetings at the district level, would equally 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 Department of Education insofar as reform schools and programmes presented there fall under that Department. Welfare organisations and NGOs relevant to the furtherance of this legislation would enjoy representation on the council.

12.16 A further suggestion mooted in the Issue Paper was the possible appointment of an inspecting judge (similar to the idea proposed in the draft Correctional Services Act of November 1997). This option did not receive as much support as other proposals, possibly because the phenomenon of such an independent office is not yet established in South Africa, and its merit here has yet to be demonstrated. However, there was public support for a figure such as an ombud for children who are affected by this legislation, especially those in residential care of one form or another. The call for an ombud has also been voiced in other circles, particularly insofar as there is no effective complaints system for children in residential care. The project committee also considered the establishment of an office of Inspector-General of child justice, who would be appointed by the Judicial Services Commission and who would report independently to Parliament. The Inspector-General's tasks would not overlap with those of the national monitoring council, as his or her tasks would be to investigate complaints, and especially complaints from children who are in detention or in the residential care system as a result of the implementation of provisions of this legislation. The project committee decided against the establishment of this office under the auspices of this Act as the monitoring of conditions under which children are detained in residential care should be regulated within the Child Care Act and this recommendation will be forwarded to the project committee of the Law Commission that is currently investigating the reform of the Child Care Act.

12.17 In summary, the project committee has endeavoured to plan for a monitoring and review system which captures and extends existing models, effectively utilises existing staff where possible, yet ensures that this legislation has the built-in potential to provide its own success indicators. 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. The project committee is especially concerned to ensure that this legislation works in practice, and that future difficulties, inconsistencies, and legislative gaps or loopholes that might emerge are addressed in a responsible way, based on sound research, with appropriate consultation with relevant officials at local level. It is envisaged that, as has been the case with the Criminal Procedure Act, procedural amendments may from time to time become necessary. Also, amendments might be occasioned by the development of a future Children's Statute, especially as this may entail substantial revision of the role and functions of the children's court. Both the Office for Child Justice and the inter-sectoral child justice committee will therefore be able to play a developmental role in relation to the proposed legislation.

13. LEGAL REPRESENTATION

Current South African law

Assistance by parent or guardian

13.1 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. This includes the right to assistance in the pre-trial stage of the proceedings such as identity parades, pointing outs and confessions.¹ The courts have noted that the entitlement to a legal representative (section 73(1) of the Criminal Procedure Act) and the right to assistance by a parent or guardian are separate. It is suggested that both options should be retained in proposed legislation.

The right to legal representation

13.2 Like adults, children who are accused have a right to legal representation as from the time of arrest. There is a duty on magistrates to explain the right to legal representation to every accused who appears before the court. The services provided by the Legal Aid Board are also explained. However, in over 80% of cases accused persons under 18 appear before the courts unrepresented.² Some reasons for this are that children³ -

- * claim that they were not informed about the possibility of free legal assistance;
- * distrust what they call “government lawyers”;
- * proclaim that they are innocent and do not need a lawyer;

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

2 J Raulinga, D Siditi and T Thipanyane in L Pollecut *et al Legal Rights of Children in South Africa* National Institute for Public Interest Law and Research 1995 at 63, 86 and 101.

3 Lawyers for Human Rights Project 1992 - 94 where 1 140 accused children were interviewed.

- * claim that lawyers on legal aid briefs delay and/or prolong cases unnecessarily;
- * allege that lawyers coerce them to plead guilty;
- * say that they would prefer to speak on their own behalf rather than have lawyers speaking for them.

13.3 Section 35 of the Constitution of the Republic of South Africa 108 of 1996 guarantees the right of all detained and sentenced persons (including children) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Due to their youth and immaturity, children facing criminal charges are particularly vulnerable and in need of competent legal representation.⁴

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

13.5 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.

4 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.

- (iii) The current judicare system could be extended by providing for some form of specialisation in children's rights.

13.6 In addition to the proposals reflected above, the matter of waiver of the right to legal representation was also raised. The question was posed at 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 was 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.

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

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

Comment on Issue Paper 9

Written responses

13.9 According to article 37(d) of the Convention on the Rights of the Child every child deprived of liberty has the right to “prompt access to legal and other appropriate assistance”. Professor Van Bueren⁵ comments that “deprivation of liberty is an intentionally broad term and includes not only police stations but any situation, facility or building, public or private, where the child is not free to leave”.⁶

13.10 The majority of the respondents agreed that the child’s right to legal representation should be implemented from the earliest possible opportunity. Ms Louw and Professor van Oosten suggest that young persons should have the right to legal representation not only from the time of arrest but also from the time of detention and that it would be prudent to endorse such right in the future legislation.

13.11 The submission by the Association of Law Societies advocates the view that there should be no deviation from the general rule of legal representation for all and supports the view that young people should be represented until the commencement of the diversion process. The Society of Advocates of Natal are also of the view that even in cases where diversion is recommended, children should be represented as both “the enquiry and the outcome would affect the rights of child”. The Natal Law Society disagrees with this view and recommends, 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.

5 G Van Bueren ‘Legal Representation of children in South Africa - A report for the South African Law Commission’ Paper presented at the SA Law Commission/UNDP International Seminar on Drafting Juvenile Justice Legislation held at Gordon’s Bay in November 1997.

6 Rule 11 UN Rules for the Protection of Juveniles Deprived of their Liberty.

13.12 Many respondents were critical of the suggestion embodied under option (i) above (children should be allowed to engage their own attorneys at state expense) in that it is likely to give rise to many problems in practice. Magistrate McMahon is of the view that this option would be discriminatory and that it clearly favours the young person over the adult offender by allowing the young person to approach a lawyer of his/her choice and pay the fees, whatever they might be, of such lawyer. The Society of Advocates of Natal support the proposal contained in option (i) with the constructive suggestion that such a proposal would necessitate a legal aid type system, whether as part of the existing legal aid system or under some other authority, with a means test coupled with the setting of some parameters to the fees by the legal adviser so selected.

13.13 Option (ii), providing for representation by the office of the public defender, was met with concern over the quality of representation offered by public defenders. The Association of Law Societies was concerned that the system is not yet operative nationally, which means that only children living in the larger centres would benefit from these services. Many of the respondents from the social services sphere preferred this option but almost all raised concerns over the inequality that presently exists with regard to availability.

13.14 The respondents that favoured the third option were particularly partial to the specialisation requirement. NIPILAR was of the view that the idea of judicare for children is appealing and proposed that support for such service would be increased if the law faculties of universities are included. The respondent quotes the successful pilot project of the Juvenile Defender Clinic at the University of the Western Cape in this respect. The Campus Law Clinic of the University of Natal ran a "Children Awaiting Trial" project and recommended that the clinic should work in partnership with the Legal Aid Board, and that final year students should act as facilitators between the child and the attorneys. These students should prepare the necessary documentation and brief the attorneys because there is evidence that attorneys and advocates do not have enough time to prepare for these cases.

13.15 As far as waiver of legal representation is concerned, most of the respondents who addressed this issue were of the view that young people should not have the right to waive legal representation. The Association of Law Societies holds the view that magistrates, as agents for the High Court (being the upper guardian of minors) should have the discretion to make such

representation compulsory. The Tshwaranang Legal Advocacy Centre presented an interesting perspective as to why a young person or his or her parents should not be allowed to refuse legal representation. The Centre contends that allowing the child the right to refuse legal representation is based on the assumption that the child or guardian is sufficiently empowered to make an informed decision. The argument postulates that, given the way in which the legal system routinely disempowers women and children in its structure and inaccessibility, it should never be assumed that groups that are at risk (such as women and children) are empowered to take care of their rights without assistance. It is further contended that parental assistance is not a viable option given the fact that many children are parentless, or are brought up in single parent families consisting of women who are treated in a hostile manner by the legal system. The Centre submits that only where alternative legal representation is procured, should a young person, or his or her guardian, be entitled to refuse the representation offered by the state.

13.16 Ms Louw and Professor van Oosten reject the proposal in paragraph 4.7 of the Issue Paper as it would result in the same anomalous position created by section 8A of the Child Care Amendment Act: in spite of a waiver by the child of his or her right to legal representation, a lawyer may be appointed to “monitor the proceedings” relating to such child. They argue that the ostensible right of the child not to be legally represented would, in effect, be undone. The respondents further contend that a right to legal representation logically includes the right to refuse legal representation. They also point to the practical problem of having to “monitor proceedings” without actually representing the child, and that of co-operation between the child who refuses to be legally represented and the lawyer appointed in the case.

13.17 Bernadine Dohrn, in her paper on “Legal Representation of Youth in Delinquency Proceedings”⁷ 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 comments: “The Issue Paper appears to confirm a 'right' by child clients to refuse legal

7 The full title of the paper was ‘Legal Representation of Youth in Delinquency Proceedings - A comparative inquiry: South Africa and the United States’ presented at the SA Law Commission/UNDP International Conference on Drafting Juvenile Justice Legislation held at Gordon’s Bay in November 1997.

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.”

Responses to questionnaire

LEGAL REPRESENTATION	RESPONDENTS SUPPORTING
i) lawyers of own choice paid by the state	6
ii) specially trained public defender	57
iii) present judicare system with specialisation criteria	48
iv) waiver of right to legal representation: lawyer should be appointed to monitor proceedings and ensure the best interests of the child	83

LEGAL REPRESENTATION AND DIVERSION	RESPONSES
i) Should a child who is diverted from the criminal justice system be represented?	Yes: 46 No: 72
ii) Other	3
iii) No response	22

Evaluation and recommendations

13.18 The right of a child to be assisted by his or her parent or guardian⁸ must be clearly separated from the right to legal representation. Assistance of a child by his or her parents or guardians is a very important protection for the child. This assistance needs to be available from

8 This protection is currently provided in section 73(3) of the Criminal Procedure Act 51 of 1977, which states: “An accused who is under the age of 18 years may be assisted by his parent or guardian at criminal proceedings”.

as soon after the arrest as possible⁹ and must continue throughout the proceedings. Accordingly, the project committee recommends the inclusion of provisions in the proposed legislation of provisions substantially similar to the present provisions concerning parental assistance. However, assistance by parents or guardians cannot be equated with, and is not a substitute for, legal representation.

The right to legal representation

13.19 The Constitution¹⁰ provides a right to every accused person to choose and be represented by a legal practitioner, and to have a legal practitioner assigned to him or her at state expense if “substantial injustice would otherwise occur.”¹¹ There is not yet case law to embellish the meaning of “substantial injustice” as it relates specifically to children and it is therefore necessary to ensure that the proposed child justice legislation gives a clearer explanation regarding the rights of the child to be legally represented.¹²

13.20 Article 12(2) of the Convention on the Rights of the Child refers only to the right to be heard in judicial and administrative proceedings and the right to be heard either directly or through a representative. This does not specify that the representative has to be a lawyer. However, 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”.

13.21 The project committee fully recognises the value of legal representation for children, as

9 See Chapter 7 for a discussion of the notification of parents and guardians and their involvement during the pre-trial stage.

10 At section 35(3)(f) and (g).

11 N Zaal and A Skelton in ‘Providing effective representation for children in a new constitutional era: Lawyers in the Criminal and Children’s Courts’ (1998) *SAJHR* (forthcoming) make the point that the right to legal representation in terms of section 35(3)(g) is “both limited in scope and dependent upon a rather vague, predictive ground - the ‘substantial injustice’ test which may prove somewhat difficult to delineate in practice.”

12 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.

part of the armoury of due process rights. This is of particular importance in those cases where children are deprived of their liberty during the pre-trial stage, and where children are to plead to or be tried for offences which are of a more serious nature.

How soon after arrest should legal representation be available?

13.22 According to section 73 of the Criminal Procedure Act any accused person is entitled to legal representation “as from the time of his arrest”.¹³ It may be argued that “deprivation of liberty” begins as soon as the child is apprehended and, for example, placed in a police vehicle, but the practical reality is that a lawyer will under ordinary circumstances not be involved at this point. The right to legal representation must, however, be explained at this stage.¹⁴

13.23 Desirable as it may be that children at risk of further detention be provided with a legal representative, in practice this may be difficult to achieve prior to the first appearance in court, especially where children require state provided legal representation. In the current system, it is generally only people who have privately paid lawyers who are able to gain access to their lawyers in the period prior to their first court appearance. What generally happens with regard to accused people who cannot afford their own lawyers, is that their first real opportunity to apply for legal aid representation will be on the day that they first appear in court.¹⁵ It is also likely that although an application for the appointment of a legal aid lawyer on the date of first appearance 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. This situation is exacerbated by the fact that the Legal Aid Board does not usually fund bail applications; thus, legal aid lawyers usually only become involved in preparation for the trial and the trial itself. If we are to achieve the requirements set by the Convention on the Rights of the Child - namely that children deprived of their liberty must have the right to “prompt access to legal and other appropriate assistance” - the current operation of the Legal Aid system of appointment of lawyers will have to change markedly *vis-a-vis* children.

13 See further C Wides ‘An arrested person’s right of access to his lawyer - a necessary restatement of the law’ (1989) *SALJ* at 48.

14 See par 7.29 above for a description or explanation of rights upon arrest.

15 NC Steytler *The Undefended Accused* Cape Town: Juta 1988 at 64.

13.24 The project committee has recommended that children should be advised of their right to legal representation by both the arresting officer and again by the probation officer at the time of the assessment, and that all endeavours should be made to procure such representation as soon as possible. However, if no lawyer has been appointed prior to the first appearance before the inquiry magistrate (which appearance must occur within 48 hours of the arrest where the child is in custody or 72 hours where an alternative process to arrest has been used), the inquiry magistrate should again explain the right to legal representation. After finalisation of the preliminary inquiry, if a legal representative has not yet been appointed, and if the child is to be remanded in custody or referred for the institution of charges in a court, the inquiry magistrate should assist the child to obtain legal representation through the Legal Aid Board.

Should children be represented when they are going to be diverted?

13.25 The comments on the Issue Paper indicated a variation of views on this subject. One position articulated is that the right of the child to be legally represented is absolute, and should not be derogated from under any circumstances. A more pragmatic view is 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.

13.26 There are due process risks involved in the process of diversion, particularly with regard to the fact that, in order to be considered for diversion, a child must acknowledge responsibility for the offence. This may open the door to the child being coerced to acknowledge responsibility merely to avoid prosecution. Some of the comments on the Issue Paper supported the idea that the only way to address these risks is to ensure that the child is legally represented before and at the time that the decision about diversion is to be made, which in some cases will occur at assessment or, in many others, at the preliminary inquiry.

13.27 However, the majority of respondents to the questionnaire holds the view that a child who is diverted from the criminal justice system does not need to be legally represented. Respondents were not required to give reasons to support their answers, but as the questionnaires were completed mainly by practitioners, the reasons are likely to be linked to the practical realities experienced in the field. In the proposed system described by this Discussion Paper, children will,

in less serious cases, be able to be diverted before having to appear in court, and the emphasis will be on getting the children back to their homes as quickly as possible. It is feasible to do this within a few hours of the arrest in the majority of less serious cases. As has been mentioned above, in practice it is difficult to access the services of a state-funded lawyer before the first appearance in court, and particularly difficult to make them available within a few hours of the arrest.

13.28 Whilst fully recognising the due process risks which the process of diversion entails, the project committee is of the view that these risks can be managed through means other than legal representation.¹⁶ What must first be understood is that diversion is conceptualised as an alternative to the adversarial model of a contest between the prosecution and the defence. It focusses on keeping children out of the criminal justice system, and using the family and community as a resource for supportive censure. This gives children a chance to escape the stigmatisation and possible brutalisation of the criminal justice system whilst at the same time teaching them about accountability for their actions. Although there may be inherent risks in the process of offering diversion, these risks must be weighed against the probable positive outcomes for the child.¹⁷ The project committee recommends that the proposed legislation should set out a number of principles to guide the process and practice of diversion.

13.29 As a further protection of children's due process rights, it is proposed that officials offering an explanation of diversion to children, and establishing whether or not they acknowledge responsibility for the crime, must be properly trained to undertake this task, and operate according to pre-set standards which are annunciated either in forms or regulations as well as in departmental training manuals. Understanding and protecting due process rights need not necessarily be the sole preserve of the qualified legal profession - properly trained para-legals, probation officers or social workers will, the project committee suggests, be able to offer children the opportunity of diversion without placing at risk their rights.¹⁸ As an additional protection it is recommended that the child's

16 The IMC *Interim Policy Recommendations* at 41 suggests that "minimum standards are therefore required to ensure that diversion operates without risks to due process or proportionality."

17 T Klauberg *Constitutional Implications of Diversionary Practices for Juvenile Offenders* Unpublished LLM thesis, University of the Western Cape, 1996.

18 A Skelton 'Diversion and Due Process' in L Munting (ed) *Perspectives on Diversion* Cape Town: NICRO National Office 1995 at 34.

admission of responsibility made at the time of the assessment, for the purposes of being diverted, may not be used against him or her in any future criminal case, and this should be provided for in the proposed draft Bill.

13.30 Bernadine Dohrn¹⁹ puts forward a further reason why legal representation need not be a pre-requisite 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. She concludes this point by saying: “The creation of a new system of juvenile justice offers an opportunity to develop, as a first line of response to most youthful offenses, a community-run system of accountability and recovery... . Without such an innovative approach to reduce the crushing case-loads endemic to most urban court systems, the due process guarantee of right to counsel becomes diluted, formal and ineffective.” If the provision of legal representation is made a requirement linked to diversion, the systemic advantages described by Dohrn may well be lost.

13.31 It is therefore recommended that legal representation should not be a pre-requisite for diversion or at the time of assessment, although the child or family who exercises their right to legal representation, should not be denied this benefit.

Legal representation at the preliminary inquiry

13.32 The project committee recommends that, if a child appears at the preliminary inquiry without legal representation, the right to legal representation should be explained to him or her. If the child wishes to have a lawyer present at the preliminary inquiry, this should be permitted and the preliminary inquiry should be postponed (for 48 hours) so that a lawyer can be appointed by the child’s family or by the Legal Aid Board.

Waiver of legal representation

13.33 The response to the Issue Paper indicated strong support for removing the possibility that a child waive legal representation when it is compulsory. Bernadine Dohrn gives us the benefit of retrospective insight into the issue of waiver in the United States. Dohrn points out that the majority of children who proceed in court without a lawyer do so because they have waived the right. She states that waiver by children has been widely criticised as unfair and coercive. She goes on to make the following recommendation:

Waiver of counsel by children is a major mechanism by which children in the US continue to appear in delinquency proceedings without the benefit of an attorney thirty years after *Gault*.²⁰ South African juvenile justice advocates may wish to consider prohibiting waiver by children in delinquency matters, or provide a presumption against the capacity to waive counsel, rebuttable only by a hearing in which the child is represented by an attorney.

13.34 The project committee is persuaded that the right to waiver of legal representation will 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. Other mechanisms have been built into the system to ensure that less serious cases are, for the most part, diverted out of the system. Thus the project committee does not envisage that these proposals would place an undue burden on the legal aid system.

13.35 In deciding whether or not to include the prohibition on waiver, the practical realities were considered. It is acknowledged that the long delays of trials are sometimes contributed to by the lawyers who have very “full” diaries and ask for long remand dates. Magistrates interviewed²¹ indicate that when pressure is put on attorneys to proceed without such delays many of them withdraw and it is then necessary to appoint a legal representative who must start from the beginning again, causing further delays. However, the appropriate approach to correcting this problem should be the development of a body of committed legal representatives who commit themselves to giving priority to cases involving children. This is discussed in the next section.

13.36 It is recommended therefore that after the finalisation of the preliminary inquiry, all

20 *In re Gault* 387 U.S. (1967) 1, 20 was a landmark case which established the entitlement of children to due process rights, including the right to counsel.

21 Mr S Collins and Mr N Mkhize, in Durban on 19 March 1998.

children remanded in custody, or in respect of whom charges are to be instituted in the child justice court or any other court, must be legally represented, save where the offence is a petty offence listed in a schedule to the proposed draft Bill.

13.37 It may be that lawyers will find themselves faced with having to represent children who do not wish to have their assistance and possibly refuse to give proper instructions to their appointed lawyer. The proposal therefore is that the child should have an opportunity to request a different lawyer if there is some impediment to the lawyer client relationship. The project committee recommends that if the child refuses to give instructions to a lawyer because he or she does not want a lawyer, the proposed legislation should provide that the 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 the project committee proposes balancing the best interests approach with the child's expressed wish not to benefit from legal representation.

A model for effective legal representation of children

13.38 It is not enough to simply ensure that children have lawyers. Lawyers representing children have a special responsibility and need to provide representation of a high standard.²² In order to ensure such a standard there is a need for some degree of specialisation. In New Zealand youth advocates are lawyers in private practice who are appointed by the Youth Court Judge. This has the advantage that, as the presiding officer in the Youth Court, the Judge is in an ideal position to know what qualities and expertise are needed. He or she is also in an ideal position to be able to "monitor" the performance of the youth advocates. However, it may be that this model might restrict the pool of possible youth advocates. In a report published in November 1997²³ there are recommendations for improvements to the selection and appointment of youth advocates in New Zealand. Suggestions included a published list of criteria for appointment and more transparency

22 Zaal and Skelton *op cit* 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 the authority."

23 A Morris, G Maxwell and P Shepard *Being a Youth Advocate: An analysis of their role and responsibilities* Institute of Criminology, Victoria University of Wellington 1997.

in the appointments process. This report also sets out draft guidelines for best practice, and outlines a training curriculum for youth advocates.

13.39 In the United States there are three different forms of legal representation for children. A public defender's office, court appointed or panel counsel, or contract lawyers (similar to the judicare system in South Africa). According to Bernadine Dohrn,²⁴ each method brings different strengths and weaknesses. Public Defenders have the advantage of being a group of lawyers who work together and gain expertise in representing children. The weaknesses tend to be huge case-loads, high turnover, under-funding and political pressure.²⁵ Court appointed attorneys do not share these problems, but studies have shown that they are often inexperienced and not specialised and lack independence from the judiciary who appoints them.²⁶ 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.²⁷

13.40 It is likely that in the South African child justice system we may need to continue to have a mixed system, as the provision of legal representation by the Legal Aid Board is currently varied. The Public Defender's officer is situated only in Johannesburg, although at a Department of Justice conference on legal representation held in Johannesburg in January 1998, there was considerable support for the extension of the office of the public defender to other areas. There are a number of Legal Aid Clinics staffed by candidate attorneys supervised by one or more attorneys. The candidate attorneys are, understandably, inexperienced. A requirement that they should be exposed to as wide a range of work whilst serving their articles also makes it difficult to encourage specialisation. The judicare system is the system which operates in the majority of courts in South Africa. Lawyers in private practice volunteer to have their names placed on a roster which is administered by the legal aid officer at the local magistrate's court. These lawyers are then paid,

24 *Ibid* 18.

25 Juvenile Justice Center *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* Washington: American Bar Association 1995 at 25.

26 J Knitzer and M Sobie *Law guardians in New York State: A study of the legal representation of children* New York 1984.

27 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.

upon claiming from the legal aid clinic, according to a set tariff. The problems with this system are that there are indications of cost cutting by lawyers and possible coercion of clients to plead guilty as this brings in a good fee for a relatively short time spent in court.²⁸ Attorneys in private practice are also not an easy group within which to foster specialisation.

13.41 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.

13.42 It is proposed that the draft Bill should provide the building blocks for the development of an effective model of legal representation²⁹ by setting the requirement of accreditation by the Legal Aid Board where legal representation is to be at state expense. In order to be accredited the lawyer should agree to abide by the principles and minimum standards for the legal representation of children in the child justice court.³⁰ Once accredited, the name of the lawyer concerned may be placed on the Legal Aid Roster and cases involving children will be referred to these lawyers. The Legal Aid Board and professional associations, together with non-governmental organisations, universities and other role-players, are encouraged to develop further guidelines or practice rules to supplement the proposed legislation, and relevant information about child justice law should regularly be conveyed to such role-players.

28 O Makhathini and A Skelton 'Report on the Lawyers for Human Rights Juvenile Justice Project' Pietermaritzburg, 1994 (unpublished). Children interviewed as part of the project claimed, with regard to lawyers acting on legal aid instructions, that "those lawyers make you plead guilty".

29 It should be noted, in this regard, that clause 82(5) - (9) of the proposed draft Bill in Annexure A represents a restatement of the 1996 amendments to section 8 of the Child Care Act 74 of 1983.

30 In the United States the Institute for Judicial Administration / American Bar Association Joint Commission on Juvenile Justice Standards published 20 volumes of standards in 1980. These include the role of counsel, practice requirements, ethical guidelines and training requirements.

14. CONFIDENTIALITY AND EXPUNGEMENT OF RECORDS

Protection of identity and privacy of proceedings

14.1 In view of the fact that the project committee found the provisions in the Criminal Procedure Act 1977 relating to the protection of the identity of accused persons under the age of 18 years and the confidentiality of criminal proceedings involving such persons to be satisfactory, the Issue Paper did not address these issues. However, since the inclusion of similar provisions in the proposed child justice legislation is contemplated, a brief discussion of the relevant provisions follows.

14.2 Section 153(4) of the Criminal Procedure Act provides that where an accused at criminal proceedings before any court is under the age of 18 years, no person, other than such accused, his legal representative and parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court. Section 153(5) contains a similar provision with regard to witnesses under the age of 18 years.

14.3 Section 154(3) of the Act prohibits any person from publishing any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness of such age.¹ The presiding officer may, however, authorise the publication of such information as he or she may deem fit if the publication thereof would be just and equitable and in the interest of any particular person.

14.4 In 1994 two similar provisions, echoing the existing legal position as embodied in the Criminal Procedure Act, were proposed by the Juvenile Justice Drafting Consultancy.² The provisions stipulated that the Consultancy's proposed Juvenile Court should be held *in camera* and that no information which reveals or may reveal the identity of an accused person under the age

1 See *S v Citizen Newspapers (Pty) Ltd en 'n Ander, S v Perskorporasie van Suid-Afrika Bpk & Another* 1980 (3) SA 889 (T), confirmed on appeal in 1981 4 SA 18 (A).

2 *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* Cape Town: Allies Printers 1994 at 48, 55 - 56.

of 18 years may be published. 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 the Juvenile Justice Drafting Consultancy contended that the provision in the Criminal Procedure Act has often been used to prevent individuals and organisations from obtaining access to information when seeking to assist children and to analyse or conduct research about the situation of children caught up in the criminal justice system.

14.5 A recent amendment to regulations under the Child Care Act 1983 provide for the introduction of a Child Protection Register in which details of a child exposed to ill-treatment or deliberate injury of which the Director-General of Welfare and Population Development had been notified, have to be entered.³ The regulations permit the Director-General to approve that the register may be examined or inspected for official and *bona fide* research purposes,⁴ 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.⁵

14.6 The Commission, in view of the above, recommends that the present provisions relating to the protection of the identity of accused persons under the age of 18 years and the privacy of criminal proceedings involving such children be incorporated in similar form in the proposed legislation and that an additional provision along the lines of the regulation referred to above be inserted so as not to prevent people or organisations from gaining access to information pertaining to children 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.⁶

3 Regulation 39B published in *Government Gazette* 18770 of 31 March 1998.

4 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.

5 Regulation 39B(1)(3) and (4).

6 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

Records

Confidentiality and status of records

14.7 Whilst it is clear that the privacy of the child and the confidentiality of the criminal proceedings is protected by law, the record of the child's previous conviction does not enjoy such confidentiality in our present system. If we accept that the purpose of the proposed legislation is to create a separate system that will administer justice to children who are alleged to have committed a crime, then certain issues around the confidentiality, disclosure and information sharing in respect of the records of the child emanating from the proposed child justice court need to be considered.

Current South African law

14.8 Section 271 of the Criminal Procedure Act, 51 of 1977, permits the prosecution to prove previous convictions against an accused person upon conviction. Such previous convictions may be taken into account by the court when imposing sentence in respect of the offence of which the accused has been convicted. Previous convictions may be highly relevant during the sentencing phase and it is for the court and not the prosecutor to decide what weight is to be attached to previous convictions. Section 303 *ter*, read with Schedule 5 of the repealed Criminal Procedure Act, 56 of 1955, acknowledged the principle that a previous conviction lapsed after a period of ten years has expired without a further conviction in between.⁷ Initially the new Criminal Procedure Act, 51 of 1977, did not contain a similar provision and in terms of the new Act the courts had a discretion whether or not to take previous convictions older than ten years into account and if so what weight was to be given to such previous convictions. However, in their

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.

7 Compare *S v Van der Poel* 1962 (2) SA 19 (CPD) and *S v Makhae en 'n Ander* 1974 (1) SA 578 (OPD).

discretion, the courts did not ignore the principle contained in the repealed section 303 *ter* and it continued to influence the decisions taken by the courts.⁸

14.9 Following the remarks in *S v Mqwathi*⁹ the Criminal Procedure Act was amended during 1991. In terms of the new provision it is now specified 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. Section 271A reads as follows:

Where a court has convicted a person of -

- (a) an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and-
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
- (b) any other offence than that for which the punishment may be a period of imprisonment exceeding six months without the option of a fine,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.

14.9 The lapsing of previous convictions in terms of this provision is automatic. In *S v Zondi*¹⁰ the court held that the offence fell away and that the provisions of the section did not merely mean that the offence was not to be taken into consideration when sentence was imposed for a later offence.

14.10 The Criminal Procedure Act does not provide for a definition of a previous conviction, but

8 See *S v Mqwathi* 1985 (4) SA 22 (TPD).

9 1985 (4) SA 22 (TPD).

10 1995 (1) SACR 18 (A).

our courts have defined the concept to mean a conviction by a court of law of a crime or offence.¹¹ A conviction will not be a previous conviction for the purposes of section 271 unless the accused has been brought before court, and convicted and sentenced by that court. The concept is furthermore interpreted restrictively and convictions for crimes committed after the crime for which the accused stands to be sentenced, can also be taken into account, in the sense that it is indicative of the character of the accused. It is not a misdirection to take into account, in aggravation of sentence, the fact that the accused had a few weeks prior to the commission of the crime for which the judge sentenced him committed rape, although, at the time of the commission of the second rape he had not yet been convicted of the first rape.¹² It is indicative of his character and therefore relevant. The State may prove all previous convictions, including those for crimes committed after the one for which the accused person stands to be sentenced.

14.11 The project committee of the Commission's investigation into sentencing, referred to earlier, identified a number of issues for investigation at a meeting during October 1996. One of these was the expungement of the criminal records of child offenders. The motivation for the exploration of this topic was the following: 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. It was argued that in order to protect the interests of child offenders in this regard legislation should be enacted to allow them to resume their lives without the stigma of a conviction. It was initially decided that the investigation into the expungement of criminal records of child offenders should form a separate investigation under the auspices of the project committee on sentencing. However, due to the fact that the project committee on the present investigation into a new child justice system contemplates a review of child justice legislation in its entirety, it was decided that the issue of the expungement of records of child offenders should be dealt with in the present investigation.

11 *S v Greveling* 1976 (2) SA 103 (OPD).

12 *S v S* 1988 (1) SA 120 (A).

Current debates on the retention and disclosure of the record of a child offender

14.12 In view of the fact that the topic was not raised in the Issue Paper, no comment on the retention and use of the records of a child was received. The project committee can therefore only put its own view forward and invites specific comment on this issue.

14.13 It is necessary to have a clear understanding of the meaning of the expungement of a convicted person's criminal record. In international parlance the term "expungement" generally refers to the destruction, obliteration or "purging"¹³ of an individual's criminal file by the relevant authorities in order to prevent employers, judges, police officers and others from obtaining information about a person's prior criminal activities conducted during that person's age of minority. It is important to note that there is a difference between expungement which involves the complete destruction of a person's record and expungement which merely "seals" the previous convictions. The latter option means that the record is not destroyed completely, leaving open the possibility of future access to the records.

14.14 The issue of expungement of criminal records is part of recent developments in South African law and has for the first time been dealt with extensively in the Promotion of National Unity and Reconciliation Act, 34 of 1995. The Act, however, applies to offences committed with a political objective only; it does not deal specifically with children but includes expungement for offences committed by adults and its operation is not limited to convictions for criminal offences.

14.15 Section 20(10) of the Act provides as follows:

Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

13 'Purging' is the term referred to in *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* US Department of Justice May 1997.

14.16 What is clear from section 20 is that once a person has been granted amnesty in respect of an act, omission or offence -

- (a) the offender can no longer be held "criminally liable" for such offence and no prosecution in respect thereof can be maintained against him or her;
- (b) such an offender can also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings can successfully be pursued against him or her;
- (c) if the wrongdoer is an employee of the state, the state is equally discharged from any civil liability in respect of any act or omission of such an employee, even if the relevant act or omission was effected during the course and within the scope of his or her employment; and
- (d) other bodies, organisations or persons are also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.

14.17 Section 20 of the Act, in particular section 20(7), also survived an attack on the grounds of unconstitutionality.¹⁴

14.18 It is clear from the outline given above that the principle of expungement of criminal records has found acceptance in South African law, at least with regard to offences which are associated with a political objective and committed in the course of the conflicts of the past.

14 *Azapo and Others v The President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC). The Constitutional Court held that amnesty for criminal liability was permitted by the epilogue to the Constitution because without it there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such amnesty, assisting in the process of reconciliation and reconstruction. Further, the Court noted that such amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It found that the amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments.

14.19 In the United States of America¹⁵ numerous statutes, both federal and state, allow for, and occasionally even mandate, the expungement of juvenile convictions when the juvenile reaches a certain age. While one federal law allows, upon application of the offender, expungement for first-time drug possession by a person under the age of twenty-one who receives not more than one year of probation, another only seals the criminal records of those who have been convicted of a federal juvenile offence. However, states permit requests to expunge or destroy juvenile records, under varying conditions and most instances of expungement occur under these state statutes.

14.20 All but two States govern by statute the sealing and expungement of juvenile records, and such laws are more likely to apply to juvenile court records than to other law enforcement records. In 21 States the law calls for the sealing of juvenile court records, in 24 States the law calls for the expungement of criminal records and in 40 States sealing and expungement is discretionary while it is mandatory in 8 States. Over the past few years legislation was amended in a number of States and in most instances the law was changed to make expungement or sealing of records more difficult.

14.21 Where records are to be sealed certain conditions usually have to be met, for example there must be a clean record period or no subsequent convictions or adjudications or no pending proceedings or attainment of a defined age or expiration of juvenile court jurisdiction or satisfactory outcome to the proceeding for which the record was created. Expungement guidelines are similar to sealing guidelines, but because expungement involves a certain degree of finality, court orders are almost always required. In most States access to sealed records are strictly regulated and the courts have made it clear that there is no constitutional right to demand the sealing or expungement of criminal records.

14.22 The questions which arise in the present investigation is whether legislation should make

15 The information referred to was reproduced from the following sources: TM Funk 'A mere youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records' (1996) *University of Michigan Journal of Law Reform*; US Department of Justice, Bureau of Justice Statistics *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* May 1997; Bureau of Justice Statistics *National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Justice Uses* May 1997.

provision for the concept of expungement in child justice law, whether the possibility of expungement of criminal records should be available to particular offenders (in this case to children) only, whether or not expungement should be recognised in respect of offences other than those dealt with in the Promotion of National Unity and Reconciliation Act 34 of 1995 and what kind of procedures should be provided for in legislation dealing with the issue. For example, it has to be considered whether expungement should be automatic or whether it should only be allowed on application to an institution or judicial officer appointed to consider such applications.

14.23 The Canadian Young Offenders Act sets out time periods, which after being realised, require that records not be disclosed or in the case of police records kept in a central repository, be destroyed. The Act also provides for the indefinite retention, in a special records repository, of police records of first and second degree murder offences as well as the longer retention (five additional years) of records of serious offences set out in a schedule to the Act.¹⁶

14.24 In certain jurisdictions¹⁷ the issue of the retention of the record of a child does not arise as the legislation expressly forbids the use of the words 'conviction' and 'sentence' when the court makes a finding of guilt in respect of a child and stipulates that the words 'proof of an offence against a child' and 'order' shall be substituted.

14.25 It seems that a case can be made for the proposition that a child who has committed an isolated non-violent criminal act should have his or her record cleared. The Juvenile Justice Drafting Consultancy, in 1994, proposed that criminal records should be kept of every young person convicted by that Consultancy's proposed Juvenile Court, but that the records should fall away upon the child offender's reaching the age of 18 years except in the case of murder, armed robbery, rape or violent sexual assault.¹⁸ It would appear that the Consultancy had in mind the automatic expungement of criminal records at a prescribed age, save in the case of serious specified offences.

16 *A Review of the Young Offenders Act and the Youth Justice System in Canada* Report of the Federal-Provincial-Territorial Task Force on Youth Justice, August 1996.

17 For example Uganda and Kenya.

18 *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* *supra* at 35.

14.26 The project committee also considered those arguments in favour of the retention of the record of a child under the age of 18 years. It has been argued that there is great value in retaining the court records of child offenders as it assists the court in making decisions in respect of any further sentences that the court may impose on the child.¹⁹ There is merit in this argument as the record would, over time, present a profile of the child, offences for which he or she was convicted, sentences served, programmes that he or she has undergone, probation officers' reports and other relevant information that would enable the court to make the most effective disposition in respect of the child's well-being. The manner in which this information would be used by a court depends entirely on the judicial officer hearing the matter and the use which he or she makes of the information. Another purpose of using the record is to "want to know something about the offender's record because we want to be more retributive, more punitive to somebody who did wrong previously and who did not heed the punishment...".²⁰ This line of thinking is contradictory to the restorative justice ideals upon which the new system is founded and must be strongly rejected.

14.27 The project committee has considered whether it would be desirable to give special protection to child offenders in creating, by statute, the possibility of expungement of criminal records. A criminal conviction, even for less serious offences, has such serious implications for the advancement, development and societal integration of a child offender that the advantages of retaining a criminal record, in terms of the protection of society, are outweighed by the advantages of enabling a child offender to start adulthood free from the stigma of a criminal conviction. The project committee is of the view that the expungement of records, though not specifically addressed by the international instruments relating to children, would be in conformity with the spirit underlying those instruments and in line with the special protection afforded to children world wide and also in our own Constitution. The project committee has followed the recommendations of the Juvenile Justice Drafting Consultancy in proposing that the criminal record that a person has in respect of crimes committed whilst under the age of eighteen years in respect of more serious crimes should remain as the safety of a community far outweighs the

19 J Scully *Juvenile justice issues and the role of juvenile records in decisionmaking: A prosecutor's viewpoint* National Conference on Juvenile Justice Records May 1997at 40.

20 Dr A Blumstein *Using juvenile records to predict criminal behaviour* National Conference on Juvenile Justice Records May 1997at 61.

privacy rights of a person convicted of a violent criminal offence. The project committee proposes the following list of offences in respect of which expungement of records will not be possible:

- (a) murder,
- (b) rape,
- (c) indecent assault involving the infliction of grievous bodily harm,
- (d) robbery with aggravating circumstances,
- (e) 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 R50 000,
- (f) any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament.

As far as the retention or expungement of criminal records for all other offences are concerned, the project committee recommends a number of options and invites comment in respect thereof.

Option 1

14.28 As the first option, the project committee presents a simple model for the automatic expungement of the records of a child. All that is required is the lapse of a period of five years following the expiration of the sentence, provided that during this time the person is not again convicted of any offence.

Option 2

14.29 The second option is one that draws a distinction between the seriousness of the offences with which the person has been convicted. A “clean” record is once again required in the stipulated period following expiration of the sentence. In cases where the child’s record reflects that a sentence which does not involve a residential element has been imposed, expungement could occur five years after completion of the sentence. In those cases where the sentence imposed included a residential element, the record could be expunged ten years after the completion of the sentence and upon application to the national committee for child justice. If that committee decides to grant

the application, it should 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.

14.30 The project committee draws attention to the fact that the provision requiring the “clean record” of the applicant in the stipulated period would probably involve the official considering the application for expungement conducting a search of the court records to ascertain whether there was any recidivism in respect of the applicant. Application to the national committee for child justice and the subsequent notification to the South African Criminal Bureau will increase the administrative functions of the committee and will impose a slightly higher standard than that required by section 271 of the Criminal Procedure Act for the expungement of records of adult offenders.

The project committee appreciates that there are numerous models and variations that are possible in respect of this issue and invites comment thereon.

Access to the record before expungement

14.32 Certain issues of confidentiality regarding the record of the child during the period of its retention arise. The crucial question turns on access to the record. Clearly, 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.

Comment is invited as to how this controversial issue can best be addressed.

BILL

To establish a comprehensive criminal justice system for children which aims to protect the rights of children entrenched in the Constitution and provided for in international instruments, and to ensure an appropriate and individual response towards each child accused of committing an offence while still holding him or her accountable for his or her actions.

INTRODUCED BY THE MINISTER OF JUSTICE

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 guardian who is not a parent; a social worker; a person appointed by the child justice committee described in section 91, or failing any of these persons, another responsible person aged eighteen years or above who is not a police officer or employed by the police;
 - (ii) “assessment” means a process of evaluation, by a probation officer, of a child; the child’s development and competencies; the child’s home or family circumstances; the nature and circumstances surrounding the alleged commission of an offence by the child and its impact upon the victim; the intention of the child to acknowledge responsibility for the alleged offence, and any other relevant circumstance or factors;
 - (iii) “child” means any person under the age of eighteen years, irrespective of nationality, citizenship or other status;
 - (iv) “child justice court” means the court described in section 53;
 - (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 for a community organisation or other compulsory work of value to the community, performed by a child with his or her consent and without payment;
- (vii) “correctional supervision” means a form of community correction provided for in Chapter 6 of the Correctional Services Bill 65 of 1998 and Chapter 28 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- (viii) “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 reform school;
- (ix) “diversion” means the referral of cases of children alleged to have committed offences away from the criminal justice system with or without conditions;
- (x) “diversion programme” means a programme which is intended to promote a child’s accountability and reintegration into society;
- (xi) “family group conference” means a meeting involving the child, his or her parents and family members, the victim of the offence and any other relevant party to find ways to restore the harm caused by the child’s offending;
- (xii) “family member” means a person who is related to a child biologically, by law or according to custom;
- (xiii) “inquiry magistrate” means the officer presiding in a preliminary inquiry;
- (xiv) “preliminary inquiry” means the compulsory procedure described in section 36 which takes place before charges are instituted in relation to an alleged offence, and which is held in all cases involving a child over the minimum age of prosecution, where diversion, conversion to a children’s court inquiry as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), or a decision to decline to charge the child has not yet been taken in accordance with Chapters 4 and 5 of this Act;
- (xv) “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 for tasks to be carried out in terms of this Act;
- (xvi) “recognisance” means a communication to the child by a police officer to appear at assessment on a specified date and at a specified place and time, or by a magistrate to appear at a preliminary inquiry or at a court;
- (xvii) “residential element of a sentence” means a sentence described in section 77(3) or a programme referred to in section 34 where part of that sentence or programme involves

- compulsory residence in a residential facility or a place other than the child's home;
- (xviii) "residential facility" as referred to in Chapters 8 and 10 means a reform school or a prison;
- (xix) "secure care facility" means a place of safety or part of a place of safety which has been designated in terms of the Child Care Act, 1983 (Act No. 74 of 1983) by the Minister of Welfare and Population Development as a facility suitable for the secure containment of children who are awaiting trial or awaiting sentencing and who have been accused of having committed serious offences.

Objectives

- 2.** The objectives of this Act are to -
- (a) promote the spirit of *ubuntu* in the child justice system;
- (b) promote the child's sense of dignity and worth;
- (c) protect the child's procedural rights;
- (d) reinforce the child's respect for human rights and fundamental freedoms of others by holding the child accountable for his or her actions and safe-guarding victims' interests and the interests of the community;
- (e) promote reconciliation, restitution and responsibility through the involvement of parents, families, victims and communities by means of a restorative justice approach;
- (f) provide for appropriate sentencing of children who have been convicted of offences;
- (g) promote co-operation between all Government Departments, other organisations and agencies involved in ensuring an effective child justice system.

Principles

- 3.** Any court or person exercising any power conferred by or under this Act or under section 20 of the Black Administration Act, 1927 (Act No. 38 of 1927) must be guided by the following principles:
- (a) All responses to children accused of crimes must be proportionate to both the circumstances of the child and the nature of the offence, and a child must not receive a sanction more severe than an adult would have received in the same circumstances.
- (b) Children should be dealt with in a manner which respects their cultural values and beliefs

and should be addressed in language they understand.

- (c) All child justice matters must be dealt with speedily.
- (d) A child must at all times be given an opportunity to express an opinion and to be involved in the making of decisions affecting him or her.
- (e) No child must be unfairly discriminated against and children must have equal access to available services.
- (f) No child must be deprived of his or her liberty unlawfully or arbitrarily.
- (g) Arrest, detention and imprisonment must be used only as a measure of last resort and for the shortest appropriate period of time.
- (h) No child should be detained in a residential facility for the sole purpose of gaining access to services.
- (i) Every child deprived of liberty must be separated from adults unless it is considered, for purposes of education and training, that it is in the child's best interests not to do so.
- (j) Every child must have the right to maintain contact with his or her family, and access to health care and social services.
- (k) Parents and families are responsible for the well-being and development of children who are subject to the provisions of this Act, and should be supported in this role.
- (l) Parents and families have the right to assist their children in proceedings under this Act and wherever reasonably possible to participate in decisions affecting such children.
- (m) No child lacking in family support or opportunities to engage in educational programmes or employment should, as a result of those factors alone, receive a sentence that is more severe than that of a child who has access to family support or educational or employment opportunities.
- (n) Consideration should be given to the age of a child in the determination of the nature, duration and conditions of any sentence imposed in terms of this Act.

CHAPTER 2: MINIMUM AGE OF PROSECUTION AND AGE DETERMINATION**Minimum age of prosecution**

[NOTE: The project committee puts forward a number of options for consideration. It should be borne in mind that certain additional provisions have been drafted to accommodate Options 2 and 3, and also that if the *doli capax/doli incapax* rule were to be retained, as provided for in Option 1, the notion of holding children accountable who are below the minimum age of prosecution would not be appropriate. Therefore, sections of the proposed Bill that refer to assessment and referral where children are below the minimum age of prosecution are unsuitable in relation to Option 1. For ease of reference, the following sections would be affected if Option 1 instead of Options 2 and 3 were to be adopted: sections 5, 6, 7(2)(b), 25(1)(f), 27(7), 29 and 48.

Moreover, depending on the particular option decided upon, further sections may need to be inserted in the Bill, such as new sections dealing with the procedure at the preliminary inquiry in relation to the proof and the determination of criminal capacity and the powers of the inquiry magistrate in this regard.]

Option 1

4. (1) A child below the age of seven (or ten) years may not be prosecuted for a criminal offence (in this Act referred to as the minimum age of prosecution).

(2) It must be presumed that a child between the ages of seven (or ten) and fourteen years lacks the capacity to appreciate the difference between right and wrong, and to act in accordance with that appreciation, unless the State, in terms of subsection (4), proves beyond reasonable doubt that such child as a matter of fact has that appreciation and is able to act in accordance with that appreciation.

(3) An inquiry to establish whether a child appreciates the difference between right and wrong and is able to act in accordance with that appreciation must be conducted by the inquiry magistrate.

(4) Evidence of the intellectual, emotional, psychological and social development of a child referred to in subsection (2) is relevant to any enquiry into whether such child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.

(5) The evidence referred to in subsection (4) must be supported by a report from a person with expertise in child development or child psychology, who must testify before an inquiry magistrate in person as to the content and findings of the report.

(6) The evidence referred to in subsection (4) may be challenged by any person present at the inquiry referred to in subsection (3), and any evidence in rebuttal may be adduced.

(7) No prosecution may be instituted against a child referred to in subsection (2) until the inquiry magistrate is satisfied that the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.

(8) Nothing in this section should be construed as derogating from the powers of any presiding officer to hear any evidence relating to the proof of criminal capacity of a child in a matter other than the inquiry referred to in subsection (3).

Option 2

4. (1) A child below the age of twelve (or fourteen) years may not be prosecuted for a criminal offence.

(2) For the purposes of this Act, a child below the minimum age of prosecution means a child under the age of twelve (or fourteen) years but ten years or older.

(3) A child below the minimum age of prosecution may be brought to a probation officer for assessment in terms of section 27.

Option 3

4. (1) A child below the age of twelve (or fourteen) years may not be prosecuted for a criminal offence: Provided that a child of ten years or older may be prosecuted for the following offences:

- (a) Murder,
- (b) rape,
- (c) indecent assault involving the infliction of grievous bodily harm,
- (d) robbery with aggravating circumstances,
- (e) 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 R50 000 or,
- (f) any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

(2) For the purposes of this Act, a child below the minimum age of prosecution means a child of under the age of twelve (or fourteen) years, but ten years or older, except where a child is prosecuted for the offences specified in subsection (1).

(3) A child below the minimum age of prosecution may be brought to a probation officer for assessment in terms of section 27.

Duties of police officers in relation to age assessment

5. If a police officer is uncertain about the exact age of a person suspected of having committed an offence, but has reason to believe that the age of such person would render that person subject to the protections of this Act, he or she must take such person to a probation officer for assessment of age within the periods prescribed in section 27 or, if a probation officer is not readily available, to a district surgeon: Provided that where a police officer has reason to believe that a child is below the minimum age of prosecution as described in section 4, he or she may not arrest the child.

Age assessment by probation officer

6. (1) The probation officer referred to in section 5 must receive, obtain or requisition any evidence relevant to assessment of age of a child or person.

(2) Upon receipt of the information referred to in subsection (1), the probation officer must make an assessment in respect of the age of the person brought before him or her and must for this purpose, consider the evidence received in the following order of cogency -

- (a) a valid birth certificate, identity document or passport;
- (b) any other form of registration of birth, identity or age acknowledged by the Department of Home Affairs;
- (c) an estimation of age made by the district surgeon;
- (d) a previous determination of age by a magistrate under this Act or under the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- (e) 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;
- (f) secondary documentary evidence, such as a baptismal certificate, school registration forms, school reports, and other evidence of a similar nature if relevant to establishing a probable age.

(3) The probation officer must make an assessment as to the probable age of the child or person and complete an age assessment in the manner prescribed in Form D.

(4) Where the probation officer, after making the assessment, concludes that a child or person referred to him or her by a police officer in terms of section 5 -

- (a) is over the age of eighteen years, that person is deemed to be an adult and is not subject to the provisions of this Act: Provided that contrary evidence may be placed before an inquiry magistrate or any other court in which the person appears, or
- (b) is below the minimum age of prosecution as referred to in section 4, that child is not subject to the provisions of this Act, save for the provisions of section 29: Provided that if the conclusion of the probation officer is placed in dispute by the Director of Public

Prosecutions having jurisdiction or by the child, the matter may be placed before an inquiry magistrate as referred to in section 8.

(5) Where the probation officer concludes that a child, by virtue of his or her age, is subject to the provisions of this Act, he or she must proceed with assessment of the child as referred to in Chapter 4 and his or her age assessment can form the basis of -

- (a) the decisions of the probation officer referred to in sections 29 and 30, and
- (b) the recommendations of the probation officer referred to in section 31.

(6) The probation officer must attach any relevant documentation to the age assessment form referred to in subsection (3).

(7) Where the probation officer is uncertain as to the probable age of a child or person, or where the age of a child or person is in dispute, the probation officer must cause the child or person to be taken to a district surgeon for assessment of age unless the child or person has already been taken to the district surgeon by the police in terms of section 5, in which case the provisions of section 8 apply.

Age estimation by district surgeon

7. (1) Any police officer or probation officer may refer a child to a district surgeon for an estimation of the age of the child.

(2) Where a district surgeon concludes that a child or person referred to him or her for estimation of age is -

- (a) over the age of eighteen years, that person is deemed to be an adult and is not subject to the provisions of this Act, or
- (b) below the minimum age of prosecution as referred to in section 4, that child must be referred back to the probation officer for further attention in terms of section 29, or
- (c) over the minimum age of prosecution as referred to in section 4 and under the age of eighteen years, that child must be referred back to the probation officer concerned, together with the record of the estimation of age for further procedures under this Act.

(3) Where a district surgeon concludes that he or she is unable to make an accurate assessment of a person's age and it is not clear as to whether that person is subject to the provisions of this Act, he or she must refer such person back to the probation officer concerned for purposes of determination of age by an inquiry magistrate.

Age determination to be effected at preliminary inquiry

8. (1) The probation officer to whom a child or person has been referred by a district surgeon in terms of the provisions of section 7(3), must cause that child or person to appear before an inquiry magistrate for purposes of the determination of the age of that child or person and must place such inquiry magistrate in possession of a completed age assessment in the manner prescribed in Form D together with any relevant documentation referred to in section 6(6).

(2) The inquiry magistrate referred to in subsection (1) must, on all the available evidence and with due regard to the provisions of subsection 6(2), make a determination as to the age of a child or person, which must be entered into the record as the age of the child, and must be considered to be his or her correct age until such time as any contrary evidence is placed before the court in which the inquiry magistrate presides or any other court.

(3) For the purposes of the determination referred to in subsection (2), an inquiry magistrate may require any documentation, evidence or statements relevant to age determination from any person, body or institution to be placed before him or her.

(4) If an inquiry magistrate determines that a person is over the age of eighteen 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).

(5) Where an inquiry magistrate makes a determination in terms of subsection (2), he or she must cause a record of the determination to be forwarded to the Department of Home Affairs for the purposes of the issuing of relevant identification documents.

(6) Where necessary, an inquiry magistrate may cause a subpoena to be served on any person to produce the documentation, evidence or statements referred to in subsection (3).

Age assessment and determination by officer presiding in criminal court

9. (1) Where a person appearing in a criminal court other than a preliminary inquiry or a child justice court alleges that he or she is below the age of eighteen years at any stage in a criminal trial before sentence, or where it appears to such court that that person may be below the age of eighteen years, the officer presiding in that court must cause that person to be referred to a probation officer for assessment of age in terms of section 6, which age assessment 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 8.

(3) If the age of the person referred to in subsection (1) is found to be below eighteen years and the trial has not yet commenced, the presiding officer concerned must transfer the matter to the inquiry magistrate 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 eighteen years and the trial has commenced, the proceedings must continue to be conducted before the presiding officer concerned, 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 it is in the best interests of the child.

CHAPTER 3: POLICE POWERS AND DUTIES

Meaning and purpose of arrest

10. (1) An arrest, for purposes of this Act, must be made by a police officer with or without a warrant and, unless the child to be arrested submits to custody, by touching his or her body or, if the circumstances so require, by forcibly confining his or her body.

(2) The effect of an arrest, for purposes of this Act, is that the child arrested is in lawful custody until lawfully discharged or released from such custody.

(3) The aim of arrest, for purposes of this Act, is to bring the child before a preliminary inquiry or for assessment in terms of section 27.

(4) An arrest must be made with due regard to the dignity and well-being of the child and, in making an arrest, minimum force must be used: Provided that where the use of minimum force is placed in dispute in civil matters, the onus of proving that minimum force was used rests on the person so alleging.

(5) If it is clear that a child cannot be arrested without the use of force, the arresting officer may use such force as may be reasonably necessary and proportional in the circumstances, to overcome any resistance or to prevent the child from fleeing.

(6) The officer arresting or attempting to arrest a child in terms of this section is justified in using deadly force that is intended or is likely to cause death or serious bodily harm to such child, only if he or she on reasonable grounds believes -

- (a) that the force is immediately necessary for the purposes of protecting himself or herself, any person lawfully assisting him or her or any other person from imminent death or serious bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent death or serious bodily harm if the arrest is delayed; or
- (c) that 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.

Powers of arrest and arrest by police officer without warrant

11. (1) A police officer may, subject to subsections (2), (3) and (4), without warrant arrest any child -

- (a) who commits or attempts to commit any offence in her or his presence;
- (b) whom he or she reasonably suspects of having committed an offence, including the offence of escaping from lawful custody;
- (c) who wilfully obstructs her or him in the execution of her or his duty;
- (d) who is reasonably suspected of having failed to observe any condition imposed in the passing of sentence or in postponing or suspending the operation of any sentence under this Act.

(2) Any police officer may arrest any child referred to in subsection (1) whose age is above the minimum age of prosecution as referred to in section 4 but below the age of eighteen years for the purposes of bringing that child for assessment by a probation officer as referred to in section 27.

(3) In deciding whether to effect an arrest, a police officer is obliged to consider whether an alternative method of securing the appearance of the child at assessment, as referred to in section 12, can be used, or whether an informal caution referred to in section 19(1) can be used.

(4) In respect of the offences referred to in Schedule 1 it must be presumed, unless there are sufficient reasons to the contrary, that an arrest should not be effected, and that alternatives to arrest set out in section 12 should be used unless there are compelling reasons not to do so.

Alternatives to arrest

- 12.** (1) Alternatives to arrest include the following -
- (a) requesting the child in language that the child understands to accompany the police officer to the place where assessment can be effected;
 - (b) written notification in the manner prescribed in Form A to the child and, if available, the parents or family of that child to appear for assessment at a place and on a date and at a time specified in the written notice;
 - (c) granting of a recognisance by a police officer at the place of arrest, to be noted in the pocket book of the police officer concerned, informing the child to appear at assessment at a specified date, place and time: Provided that the police officer must as soon as is reasonably possible inform the probation officer in the manner prescribed on Form E2 of the granting of such recognisance;
 - (d) accompanying the child to his or her home, where a written notice referred to in paragraph (b) can be given to the child and his or her parents or family; and
 - (e) opening a docket for the purposes of consideration by the Director of Public Prosecutions as to whether the matter should be set down for the holding of a preliminary inquiry or whether the child should be charged.

(2) Further to the provisions of subsection (1), a child may be summoned to appear at assessment at a place and on a date and at a time specified in the summons as set out in Form B, upon application by a prosecutor to the clerk of the court.

(3) Where an alternative to arrest as referred to in subsection (1) has been employed, a child must be required to appear for assessment within 72 hours of such alternative being employed, or in the case of the issuing of a summons, within 72 hours of the summons being served on the child.

Arrest by private person without warrant

13. (1) Any private person may without warrant arrest any child whom he or she reasonably believes to be above the minimum age of prosecution as referred to in section 4, and

below the age of eighteen years -

- (a) who commits or attempts to commit in his or her presence or whom he or she reasonably suspects of having committed an offence other than an offence referred to in Schedule 1;
- (b) whom he or she reasonably believes to have committed any offence and to be escaping from and being freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
- (c) whom he or she is by any law authorised to arrest without warrant in respect of any offence specified in that law.

(2) Minimum force must be used in effecting an arrest in terms of this section: Provided that where the use of minimum force is placed in dispute in civil matters, the onus of proving that minimum force was used rests on the person so alleging.

(3) The provisions of section 10(5) and (6) relating to the use of force and deadly force, with the changes required by the context, apply to this section.

(4) Any private person who has effected an arrest as referred to in this section must hand the child concerned over to the police forthwith.

Warrant of arrest may be issued by magistrate or justice

14. (1) Any inquiry magistrate or officer presiding in a child justice court may issue a warrant for the arrest of any child presumed to be below the age of eighteen years and above the minimum age of prosecution as referred to in section 4 upon the written application of an Attorney-General, a public prosecutor or a commissioned police officer which -

- (a) sets out the offence alleged to have been committed;
- (b) alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the child in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) states that from information taken upon oath there is a reasonable suspicion that the child in respect of whom the warrant is applied has committed the alleged offence.

(2) A warrant of arrest issued under this section must direct that the person described in the warrant must be arrested by a police officer in respect of the offence set out in the warrant and that he or she be brought before a probation officer for assessment as referred to in section 27.

(3) A warrant of arrest may be issued on any day and must remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.

(4) A warrant of arrest referred to in this Chapter may be suspended by any inquiry magistrate or officer presiding in a child justice court, and the officer required to execute such warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to in section 12.

Duties of police officer upon arrest with or without warrant

15. (1) Where an arrest of a child above the minimum age of prosecution as referred to in section 4 but below the age of eighteen years has taken place, the arresting officer must -

- (a) if the child is in detention in police custody as referred to in section 27(1), bring such child to the probation officer in whose area of jurisdiction the arrest of the child has taken place promptly for assessment, but no later than 12 hours after arrest: Provided that if by the expiry of this period a probation officer cannot practicably be traced, the arresting officer must request the prosecutor to set the matter down for the holding of a preliminary inquiry as soon as possible.
- (b) inform the child in language that the child understands of the nature of the allegation against him or her; and
- (c) inform the child in language that the child understands of the following rights -
 - (i) the right to remain silent;

- (ii) the right to have the child's parents or an appropriate adult contacted;
- (iii) the right to have a person referred to in subparagraph (ii) or a legal representative present during the noting of a confession, admission, pointing out or identification parade as referred to in sections 37, 217 and 218 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- (iv) the right to choose and to be represented by a legal practitioner at his or her own cost; and
- (v) the right to obtain legal representation as referred to in section 35 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969) and Chapter 9 of this Act.

(2) Where an alternative to arrest as set out in section 12 has been used, the police officer must explain the rights set out in paragraph (c) of subsection (1) to the child.

(3) Where an arrest has been effected, the arresting officer must provide an inquiry magistrate with a written report in the manner prescribed in Form C1 within 48 hours, giving reasons why alternatives to arrest as described in section 12 could not be employed.

Duty of police to inform probation officer

16. (1) The arresting officer must forthwith inform the probation officer in whose area of jurisdiction the arrest of a person under the age of eighteen has taken place, of such arrest in the manner prescribed in Form E1, or at the latest within 12 hours.

(2) If an alternative method of securing the attendance of the child at assessment as described in section 12 has been used, the police officer concerned must inform the probation officer in whose area the assessment will take place in the manner prescribed in Form E2 as soon as possible and no later than 72 hours after the procedures described in the said section 12 have been effected.

Duty of police to notify parents or legal guardian, family member or appropriate adult

17. (1) Where a child has been arrested, the police officer who has performed the arrest must notify the child's parents, legal guardian, or a family member forthwith of the arrest, and give the relevant person or persons a written notice in the manner prescribed in Form A requiring such person to attend an assessment at a specified time and place.

(2) If one of the persons mentioned in subsection (1) is not available, or cannot be traced, the arresting officer must request the child to identify another appropriate adult, and if such adult is identified, the arresting officer must request that person to attend the assessment at a specified time and place.

(3) Where an alternative method to arrest as referred to in section 12 has been effected, the person employing such alternative must as soon as possible thereafter notify the child's parents, legal guardian or a family member of the use of the procedure described in the said section 12, and give the relevant person written notice in a manner prescribed in Form A requiring the person to attend the assessment at a specified time, place and date.

(4) If one of the persons mentioned in subsection (3) is not available, or cannot be traced, the person employing an alternative method to arrest must request the child to identify another appropriate adult, and if such adult is identified, the arresting officer must request that person to attend the assessment at a specified time and place.

Duties of police upon request

18. An arresting officer or another police officer may be required by a probation officer, as a matter of urgency, to -

- (a) notify a specified person of the appearance of a child under the age of eighteen years at assessment;
- (b) give the relevant person a written notice in the manner prescribed in Form A to attend the assessment at a specified time and place;
- (c) obtain documents relevant to proof of age from a specified address or place; or

- (d) transport a specified person or persons to the place where assessment is to be effected.

Cautioning by police

19. (1) A police officer may apply an informal caution instead of arresting a child or effecting an alternative arrest in accordance with regulations to be made by the Commissioner of Police.

(2) A formal caution, where recommended by a probation officer, prosecutor or an inquiry magistrate, may be administered by a police officer of the rank of superintendent or above or a station commander to a child in the presence of his or her parent or an appropriate adult.

(3) A formal caution must be administered in private, whether in a police station or elsewhere, in the presence of a probation officer, if available, and the persons mentioned in subsection (2).

(4) A formal caution -

- (a) without conditions must be administered in the manner prescribed in Form F1;
- (b) with conditions must be administered in the manner prescribed in Form F2.

(5) The police officer referred to in subsection (2) must cause a record of the caution to be kept at the applicable police station and must forward a record of the caution to the Provincial Commissioner of Police, who must cause a register of cautions to be kept.

(6) The register referred to in subsection (5) may be made available to -

- (a) any member of the South African Police Service;
- (b) any probation officer;
- (c) any inquiry magistrate;
- (d) a child justice committee referred to in section 91;
- (e) the Office for Child Justice referred to in section 96;

- (f) the national committee for child justice referred to in section 99; and
- (g) any person for bona fide research purposes with the permission of the Provincial Commissioner referred to in subsection (5).

(7) The record of a formal caution referred to in subsection (5) must be expunged after a period of two years from the date on which the caution was administered.

Pre-trial procedures and requirement that parent or an appropriate adult be present

20. (1) No confession, admission or pointing out by a child as referred to in sections 217 and 218 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) may be admitted as evidence in a child justice court or other criminal court acting in terms of the provisions of this Act where such confession, admission or pointing out was made to a police officer or magistrate unless a legal representative, parent of such child or an appropriate adult was present at the time of such procedure.

(2) No evidence obtained at an identity parade as referred to in section 37(1)(b) of the Criminal Procedure Act, 1977, may be admitted as evidence in a child justice court or other criminal court acting in terms of the provisions of this Act unless a legal representative, parent of such child or an appropriate adult was present at the time of such procedure.

(3) Fingerprinting of children should be regarded as a measure which should not be resorted to before the finalisation of a preliminary inquiry: Provided that the fingerprints of a person under the age of eighteen years may be taken during the period after arrest and before the appearance of the child before a preliminary inquiry if -

- (a) it is essential for the investigation of the case;
- (b) it is required for the purposes of establishing the age of the person in question; or
- (c) it is 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.

Detention in police custody before appearance at assessment

21. (1) Detention of a child in police custody, whether in a police cell, police vehicle, lock-up or other place must be used as a measure of last resort and for the shortest possible period of time.

(2) The station commander of each police station must cause a separate cell register to be kept, in which details regarding the detention in police cells of all persons under the age of eighteen years must be recorded.

(3) The register referred to in subsection (2) 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 any other person authorised by the station commander to examine the register.

(4) Whilst in detention in police custody, a child must -

- (a) be held in conditions and treated in a manner that takes account of his or her age;
- (b) be held separately from adults and boys must be held separately from girls;
- (c) be held, as far as possible, in conditions which will minimise the risk of harm to that child, including the risk of harm from other children;
- (d) have the right -
 - (i) to adequate food;
 - (ii) to medical treatment when required;
 - (iii) of access to reasonable visits by parents, guardians, legal representatives, registered social workers, probation officers, health workers, members of the child justice committee and religious counsellors;
 - (iv) of access to reading material;
 - (v) to adequate exercise; and
 - (vi) of access to adequate clothing, including sufficient blankets and bedding.

(5) No child may be held in detention in police custody for longer than 48 hours prior to appearing before an inquiry magistrate.

(6) A child may only be remanded to detention in police custody in terms of section 44 for a period of 48 hours and for one further period of a maximum of 48 hours.

(7) No police officer may admit, or allow a child to remain, in detention in police custody after the expiry of the periods of time set out in subsections (5) and (6), and any police officer admitting or allowing such child to remain in police custody for longer than the said periods of time, is guilty of an offence and liable upon conviction to the penalty as set out in section 103.

(8) Where a child in police custody makes a complaint regarding injury sustained by that child during arrest or whilst in detention, the police officer to whom such complaint is made, must report the complaint to the station commander who must cause the child to be taken to the district surgeon for examination and treatment and attach the report of the district surgeon to the police docket relating to the child concerned.

(9) A police officer or station commander who fails to comply with the provisions of subsection (8) is guilty of an offence and liable upon conviction to the penalty set out in section 103.

Powers of police to release a child from detention before preliminary inquiry

22. (1) Consideration should be given, in respect of a child accused of any offence, to the release of such child from detention in police custody.

(2) In respect of the offences referred to in Schedule 1, a child must, unless there are substantial reasons not to do so, be released from detention in police custody by a police officer on own recognisances, or into the care of a parent or an appropriate adult, on one or more appropriate conditions as set out in subsection (4).

(3) A child arrested for an offence referred to in Schedule 2, may be released from police custody by a police officer, in consultation with the Director of Public Prosecutions, on one or more appropriate conditions as set out in the remainder of this section.

(4) Conditions of release of a child for the purposes of this section include the following -

- (a) the obligation to appear at a specified time and place for assessment no later than 48 hours after the arrest;
- (b) the obligation to report periodically to a specified person or place;
- (c) the prohibition not to interfere with witnesses; to tamper with evidence or to associate with a person, persons or group of specified people; and
- (d) the obligation that the child has to return to his or her home or to a specified address.

(5) Where a child has not been released from detention in police custody prior to the holding of a preliminary inquiry, the arresting officer must provide the relevant inquiry magistrate with a written report in the manner prescribed in Form C2 giving reasons why such child could not be released from detention in police custody.

(6) The Commissioner of Police must make regulations relating to -

- (a) the provision of transport costs and transport assistance in respect of a child who is released from police custody on own recognisances;
- (b) the recovery of transport costs from a child to whom such costs had been provided if it appears that such child or his or her family is able to pay for such costs.

Child not charged until matter entered on roll of court

23. For the purposes of proceedings under this Act, a child is deemed not to be charged until, after the finalisation of the preliminary inquiry, the prosecutor enters the matter on the roll of a child justice court or on the roll of any other court acting in terms of the provisions of this Act and formally puts the charges to the child.

Applicability of provisions of the Criminal Procedure Act, 1977

24. (1) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to -

- (a) search warrants, entering of premises, seizure, forfeiture and disposal of property

- connected with offences as set out in Chapter 2 of that Act;
- (b) ascertainment of bodily features of accused as set out in Chapter 3 of that Act, subject to the provisions of section 20 of this Act;
 - (c) arrest as set out in Chapter 5 of that Act, save for sections 39, 40, 42, 43, 49 and 52, and subject to the provisions of sections 10, 11, 12, 13, 14, 15 and 19 of this Act,
- with the changes required by the context, are applicable to the provisions of this Chapter.

(2) In the event of any inconsistency between the provisions of this Act and the applicable provisions of the Criminal Procedure Act, 1977, as referred to in subsection (1), the provisions of this Act prevail.

CHAPTER 4: ASSESSMENT AND REFERRAL

Purposes of assessment

- 25.** (1) The purposes of assessment are to -
- (a) establish the probable age of the child;
 - (b) establish the prospects of the child being able to be diverted by a probation officer in terms of sections 30(1)(c) or 31(3)(a);
 - (c) establish the prospects for diversion by a prosecutor or an inquiry magistrate;
 - (d) establish whether the child may be referred to a children's court inquiry, as determined in section 13 of the Child Care Act, 1983 (Act No. 74 of 1983), in terms of the factors set out in section 51(2);
 - (e) provide information to support recommendations to the prosecutor and the inquiry magistrate regarding release of the child into the care of a parent or an appropriate adult, or placement in a residential facility; and
 - (f) in the case of children below the minimum age of prosecution, to establish what measures, if any, need to be taken.

(2) Assessment is effected by a probation officer and may take place at a magistrate's court, the offices of the Department of Welfare, a private house, dwelling or building, a police station or any other suitable place identified by the probation officer concerned.

(3) No person other than the following is entitled to attend assessment of a child as referred to in this section -

- (a) the child in respect of whom the assessment is conducted;
- (b) the child's parent or an appropriate adult;
- (c) the prosecutor in whose magisterial district the assessment is being conducted;
- (d) a legal representative;
- (e) the police officer responsible for arresting the child; and
- (f) any person whose presence is necessary or desirable for the completion of the assessment process.

Parent or appropriate adult to attend assessment

26. (1) Any parent or an appropriate adult who has been issued with a written notice in terms of section 12(1)(b) or a summons in terms of section 12(2) to appear at an assessment of a child, must attend such assessment unless exempted from the obligation to do so in terms of subsection (3).

(2) If a person referred to in subsection (1) has not been notified to attend the assessment, the probation officer concerned may at any time before such assessment direct a police officer to issue a written notice to such person to appear at an assessment in the manner set out in Form A.

(3) A person who has been notified in terms of subsection (1) or (2), may apply to the probation officer concerned for exemption from the obligation to attend the assessment in question, and if such probation officer exempts such person, he or she must do so in writing.

(4) A person who has been notified in terms of subsection (1) or (2) and who has not been exempted from the obligation to attend the assessment in terms of subsection (3) and who fails to attend the assessment in question, is guilty of an offence and liable upon conviction to the penalty set out in section 103.

Duties of probation officer in relation to assessment

27. (1) A probation officer must assess all children -

- (a) who have been arrested and who remain in detention in police custody within 12 hours of such arrest, subject to the proviso contained in section 15(1)(a);
- (b) who have been arrested and released from detention in police custody in terms of section 22, within 48 hours of such arrest;
- (c) in respect of whom an alternative method of securing attendance at assessment has been effected in terms of section 12, within 72 hours of such alternative having been employed.

(2) The probation officer must make every effort to locate a parent or an appropriate adult for the purposes of concluding the assessment process of the child if such person is not already present: Provided that where all reasonable efforts to locate such person or persons have failed, the probation officer may conclude the assessment in the absence of such person or persons.

(3) The probation officer must explain to the child in language that the child understands -

- (a) the purposes of the assessment; and
- (b) that he or she has the right to -
 - (i) remain silent;
 - (ii) have his or her parent or an appropriate adult contacted;
 - (iii) have a person referred to in par (ii) or a legal representative present during the noting by a police officer or a magistrate of a confession, admission, pointing out or during an identification parade as referred to in sections 37, 217 and 218 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
 - (iv) choose and to be represented by a legal practitioner at his or her own cost, and
 - (v) obtain legal representation as referred to in section 35 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969) and Chapter 9 of this Act.

(4) The probation officer must interview the child, the child's parents or an

appropriate adult in order to effect the assessment referred to in section 27.

(5) The probation officer may contact or consult with any other person who has any information relevant to the assessment of the child.

(6) The probation officer must obtain evidence relevant to the age assessment referred to in section 6.

(7) Unless the child is a child below the minimum age of prosecution as referred to in section 4 and unless a decision is taken by the probation officer in terms of section 30(1), the probation officer must complete a report in the manner prescribed in Form H in which recommendations are made concerning -

- (a) the prospects of diversion;
- (b) the possible release of the child into the care of a parent or an appropriate adult; or
- (c) the placement, where applicable, of a child in a place of safety, secure care facility or residential facility.

(8) Transfer or conversion of a matter to the children's court must be considered by the probation officer as provided for in section 51(2).

(9) If the probation officer recommends that the matter be transferred to a children's court, the report must reflect this recommendation, any reasons referred to in section 51(3) as well as recommendations as to the temporary placement of the child pending the opening of the children's court inquiry in terms of section 12 of the Child Care Act, 1983 (Act No. 74 of 1983).

(10) The report mentioned in subsection (7) must be submitted forthwith to the prosecutor for the opening of a preliminary inquiry.

Powers of probation officer in relation to obtaining of relevant evidence or securing attendance of relevant persons

28. A probation officer may, by issuing a requisition notice as set out in Form G, require the arresting officer or any other police officer to -

- (a) bring a child forthwith from police custody for assessment;
- (b) obtain documentation relevant to proof of a child's age from a specified place or a specified person;
- (c) notify a specified parent or an appropriate adult to appear at an assessment in the manner prescribed in Form A; and
- (d) transport or ensure the provision of transport in order to secure the attendance of a parent of the child or an appropriate adult at the assessment.

Powers of probation officer in relation to children below the minimum age of prosecution

Note: this section will apply only if either of Option 2 or 3 under section 4 is ultimately selected.

29. (1) After assessment in terms of section 25(1)(a), (d) and (f) of a child below the minimum age of prosecution as referred to in section 4, the probation officer concerned may-

- (a) refer the child to the children's court on grounds set out in section 51(2);
- (b) refer the child or the family of the child for counselling or therapeutic intervention;
- (c) arrange the provision of support services to the child or family of the child;
- (d) arrange a conference, which must be attended by the child, his or her parents or an appropriate adult, and which may be attended by the alleged victim, the arresting officer and any other person likely to be able to provide information material to 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 assist such probation officer to -

- (a) establish more fully the circumstances surrounding the allegations against the child;
- (b) formulate a written plan appropriate to the child and relevant to the circumstances; or
- (c) make an order in terms of this section.

- (3) The written plan referred to in subsection 2(b) must -
- (a) specify the objectives to be achieved for the child concerned and the period within which those objectives should be achieved;
 - (b) contain details of the services and assistance to be provided for the child and for any parent or an appropriate adult;
 - (c) specify the persons or organisations who will provide such services and assistance;
 - (d) state the responsibilities of the child and of such child's parent or an appropriate adult ;
 - (e) state personal objectives for the child and for such child's parent or an appropriate adult; and
 - (f) contain such other matters relating to the education, employment, recreation and welfare of the child as are relevant.

(4) The probation officer must record the outcome of the assessment and the decision made or order given in terms of subsection (1), as well as the reasons for such decision or order.

(5) The record referred to in subsection (4) must be submitted within a month of the decision or order to the child justice committee referred to in section 91 for consideration.

Powers of probation officer in respect of children above the minimum age of prosecution alleged to have committed offences referred to in Schedule 1

30. (1) After assessment in terms of section 25(1)(a), (b), (d) and (e) of a child above the minimum age of prosecution as referred to in section 4, the probation officer concerned may, where the child is alleged to have committed an offence referred to in Schedule 1 -

- (a) refer the child to the children's court on one or more of the grounds set out in section 51(2);
- (b) take no further action; or
- (c) if the child acknowledges responsibility for the alleged offence, refer the child to a diversion option referred to in section 34(2) or (3),

where there are no factors militating against such decision.

(2) A decision taken by a probation officer in terms of subsection (1) may be effected in his or her sole discretion.

(3) The probation officer concerned must record any decision taken in terms of subsection (1), as well as the reasons for such decision.

(4) The record referred to in subsection (3) must be submitted within a month of the decision to the child justice committee referred to in section 91 for consideration.

(5) Instead of the decisions referred to in subsection (1), the probation officer may recommend that the matter be referred to the prosecutor for the opening of a preliminary inquiry in which case the probation officer must complete an age assessment and an assessment report in the manner prescribed in Forms D and H respectively.

Powers of probation officer in respect of children above the minimum age of prosecution alleged to have committed offences not referred to in Schedule 1

31. (1) After assessment in terms of section 25(1)(a), (c), (d) and (e) of a child above the minimum age of prosecution as referred to in section 4, the probation officer concerned must, where the child is alleged to have committed an offence not referred to in Schedule 1, complete an age assessment and an assessment report in the manner prescribed in Forms D and H, which, together with supporting information, must be submitted to the prosecutor for the opening of a preliminary inquiry forthwith.

(2) If it appears to the probation officer that the child concerned does not intend to accept responsibility for the alleged offence, that fact must be indicated in the assessment report referred to in subsection (1).

(3) After an assessment as referred to in subsection (1), the probation officer may recommend -

(a) the diversion of the child to a specified process, programme or appropriate alternative order mentioned in section 34;

- (b) that no further action be taken in respect of the alleged offence;
- (c) that the matter be transferred to the children's court on one or more of the grounds set out in section 51(2);
- (d) that the matter not be diverted and be referred to the prosecutor;
- (e) that the child be released to a parent or an appropriate adult, or on his or her own recognisance;
- (f) an appropriate placement, including placement in the care of an appropriate adult; or
- (g) detention in a place of safety, secure care facility or prison with due regard to the circumstances referred to in section 46.

CHAPTER 5: DIVERSION

Purposes of and minimum standards applicable to diversion and diversion programmes

- 32.** (1) The purposes of diversion in terms of this Act are to -
- (a) encourage the child to be accountable for the harm caused by him or her;
 - (b) promote an individualised response to the harm caused 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;
 - (d) provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such harm;
 - (e) encourage restitution of a specified object or symbolic restitution;
 - (f) promote reconciliation between the child and the person or persons or community affected by the harm caused; and
 - (g) prevent stigmatisation of a child which may occur through contact with the criminal justice system.

(2) In making a decision whether to refer a child for diversion, consideration must be given to whether, should this be in the best interests of the child, no action should be taken.

(3) No child must be unfairly discriminated against on the basis of race, gender,

sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion programme, process or option and all children must have equal access to diversion options.

(4) Corporal punishment and public humiliation may not be elements of diversion.

(5) A child under the age of thirteen years must not be required or permitted to perform community service or other work as an element of diversion.

(6) Diversion programmes 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;
- (d) not interfere with a child's schooling;
- (e) where possible and appropriate, impart useful skills;
- (f) where possible and appropriate, include a restorative justice element which aims to heal relationships, including the relationship with the victim;
- (g) where possible and appropriate, 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
- (h) where possible and appropriate, be presented in a location reasonably accessible to children, and children who do not have the means to afford transport in order to attend a selected diversion programme, should be provided with the means to do so.

(7) No child must be required to pay for admission to a diversion programme.

Diversion only to occur in certain circumstances

33. (1) A child suspected of having committed an offence may only be referred for diversion by a probation officer, a prosecutor, an inquiry magistrate or an officer presiding in a

child justice court as referred to in this Act, if -

- (a) such child acknowledges responsibility for the alleged offence and consents to diversion;
- (b) there are reasons to believe that there is sufficient evidence for the matter to proceed to trial; and
- (c) there is no risk of infringement of the child's procedural rights.

(2) Where circumstances as referred to in subsection (1) exist, diversion must be considered as a matter of first resort.

Diversion options

34. (1) A probation officer, prosecutor, inquiry magistrate or officer presiding in a child justice court as referred to in this Act, in selecting a diversion option as contained in the remainder of this section, must ensure that -

- (a) due regard is given to a child's cultural, religious and linguistic context, the child's community of origin and the child's age;
- (b) the option recommended or selected is proportionate to the circumstances of the child, the nature of the offence, and the interests of society; and
- (c) due regard is had to the various levels of diversion options.

(2) Diversion options that may be applied in respect of a child in the first instance are not limited to but may include -

- (a) an oral or written apology to a specified person or persons or institution;
- (b) referral to a commissioned officer of the police for purposes of the administration of a police caution without conditions in terms of section 19(4)(a) in the manner prescribed in Form F1;
- (c) referral to a commissioned officer of the police for purposes of the administration of a police caution with conditions in terms of section 19(4)(b) in the manner prescribed in Form F2;
- (d) placement under a supervision and guidance order as prescribed in Form K1 for a period not exceeding three months;
- (e) placement under a reporting order as prescribed in Form K2 for a period not exceeding

- three months;
- (f) issuing of a compulsory school attendance order as prescribed in Form K3 for a period not exceeding three months;
 - (g) issuing of a family time order as prescribed in Form K4 for a period not exceeding three months;
 - (h) issuing of a positive peer association order as prescribed in Form K5 in respect of a specified person or persons or a specified place for a period not exceeding three months;
 - (i) issuing of a good behaviour order containing one or more of the conditions set out in Form K6;
 - (j) issuing of an order prohibiting the child from visiting, frequenting or appearing at a specified place as prescribed in Form K7;
 - (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 eight weeks;
 - (l) symbolic restitution in respect of a specified object 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.

(3) Diversion options that may be applied in respect of a child in the second instance are not limited to but may include -

- (a) placement under a supervision and guidance order as prescribed in Form K1 for a period longer than three months but not exceeding six months;
- (b) placement under a reporting order as prescribed in Form K2 for a period longer than three months but not exceeding six months;
- (c) issuing of a compulsory school attendance order as prescribed in Form K3 for a period longer than three months but not exceeding six months;
- (d) issuing of a family time order as prescribed in Form K4 for a period longer than three months but not exceeding six months;
- (e) issuing of a positive peer association order as prescribed in Form K5 in respect of a specified person or persons or a specified place for a period longer than three months but not exceeding six months;

- (f) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding five hours each week, for a maximum of 12 weeks;
- (g) 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 91 for a maximum period of 25 hours, and to be completed within a maximum period of three months;
- (h) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of R300 to a specified person, persons, group or institution where the child or his or her family is able to afford this;
- (i) referral to appear at a victim-offender mediation, a family group conference or other restorative dispute resolution process at a specified time, on a specified date and at a specified place; and
- (j) one or more of the options set out in paragraphs (a) to (i) of this subsection or in paragraphs (a), (i) or (l) of subsection (2) used in combination, with due regard to the age of the child concerned, the circumstances of the child and his or her family, and the nature of the offence.

(4) Diversion options that may be applied in respect of a child in the third instance are not limited to but may include -

- (a) placement under a supervision and guidance order as set out in Form K1 for a period longer than six months but not exceeding one year in duration;
- (b) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period of no more than 20 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 and control of an organisation or institution, or specified person or group identified by the probation officer effecting the assessment, or by the child justice committee referred to in section 91 for a period exceeding 25 hours but not exceeding 100 hours to be completed within a maximum period of six months;

- (d) referral to appear at a victim-offender mediation, a family group conference or other restorative dispute resolution process at a specified time, on a specified date and at a specified place;
- (e) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of R600 to a specified person, persons, group or institution where the child or his or her family is able to afford this;
- (f) referral to a programme with a residential element, where the duration of the programme does not exceed three months, and no portion of the residence requirement exceeds 21 consecutive nights with a maximum of 35 nights; and
- (g) one or more of the above options used in combination, or combined with one or more of the orders referred to in paragraphs (b),(c),(d), or (e) of subsection (3) or in paragraph (a) of subsection (2).

(5) Diversion options that may be applied in respect of a child over the age of sixteen (or fourteen) years in the fourth instance, which must be imposed only by an inquiry magistrate, a child justice magistrate or other officer presiding in proceedings in terms of the provisions of this Act if he or she has reason to believe that a child justice court, in relation to the circumstances of the child and the offence, would impose a term of imprisonment exceeding six months or a reform school sentence, are not limited to but may include -

- (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 60 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 91 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 no longer 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 6 months; and

- (d) any of the options referred to in paragraphs (a), (d), (e) and (g) of subsection (4) in combination with any of the options referred to in this subsection.

(6) A victim-offender mediation, family group conference or other restorative dispute resolution process referred to in subsections (3)(i) and (4)(d) may apply any option referred to in subsections (2), (3) or (4) to a child referred to such mediation, conference or process, or reach another resolution appropriate to the child, to his or her family and to local circumstances: Provided that such mediation, conference or process may not, in the case of another resolution, contravene any applicable principle contained in this Act.

Director of Public Prosecutions to designate prosecutor to perform functions in terms of this Act

35. The relevant Director of Public Prosecutions must designate a prosecutor for each district court to perform functions relating to diversion, the preliminary inquiry and the institution of charges as set out in this Act.

Referral and powers of prosecution in respect of children above the minimum age of prosecution

36. (1) Subject to the provisions of section 30(1) and (2), where a probation officer, in relation to a child above the minimum age of prosecution, has recommended that -

- (a) such child be diverted to a specified process, programme, or appropriate alternative order mentioned in section 31(3)(a);
- (b) the matter involving such child be transferred to the children's court in terms of section 31(3)(c);
- (c) no further action be taken in terms of section 31(3)(b); or
- (d) the matter involving such child should not be diverted,

the matter must be submitted to the prosecutor of the district court having jurisdiction forthwith.

- (2) Upon consideration of the recommendations of the probation officer as

referred to in subsection (1)(a),(b) and (c) the prosecutor may -

- (a) concur with the recommendation of the probation officer and divert the matter, arrange for the transfer of the matter to the children's court, or decline to charge the child concerned; or
- (b) disagree with the recommendation of the probation officer, and arrange for the opening of a preliminary inquiry.

(3) Upon consideration of the recommendations of the probation officer as referred to in subsection (1)(d) the prosecutor may -

- (a) disagree with the recommendations of the probation officer and divert the matter, arrange for the transfer of the matter to a children's court inquiry as referred to in subsection (2)(a), or decline to charge the child concerned; or
- (b) concur with the recommendation of the probation officer, and arrange for the opening of a preliminary inquiry.

(4) Where a prosecutor takes one of the steps outlined in subsections 2(a) or 3(a), no charges against the child must be instituted in accordance with section 23: Provided that where a child fails to comply with a condition of diversion, the provisions of section 49 will apply.

(5) Where an assessment has not been effected, the prosecutor to whose notice the case involving a child under the age of eighteen years has been brought, must arrange that assessment be effected, or, if this is not possible, arrange for the opening of a preliminary inquiry.

CHAPTER 6: PRELIMINARY INQUIRY

Nature and purposes of preliminary inquiry

37. (1) For the purposes of this Act and any other Act, the proceedings of a preliminary inquiry must be regarded as proceedings of the child justice court.

(2) 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).

(3) The preliminary inquiry must be presided over by a district court magistrate designated as the inquiry magistrate for the district.

(4) The purposes of the preliminary inquiry are to enable the inquiry magistrate to -

- (a) ascertain whether an assessment of the child has been effected by a probation officer, and if not, whether compelling reasons exist as to why an assessment can be dispensed with;
- (b) order that assessment be effected, if it has not yet been done;
- (c) establish whether the matter can be diverted before charges are instituted in the child justice court or any other court acting in terms of the provisions of this Act;
- (d) refer the matter to the prosecutor for charges to be instituted in the child justice court where the child does not admit responsibility for the alleged offence, or where diversion of the matter is not possible;
- (e) transfer a matter to the children's court;
- (f) assess whether there is sufficient evidence to sustain a prosecution; and
- (g) determine release or placement of the child pending -
 - (i) the finalisation of the preliminary inquiry;
 - (ii) referral to a child justice court; or
 - (iii) transfer to the children's court.

Procedure relating to holding of preliminary inquiry

38. (1) A preliminary inquiry must be held -

- (a) if a child has been arrested as referred to in section 10, within 48 hours of such arrest; and
- (b) if an alternative to arrest as referred to in section 12 has been effected, within 72 hours of such alternative having been employed.

(2) At the commencement of the preliminary inquiry the prosecutor must ensure that the inquiry magistrate is in possession of -

- (a) the age assessment set out in Form D, save where assessment has not been effected;

- (b) the assessment report described in Form H, save where assessment has not been effected; and
- (c) any further supporting documentation that the prosecutor deems relevant to the preliminary inquiry or that is required in terms of this Act.

(3) At the commencement of the preliminary inquiry, the inquiry magistrate must inform the child in language that the child understands of the following rights -

- (a) the right to remain silent;
- (b) the right to have the child's parents or an appropriate adult present at the preliminary inquiry;
- (c) the right to choose and to be represented by a legal practitioner at his or her own cost; and
- (d) the right to obtain legal representation as referred to in section 35 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969) and Chapter 9 of this Act.

(4) No persons other than the following are entitled to attend the preliminary inquiry -

- (a) the child and his or her parents;
- (b) the prosecutor;
- (c) an appropriate adult referred to in section 1(i);
- (d) the probation officer;
- (e) the arresting officer or other police officer;
- (f) the child's legal representative if one has been appointed;
- (g) any other person served with a subpoena, requested or permitted to attend the preliminary inquiry as referred to in section 40(1)(a) or (b).

(5) The preliminary inquiry may not be held in the absence of the child concerned.

(6) The preliminary inquiry may be held in a room, office, or chamber but may not be held in a court.

(7) The proceedings must be conducted in an informal manner, and the inquiry

magistrate is responsible for conducting the proceedings, asking any necessary questions, interviewing any person or persons attending the inquiry and eliciting any information that is required.

(8) Evidence of a previous diversion or previous conviction may be elicited or adduced at the preliminary inquiry by any person.

(9) The inquiry magistrate must keep a record of the proceedings of the preliminary inquiry or cause such record to be kept.

(10) A decision of an inquiry magistrate presiding at a preliminary inquiry is not subject to appeal, save for a decision to remand a child in custody in terms of section 46.

Separation and joinder of proceedings of preliminary inquiry

39. (1) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is co-accused of an alleged offence with an adult, the case of the adult concerned must be separated from that of the child and will not be subject to the provisions of this Chapter.

(2) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is co-accused with one or more other children, a joint preliminary inquiry may be held in respect of all children concerned, provided that the inquiry proceedings may be separated at any time where this is in the best interests of any of the children.

General powers and duties of inquiry magistrate

- 40.** (1) The inquiry magistrate may -
- (a) cause a subpoena to be served on any person whose presence is necessary for the finalisation of the preliminary inquiry;
 - (b) request or permit the attendance of any other person, who, in his or her opinion, can contribute to the proceedings of the preliminary inquiry;
 - (c) request the production of any further documentation or may elicit any further information to supplement that referred to in section 38(2), which is relevant or necessary to the

proceedings;

- (d) make a determination of age in terms of section 8;
- (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 contained in the assessment report, and which is necessary in order to enable him or her to make the decisions referred to in section 41(4); and
- (f) take such steps as he or she deems necessary to establish the truth of any statement or submission that may be in dispute.

(2) Where an assessment has not been effected in terms of this Act, the inquiry magistrate must instruct the prosecutor to refer the child to a probation officer in order for an assessment to be effected: Provided that the inquiry magistrate may decide that assessment may be dispensed with if compelling reasons for doing so exist, and if this is in the best interests of the child.

(3) An inquiry magistrate must apprise himself or herself of diversion programmes available in the district of his or her jurisdiction as well as of their aims and content.

Decisions of inquiry magistrate and factors to be considered

41. (1) In regard to all matters brought before the preliminary inquiry, the inquiry magistrate must, before referring the matter to the prosecutor for the institution of charges in the child justice court in terms of subsection (4)(c), satisfy himself or herself that diversion of the matter is not possible.

(2) In order to establish whether or not diversion is possible, the inquiry magistrate must have regard to -

- (a) the assessment report, unless assessment of the child has been dispensed with in terms of section 40(2);
- (b) the views of any person present at the preliminary inquiry;
- (c) any further information provided by any person present at the preliminary inquiry; and
- (d) any further information requested by him or her in the course of conducting the preliminary

inquiry.

(3) In taking a decision in terms of subsection (4), the inquiry magistrate must take account of the principle that the child has the right to participate in all decisions affecting him or her: Provided that where a child does not acknowledge responsibility for the offence, the child must not be required to answer any questions which may infringe upon his or her right to be presumed innocent.

(4) After consideration of the assessment report, if assessment has not been dispensed with in terms of section 39(2), and submissions by the prosecutor, the child or any other party to the inquiry, the inquiry magistrate may -

- (cc) divert the matter in accordance with the standards and requirements set out in sections 32 and 33, and in terms of any of the options set out in section 34;
- (dd) stop the proceedings for the purposes of transferring the matter to the children's court on one or more of the grounds set out in section 51(2); or
- (ee) refer the matter to the prosecutor for charges to be instituted in the child justice court or any other court acting in terms of the provisions of this Act.

(5) After an inquiry magistrate has made a decision to divert the matter in terms of subsection (4)(a), and if formal programmes for diversion are not available, or are not appropriate to the circumstances of the child, his or her family or the alleged offence, the inquiry magistrate must, as far as is possible, develop a diversion strategy which meets the standards and requirements of diversion set out in sections 32 and 33 and which is appropriate to the circumstances of a particular child, his or her family, community of origin and the alleged offence.

(6) The inquiry magistrate must -

- (a) if he or she has taken a decision that the matter should be referred to the child justice court in terms of subsection (4)(c), record written reasons for such decision; and
- (b) receive and consider the reports regarding arrest of the child and detention in police custody provided by the arresting police officer in terms of sections 15(3) and 22(5) respectively, and if, in the opinion of the inquiry magistrate, an arrest or detention in a police cell, as the case may be, was unnecessary, he or she must forward a copy of the

Forms referred to in those sections to the child justice committee of the district as referred to in section 91.

Sufficiency of evidence

42. (1) An inquiry magistrate who intends to refer a matter to the prosecutor for charges to be instituted in the child justice court or other court in terms of section 41(4)(c), must satisfy himself or herself that there is sufficient evidence to sustain a prosecution, and for this purpose he or she may request the prosecutor, the investigating officer or any other relevant person to provide an oral report concerning the sufficiency of such evidence.

(2) If the inquiry magistrate has substantial and compelling reasons to believe that there is insufficient evidence to support the institution of charges against a child, he or she must close the preliminary inquiry and order that the child, if in detention, be released.

(3) If at any stage of the preliminary inquiry it appears that the child concerned does not intend to accept responsibility for the alleged offence as referred to in section 33(1)(a), the inquiry magistrate must, subject to the provisions of subsection (1) regarding sufficiency of evidence, refer the matter to the prosecutor for charges to be instituted in the child justice court or any other court acting in terms of the provisions of this Act.

Inquiry magistrate's duty where child previously released or alternatives to arrest used

43. Where a child has been released previously from detention, or where an alternative to arrest as referred to in terms of section 12 has been used, and the matter is to be transferred to the children's court in terms of section 41(4)(b) or referred to the prosecutor for charges to be instituted in the child justice court or other court in terms of section 41(4)(c), the inquiry magistrate must warn the child in language that the child understands to appear on a specified date at a specified place and at a specified time at such children's court inquiry or child justice court, as the case may be, and may extend or confirm or amend any conditions of release that were in operation by virtue of the provisions of section 22(3) prior to the child's appearance at the preliminary inquiry.

Inquiry magistrate's duty to inquire into possible release of child from detention

44. (1) Where a child who appears at a preliminary inquiry has been arrested, and has not been released previously from detention in terms of section 22, the inquiry magistrate, when -

- (a) remanding a matter in terms of section 45(1) or (2),
- (b) referring the matter to the child justice court or other court for charges to be instituted in terms of section 41(4)(c), or
- (c) transferring the matter to a children's court inquiry in terms of section 41(4)(b) on one or more of the grounds set out in section 51(2),

must establish whether the child can be released from detention pending -

- (i) finalisation of the preliminary inquiry,
- (ii) transfer of the matter to the children's court, or
- (iii) the institution of charges in the child justice court or other court.

(2) The inquiry magistrate must, in making the determination 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 evidence which has been placed before him or her by any person.

(3) Release of a child into the care of a parent or an appropriate adult on one or more of the conditions set out in subsection (5) must be considered as a measure of first resort.

(4) A child may be released on his or her own recognisance with or without conditions as set out in subsection (5).

(5) Conditions of release of a child for the purposes of this section include -

- (a) the obligation to appear before a child justice court or any other court acting in terms of the provisions of this Act at a specified place on a specified date and at a specified time;
- (b) the obligation to report periodically to a specified person or place;
- (c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person, persons, or group of specified people; and

- (d) if the preliminary inquiry has been remanded in terms of section 45, the obligation to appear at further proceedings of the preliminary inquiry at a specified place on a specified date and at a specified time.

(6) Where a decision is made at a preliminary inquiry to divert a child in terms of the provisions of section 41(4)(a), the child must be released from custody.

Remanding of preliminary inquiry

45. (1) The inquiry magistrate may remand the preliminary inquiry for a period of 48 hours, if it is necessary for the purposes of -

- (a) securing the attendance of a person necessary for the finalisation of the inquiry;
- (b) obtaining information necessary for the finalisation of the inquiry;
- (c) establishing the attitude of the victim to diversion;
- (d) furthering the development of a diversion option; or
- (e) finding alternatives to pre-trial residential detention.

(2) The preliminary inquiry may be remanded for a further period of 48 hours, after which the matter may be referred to the prosecutor for charges to be instituted in the child justice court or any other court acting in terms of the provisions of this Act.

(3) Where the preliminary inquiry is remanded for purposes of the noting of a confession, admission, pointing out or the holding of an identity parade, the inquiry magistrate must inform the child of his or her right to have a parent, an appropriate adult or legal representative present during such proceedings.

(4) Where the matter has not been referred to the child justice court or other court as referred to in subsection (2), the preliminary inquiry must be closed and the child released from custody.

(5) Where a child cannot be released into the care of a parent or an appropriate adult, such child may, subject to section 44(2), be remanded to a place of safety or a secure care

facility, or if a place of safety or secure care facility is not available, and subject to the provisions of section 21(7), to a police cell pending finalisation of the preliminary inquiry.

Circumstances under which a child may be remanded in detention after finalisation of preliminary inquiry

46. (1) Subject to the remainder of the provisions of this subsection, a child who is accused of having committed an offence may, after finalisation of the preliminary inquiry, be detained in a place of safety, secure care facility or prison pending plea and trial in the child justice court or any other court acting in terms of the provisions of this Act: Provided that -

- (a) the inquiry magistrate must consider the granting of bail to ensure that the deprivation of liberty of such child is a measure of last resort; and
- (b) such child may not be detained in a police cell or lock-up.

(2) Where an inquiry magistrate has established that a child cannot be released from detention after the finalisation of the preliminary inquiry because -

- (a) it is not in the interests of justice,
- (b) a remand in detention is required in order to locate the child's parent or an appropriate adult;
- (c) there are compelling reasons to believe that the child will abscond or will fail to attend a trial;
- (d) of the seriousness of the offence; or
- (e) of the likelihood that the child will interfere with witnesses,

the child may be remanded to a place of safety, secure care facility or prison pending the hearing of the matter before the child justice court or any other court acting in terms of the provisions of this Act, subject to the provisions of subsections (3), (4), (5) and (6).

(3) In making a determination as to whether the placement of the child should be in a place of safety or a secure care facility as referred to in subsection (2), the inquiry magistrate must have regard to the recommendations of the probation officer as contained in such officer's assessment report.

(4) Where a child is fourteen (or sixteen) years of age or older, and charged with 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 R50 000 or any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, and release or referral to a place of safety or secure care facility is not possible because -

- (a) there is no such facility within a reasonable distance from the court in which the child is appearing;
- (b) there is such a facility within a reasonable distance from the court, but written or oral evidence has been provided by an official of the Department of Welfare and Population Development that there is no vacancy at the time of making the decision; or
- (c) the inquiry magistrate is satisfied, on evidence placed before him or her, 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: Provided that such remand to a prison must only be possible after finalisation of the preliminary inquiry, and the matter has been referred to the child justice court or any other court for charges to be instituted.

(5) In making an order that a child be remanded to prison as referred to in subsection (2), the inquiry magistrate must enter the reasons for such remand on the record of the proceedings.

(6) Where a child is remanded to a place of safety, secure care facility or prison in terms of subsection (2) -

- (a) the child must appear every 14 days before the child justice court or any other court acting in terms of the provisions of this Act, which court must -
 - (i) inquire whether detention in a place of safety, secure care facility or prison remains necessary;
 - (ii) if ordering further detention of the child, enter the reasons for such further detention on the record of the proceedings; and
 - (iii) consider the reduction of any amount of bail that has been granted in respect of

such child;

- (b) the officer presiding in the child justice court must be satisfied that the child is being treated in a manner and kept in conditions that take account of the child's well-being; and
- (c) the plea and trial in the child justice court or any other court acting in terms of the provisions of this Act must be finalised as speedily as possible.

Failure of child above the minimum age of prosecution to attend assessment or preliminary inquiry

47. (1) If a child above the minimum age of prosecution as referred to in section 4 fails to appear at assessment, or breaches any conditions of release from detention in police custody, the probation officer in whose district the assessment was to have taken place, may request the inquiry magistrate to issue a warrant of arrest.

(2) If a child fails to appear at a preliminary inquiry, the prosecutor concerned may request the inquiry magistrate to issue a warrant of arrest.

(3) If a child appears at an assessment or at the preliminary inquiry, as the case may be, after the execution of a warrant of arrest referred to in subsections (1) and (2), the matter must, in the case of an assessment, forthwith be set down for the holding of a preliminary inquiry or, in the case of appearance at a preliminary inquiry, be proceeded with.

(4) Where the preliminary inquiry referred to in subsection (3) takes place, the inquiry magistrate must inquire into the reasons for the child's failure to appear at assessment or at the preliminary inquiry.

(5) Where the inquiry magistrate finds that the failure of the child to appear at an assessment or at the preliminary inquiry was due to fault on the part of the child, he or she may take that fact into account when making a decision in terms of section 41(4).

Procedure where child below minimum age of prosecution fails to attend assessment or to

comply with obligations under section 29

Note: this section will only apply if either of Option 2 or 3 under section 4 is ultimately selected

48. Where a child suspected of having committed an offence is below the minimum age of prosecution as referred to in section 4 and such child fails to attend an assessment or fails to comply with any obligation imposed upon such child by a probation officer in terms of section 29, the probation officer concerned may request the children's court having jurisdiction to open an inquiry in respect of that child.

Failure to comply with diversion conditions

49. (1) Where a child has been diverted by a probation officer in terms of section 30(1)(c) or by a prosecutor in terms of section 36(2)(a) or (3)(a), and fails to comply with a condition of diversion, or with any other order, or fails to attend a programme, the probation officer or prosecutor concerned may request the inquiry magistrate to issue a warrant of arrest or written notice to appear in respect of such child.

(2) If a child appears after the execution of a warrant of arrest or as a result of the issue of a written notice to appear as referred to in subsection (1), the matter must be set down for the holding of a preliminary inquiry where the inquiry magistrate must inquire as to the circumstances surrounding the failure of the child to comply with the conditions of a diversion option.

(3) Where a child has been diverted by an inquiry magistrate as referred to in section 41(4)(a) and fails to comply with a condition of diversion, or with any other order, or fails to attend a specified programme, the inquiry magistrate concerned may issue a warrant of arrest or written notice to appear in respect of such child.

(4) 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 (3) and the child, at the time of such appearance is still below the age of eighteen years, the inquiry magistrate must inquire as to the circumstances surrounding the failure of the child to comply with the conditions of the

diversion option.

(5) The inquiry magistrate may, at the inquiry referred to in subsections (2) and (4), decide to -

- (a) divert the matter;
- (b) divert the matter to the same programme with altered conditions;
- (c) apply any other diversion option as described in section 34;
- (d) refer the matter to the prosecutor for charges to be instituted in the child justice court or in any other court acting in terms of the provisions of this Act; or
- (e) make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied.

(6) The execution of a warrant of arrest referred to in this Chapter may be suspended by the inquiry magistrate, and the officer required to execute such warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to in section 12.

(7) When a person who has been arrested on a warrant issued pursuant to subsections (1) and (3) is no longer below the age of eighteen years at the time of appearance, that person should appear before the inquiry magistrate, who must inquire as to the circumstances surrounding the failure of that person to comply with the conditions of the diversion option.

(8) In circumstances referred to in subsection (7), the inquiry magistrate may take any of the steps referred to in subsection (5)(a), (b), (c) or (e) or refer the matter to a court other than the child justice court for prosecution on the original set of facts.

Procedure upon referral of matter for charges to be instituted

50. (1) Upon finalisation of the preliminary inquiry, if diversion has not taken place, and if the inquiry magistrate has found that there is sufficient evidence to sustain a prosecution of a child as referred to in section 42, the inquiry magistrate must -

- (a) refer the matter to the prosecutor for charges to be instituted in the child justice court or any other court acting in terms of the provisions of this Act as referred to in section 23;

- (b) warn any parent of such child or an appropriate adult to attend the proceedings referred to in paragraph (a) at a specified place and on a specified date and time; and
- (c) ensure the provision of legal representation for such child in terms of the provisions of section 82.

(2) Where the child concerned is not in detention after finalisation of the preliminary inquiry, the inquiry magistrate may -

- (a) alter or extend any condition imposed in terms of section 22 or section 44;
- (b) alter or extend any order made in terms of section 44(3) and must warn any parent or an appropriate adult in whose care the child has been released to appear in a child justice court or any other court acting in terms of the provisions of this Act at a specified place and on a specified date and at a specified time; and
- (c) warn the child, his or her parent or an appropriate adult to appear in the child justice court or any other court acting in terms of the provisions of this Act at a specified place and on a specified date and time.

(3) An inquiry magistrate must recuse himself or herself and may not preside in a child justice court in relation to that matter if such magistrate has, during the course of such preliminary inquiry, heard any information prejudicial to the impartial determination of the matter.

Transfer and conversion to a children's court inquiry

51. (1) If it appears to a court that a child under the age of eighteen years 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, it may stop the proceedings and order that the child be brought before the children's court referred to in section 5 of that Act.

(2) Transfer or conversion of a matter to the children's court in terms of subsection (1) must be considered by -

- (a) a probation officer when acting in terms of sections 29(1)(a), 30(1)(a) or 31(3)(c);
- (b) a prosecutor when acting in terms of section 36(2)(a) or (3)(a);

- (c) an inquiry magistrate when acting in terms of section 41(4)(b);
- (d) an officer presiding in a child justice court as referred to in this Act or any officer presiding in a court acting in terms of the provisions of this Act,

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

and is therefore a child as described in section 14 of the Child Care Act, 1983.

(3) Where consideration has been given to the transfer or conversion of the matter to the children's court as referred to in subsection (2) and it appears that such transfer or conversion is not in the best interests of the child concerned or is not in the interests of the administration of justice, other measures in terms of this Act may be considered: Provided that the reasons for not transferring or converting the matter must be noted on the assessment report, in the case of a person referred to in subsection (2)(a) or (b), and entered on the written record of the proceedings, in the case of a person referred to in subsection (2)(c) or (d).

(4) In the event of conversion of a trial to a children's court inquiry by a child justice magistrate or the officer presiding in a court acting in terms of the provisions of this Act after conviction of the child, any finding of guilt must be considered not to have been made.

Application for release from detention

52. (1) Nothing contained in this Act must be construed as precluding a child who is in detention in respect of an offence from applying for release from detention at any stage prior to the passing of sentence in respect of that offence.

(2) A court, in hearing an application referred to in subsection (1), must have regard to the circumstances referred to in section 46(3).

(3) An appeal against the decision of a court hearing an application referred to in subsection (1) may be lodged to a superior court having jurisdiction, and if that court is a High Court, to any judge of that court if the court is not sitting at the time of the appeal.

CHAPTER 7: CHILD JUSTICE COURT

Jurisdiction of child justice court

53. (1) A child justice court is a court at district court level which must adjudicate on all matters referred to such court in terms of the provisions of this Act, subject to the provisions of subsection (3).

(2) In making a decision as to which court has jurisdiction in proceedings under this Act, preference must be given to the retention of the jurisdiction of the child justice court, subject to the provisions of subsection (3)(b) and sections 54, 61 and 62.

(3) The child justice court has jurisdiction to adjudicate -

- (a) in all matters in which a child as referred to in subsection (1) is accused of committing a criminal offence; and
- (b) 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).

(5) The child justice court and the magistrate presiding in proceedings in such court must be designated as such 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 prosecuting authority of the child justice court must be determined in accordance with section 179 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996).

(7) 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 active participation of all persons involved in the proceedings.

(8) The child justice court has extended sentencing jurisdiction of a maximum of five years imprisonment on each count.

Proceedings in terms of this Act by a court other than a child justice court

54. (1) A Regional Court has jurisdiction to try the case of an accused child where such child is charged with murder or rape, or where he or she is charged with any other offence and -

- (a) the likely sentence will exceed the jurisdiction of the child justice court;
- (b) there are multiple charges in respect of the child concerned and the Regional Court has jurisdiction in respect of one or more of those charges in terms of this section; or
- (c) a decision has been made in terms of section 61 that there will be a joinder of trials.

(2) Where the Director of Public Prosecutions is satisfied that circumstances referred to in subsection (1)(a) or (b) exist in respect of a matter involving a particular child, he or she may prior to the commencement of the trial, refer the matter to the Regional Court for plea and trial.

(3) 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 61.

(4) The court hearing a matter in terms of this section must conduct the proceedings in accordance with the provisions of this Act relating to proceedings in a child justice

court and with due regard to the objectives and principles set out in sections 2 and 3 respectively.

(5) If a child justice court has convicted a child and the court is of the view that exceptional circumstances exist which indicate that the appropriate sentence may exceed the sentencing jurisdiction of such court, the court may refer the matter to the Regional Court or the High Court for sentencing, and cause a copy of the record of the proceedings to be made available to that court: Provided that such court must sentence the child in terms of the provisions of this Act.

Accused to plead in child justice court on instructions of Director of Public Prosecutions

55. When a child appears in the child justice court or any other district court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the child justice court, the prosecutor may, on the instructions of the Director of Public Prosecutions, put the charge, as well as any other charge which must, in terms of section 82 of the Criminal Procedure Act, 1977, (Act No. 51 of 1977), be disposed of in a superior court, to the child in the child justice court and the child must, subject to the provisions of sections 77 and 85 of the Criminal Procedure Act, 1977, be required by the presiding officer to plead to such charge or charges forthwith: Provided that a charge or charges may only be put to a child in the child justice court in terms of this section if the child is assisted by a legal representative.

Assistance to the accused

56. (1) At the commencement of proceedings in a child justice court, the presiding officer must inform the child appearing before such court in language that the child understands of the following rights -

- (a) the right to remain silent;
- (b) the right to have the child's parents or an appropriate adult present at the proceedings;
- (c) the right to choose and to be represented by a legal practitioner at his or her own cost; and
- (d) the right to obtain legal representation as referred to in section 35 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 3 of the Legal Aid Act,

1969 (Act No. 22 of 1969) and Chapter 9 of this Act.

(2) A child who is under the age of eighteen years must be assisted by his or her parent or an appropriate adult at criminal proceedings: Provided that this requirement may be dispensed with where -

- (a) all efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child; or
- (b) the child is charged with an offence listed in Schedule 1 and a sentence referred to in section 73(a)(i),(ii) or (iii), (b), (c) or (k) is likely to be imposed.

(3) An appropriate adult nominated by a child justice committee referred to in section 91 must assist a child in circumstances referred to in subsection (2)(a).

Parent or an appropriate adult to attend proceedings

57. (1) Any parent of a child or an appropriate adult who has been warned by an inquiry magistrate to attend proceedings involving such child in terms of section 50(1)(b), must attend such proceedings unless exempted from the obligation to do so in terms of subsection (3).

(2) If a person referred to in subsection (1) has not been warned to attend the relevant criminal proceedings, the court before which the proceedings are pending may at any time during the proceedings direct any person to warn a person referred to in subsection (1) to attend such proceedings.

(3) A person who has been warned in terms of subsection (1) or (2), may apply to the officer presiding in the court in which the child is to appear for exemption from the obligation to attend the proceedings in question, and if such presiding officer exempts such person, he or she must do so in writing.

(4) A person who has been warned in terms of subsection (1) or (2) and who has not been exempted from the obligation to attend 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 remain in attendance at the relevant criminal proceedings, whether in that court or any other court, unless excused by the court before which such proceedings are pending.

(5) A person who has been warned in terms of subsection (1) or (2) and who fails to attend the proceedings in question or who 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 103.

Charge sheet and withdrawal of charge

58. (1) The allegations contained in any charge sheet must be formulated in language that the accused child can understand.

(2) A child accused of the commission of an offence, his or her legal representative, parent or an appropriate adult may examine the charge sheet at any stage of the relevant criminal proceedings.

(3) Nothing contained in this Act must be construed as precluding the prosecuting authority from exercising the discretion to withdraw a charge.

Conduct of proceedings in child justice court

59. (1) The officer presiding in the child justice court may, if it would be in the best interests of the child, actively participate in eliciting evidence from any person involved in the proceedings.

(2) All proceedings conducted in the child justice court must be held in camera and the privacy of the child concerned, subject to the provisions of section 66, must be protected at all times.

(3) The proceedings of the child justice 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.

(4) The child must be permitted to speak in his or her own language with the assistance, where necessary, of an interpreter and the presiding officer must ensure that the child is addressed in language that he or she understands.

(5) The presiding officer must ensure that the conduct of all proceedings and the conduct of all court personnel are conducive to the well-being of the child.

(6) No handcuffs, leg-irons or other restraints may be used when a child appears in the child justice court, unless there are exceptional circumstances warranting the use of such restraints in such court and an imminent danger exists that the safety of any person may be endangered if such restraints are not used.

(7) A child held in a lock-up or cell in or at the court or who is being transported to court must be kept separately from adults and be treated in a manner and kept in conditions which take account of his or her age.

(8) Further to the provisions of subsection (7) a female child must be kept separately from any male child and must be under the care of an adult woman.

(9) The proceedings of the child justice court may, at the discretion of the presiding officer, be held in a place other than a court.

(10) The presiding officer must protect an accused child from hostile cross-examination where such cross-examination is regarded by the presiding officer as being prejudicial to the well-being of the child or the fairness of the proceedings.

Evidence in child justice court

60. (1) Evidence of admissions, confessions and pointings out referred to in section 20(1) made without the assistance of a child's parent, legal representative or an appropriate adult is inadmissible in proceedings in a child justice court or any other court acting in terms of the provisions of this Act.

(2) No evidence of an admission or confession made by a child during an assessment or during the course of a preliminary inquiry is admissible at proceedings in the child justice court.

Separation and joinder of trials involving children and adults

61. (1) If a child appearing in a child justice court is co-accused of an alleged offence with an adult, the case of the adult concerned must be separated from that of the child and is not subject to the provisions of this Act: Provided that any person involved in the proceedings, including the child, his or her parent, an appropriate adult, such child's legal representative and the Director of Public Prosecutions may, before the commencement of the trial, make an application to the court in which the adult is due to appear for a joinder of the trials concerned.

(2) A person making an application for joinder of trials to the court in which the adult concerned is to appear as referred to in subsection (1), must give notice of such application to all parties concerned.

(3) The rules of the court to which an application as referred to in subsection (1) is made, relating to applications, time periods for applications and opposition of applications, apply to the provisions of this section.

(4) If a person making an application as referred to in this section has shown, on a balance of probabilities, that a miscarriage of justice or prejudice to the victim or victims of the alleged offence would otherwise occur, the court to which the application is directed, may order a joinder of the trials of the child and adult concerned: Provided that the best interests of the child are duly considered.

(5) If the court makes a finding as referred to in subsection (4), the matter before the child justice court must be transferred to the court in which the adult is to appear.

(6) The court to which the matter has been transferred as referred to in subsection (5), must act in accordance with the provisions of this Act in relation to proceedings involving the child concerned.

(7) The procedures referred to in this section are not applicable if a matter has been referred to the Regional Court in terms of section 54(2).

Separation and joinder of trials involving children only

62. (1) A prosecutor may join the trial of an accused child with that of any other accused child in the same criminal proceedings at any time before evidence has been led in respect of the charge in question.

(2) Where two or more children are charged jointly, whether with the same offence or different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the children, direct that the trial of any one or more of the children must be held separately from the trial of the other children, and the court may abstain from giving judgment in respect of any such children.

Adjournment of proceedings

63. (1) The child justice court or any other court acting in terms of the provisions of this Act must finalise all trials of accused children as speedily as possible and must ensure that remands are limited in number and in period between remands.

(2) A court other than a child justice court acting in terms of the provisions of this Act must ensure that trials of accused children receive priority on the roll of such court.

(3) Where the child has been remanded to a place of safety, secure care facility

or a prison, the presiding officer must ensure that the requirements set out in section 46(6) regarding remands to places of safety, secure care facilities or prisons are complied with.

(4) Where a child has been remanded to a place of safety, secure care facility or prison pending trial in the child justice court or any other court acting in terms of the provisions of this Act, the plea and trial of such child must be finalised within a period not exceeding six months, after which period the child must be released from detention.

Powers of officer presiding in child justice court

64. (1) If, at any time before conviction, or after conviction and before sentence, a child accepts responsibility for an offence and the child justice court in which the child appears is of the opinion that the matter should be diverted, the court may refer the child to any diversion option as referred to in section 34: Provided that any finding of guilt must be considered not to have been made.

(2) If, at any time before conviction, or after conviction and before sentence, the child justice court is of the opinion that substantial grounds exist that an alternative dispute resolution mechanism may be appropriate to the resolution of the matter before the court, the court may stop the proceedings and order that the matter be referred to a victim-offender mediation, a family group conference or other restorative dispute resolution process or make any other order as it may deem necessary to resolve the matter: Provided that if the matter is referred to a victim-offender mediation, family group conference or other restorative dispute resolution process, the written recommendations emanating from such mediation, conference or process must be re-submitted to the child justice court within fourteen days if the child is not in custody, and if the child is in custody, within five days after referral of the matter upon which such court may -

- (a) confirm the recommendations by making such recommendations an order of the court;
- (b) substitute or amend the recommendations and make an appropriate order; or
- (c) reject the recommendations and proceed with the trial.

(3) Where a child justice court acts in terms of the provisions of subsection (2)(a) or (b), any finding of guilt made in relation to the matter before the court must be

considered not to have been made.

Failure to attend court proceedings

65. (1) If a child fails to appear at any proceedings in the child justice court or any other court acting in terms of the provisions of this Act, the prosecutor may request the officer presiding in such proceedings to issue a warrant of arrest in respect of such child.

(2) If the presiding officer, upon the appearance of a child in the child justice court or other court acting in terms of the provisions of this Act, after the execution of a warrant of arrest as referred to in subsection (1), finds that the failure of the child to appear at the proceedings concerned was due to fault on the part of the child, he or she may take that fact into account when making a decision as to how the matter should proceed.

Privacy and confidentiality

66. (1) Where a child appears before a child justice court or any other court acting in terms of the provisions of this Act, no person other than the persons referred to in sections 25(3) and 38(4) may be present unless such person's presence is necessary in connection with such proceedings or is authorised by the court on good cause shown.

(2) No person may publish in any manner any information which reveals or may reveal the identity of a child under the age of eighteen years appearing at an assessment, a preliminary inquiry or before a child justice court or any other court acting in terms of the provisions of this Act, or of a witness under the age of eighteen years appearing at any proceedings referred to in this Act who is under the age of eighteen years.

(3) Subject to the provisions of subsection (4), no prohibition or direction under this section must prevent -

(a) any person, institution or organisation from gaining 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 bona fide 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 bona fide 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 reports referred to in sections 29(5) and 30(4) to the child justice committee referred to in section 91.

(4) The reports 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 who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to the penalties mentioned in section 103.

Applicability of provisions of the Criminal Procedure Act, 1977

67. (1) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to -

- (a) the capacity of the child to understand the proceedings as set out in Chapter 13 of that Act;
- (b) the charge sheet as set out in Chapter 12 and the charge as set out in Chapter 14 of that Act respectively, subject to the provisions of section 58 of this Act;
- (c) the plea as set out in Chapter 15 of that Act;
- (d) jurisdiction as set out in Chapter 16 of that Act;
- (e) a plea of guilty as set out in Chapter 17 of that Act;

- (f) a plea of not guilty as set out in Chapter 18 of that Act, save for the provisions of sections 114, 115A, 116 and 117;
- (g) a trial before a superior court as set out in Chapter 21 of that Act;
- (h) the conduct of the proceedings as set out in Chapter 22 of that Act, save for the provisions of sections 152, 153(4), 154(3), 155, 156, 157 and 168 and subject to the provisions of section 59 of this Act;
- (i) witnesses as set out in Chapter 23 of that Act;
- (j) evidence as set out in Chapter 24 of that Act, subject to the provisions of section 60 of this Act,

with the changes required by the context, are applicable to the provisions of this Chapter.

(2) In the event of any inconsistency between the provisions of this Act and the applicable provisions of the Criminal Procedure Act, 1977, as referred to in subsection (1), the provisions of this Act prevail.

CHAPTER 8: SENTENCING

Power to impose sentence after conviction

68. A child justice court or other court acting in terms of the provisions of this Act may, after convicting a child, impose a sentence in accordance with the provisions of this Chapter.

Competent verdicts

69. (1) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to competent verdicts as set out in Chapter 26 of that Act, with the changes required by the context, are applicable to the provisions of this Chapter.

(2) In the event of any inconsistency between the provisions of this Act and the applicable provisions of the Criminal Procedure Act, 1977, as referred to in subsection (1), the provisions of this Act prevail.

Pre-sentence reports required

70. (1) A child justice court, or any other court imposing a sentence in terms of this Act, must require the preparation and placement before court of a pre-sentence report prior to the imposition of sentence: Provided that 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 finalisation of the case, and which delay would be prejudicial to the interests of the child.

(2) No child justice court or other court sentencing a person under the age of eighteen years in terms of this Act may impose a sentence with a residential element, unless a pre-sentence report has been placed before such court.

(3) A child justice court or any other court acting in terms of the provisions of this Act which imposes any sentence involving detention in a residential facility, must certify on the warrant of detention that such pre-sentence report has been placed before the court prior to imposition of sentence.

(4) Where the certification referred to in subsection (3) does not appear on a warrant of detention issued in terms of the provisions of this Act, the persons admitting such child to the residential facility in question must remit the matter back to court.

(5) No person may admit a person under the age of eighteen years to any residential facility in terms of this Act unless the warrant of detention contains the certification referred to in subsection (3), and a person who admits a child without the necessary certification is guilty of an offence and liable to the penalties set out in section 103.

Evidence of previous diversion and other evidence relevant to sentence

71. (1) Evidence that a child has previously been diverted, and has attended a programme or completed community service or other diversion option mentioned in Chapter 5 may be adduced after conviction and before the imposition of sentence: Provided that evidence

of previous diversion may not be considered in aggravation of sentence.

(2) The evidence of previous diversion referred to in subsection (1) may be considered relevant to the selection of a particular programme, community service option, or other sentence option referred to in sections 73, 74, 75, 76 or 77.

(3) A child justice court or other court imposing a sentence in terms of the provisions of this Act may consider written or oral evidence from the victim or victims of the offence about the impact of the offence as evidence relevant to sentence.

(4) A child justice court or any other court imposing a sentence in terms of the provisions of this Act may consider any other written or oral evidence relevant to sentence.

(5) The court must request the child concerned and his or her parents or an appropriate adult to address the court on sentence, and, where a pre-sentence report has been submitted, must allow the child and his or her parents or an appropriate adult an opportunity to place in dispute any finding or recommendation made in such report.

(6) The prosecution may, after conviction, prove any previous convictions against a child, and a court must establish whether the child admits or denies any such previous convictions: Provided that the prosecution may lead evidence to prove any convictions denied by the child.

(7) For the purposes of subsection (6), a document relating to the fingerprints of a child which emanates from the South African Criminal Bureau is admissible as preliminary proof of the facts contained therein.

Nature of sentences

72. A presiding officer imposing a sentence in terms of this Act may impose any one of the options referred to in section 34(2), (3), (4) or (5), or any of the sanctions referred to in sections 73, 74, 75, 76 and 77.

Sentences which do not involve a residential element

73. A sanction not involving a residential element which is available as a sentence for the purposes of this Act includes -

- (a) (i) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored, or payment of compensation to a specified person, persons, group or institution in an amount which the child or his or her family is able to afford;
- (ii) in a matter where there is no identifiable person or persons to whom compensation or reparation could be paid or provided to in terms of paragraph (i), payment of a sum of money or restitution of specified goods to a community organisation, charity or welfare organisation concerned with activities which benefit children, identified by the child who is to be sentenced; or
- (iii) any form of symbolic restitution;
- (b) an oral or written apology to a specified person or institution;
- (c) a correctional reprimand, in the manner prescribed in Form K8;
- (d) placement under a good behaviour order in the manner prescribed in Form K6 for a period not exceeding 6 months;
- (e) placement under a family time order in the manner prescribed Form K2 for a period not exceeding 6 months;
- (f) placement under a compulsory school attendance order in the manner prescribed in Form K4 for a period not exceeding 6 months;
- (g) placement under a positive peer association order as prescribed in Form K5 for a period not exceeding 6 months;
- (h) that the child and members of his or her family attend guidance or counselling with a specified provider of such services, for a period not exceeding 12 months;
- (i) placement under the care and control of an appropriate adult specified by the court;
- (j) placement under a supervision and guidance order in the manner prescribed in Form K1 for a period not exceeding 12 months;
- (k) compulsory attendance at a specified centre or place for a specified programme for a specified vocational or educational purpose for a period not exceeding 20 hours each week, for a maximum of 6 months: Provided that where a child is over the age of

compulsory school attendance as defined in the South African Schools Act, 1996 (Act No. 84 of 1996) and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified educational or vocational purpose for a maximum period of no more than 35 hours per week to be completed within a maximum period of 12 months may be imposed;

- (l) 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 presiding officer, or by the probation officer of the district in which the child justice court is situated, or by the child justice committee referred to in section 91, for a maximum period of 250 hours and to be completed within 12 months: Provided that this sentence may not be -
 - (i) imposed upon a child under the age of thirteen years; or
 - (ii) harmful to a child's health or development and may not prejudice school attendance.

Postponement or suspension

74. (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to in subsection (2) for a period not exceeding three years.

(2) The conditions of postponement referred to in subsection (1) may include -

- (a) restitution, compensation or symbolic restitution;
- (b) an apology;
- (c) the obligation not to re-offend;
- (d) good behaviour as referred to in Form K6;
- (e) school attendance for a specified period in the manner referred to in Form K4;
- (f) attendance at a victim-offender mediation, a family group conference or other restorative dispute resolution process;
- (g) the attendance of guidance or counselling with a specified provider of such services for a specified period by the child and members of his or her family;
- (h) submitting to supervision and guidance in the manner referred to in Form K1 for a

specified period; or

- (i) any other condition appropriate to the circumstances of the child and in keeping with the principles of this Act, which promotes the children's reintegration into society.

(3) The whole or any part of a sentence referred to in section 73 may be suspended, without conditions, or with one or more of the conditions referred to in subsection (4).

(4) The conditions of suspension referred to in subsection (3) include -

- (a) the obligation not to re-offend;
- (b) restitution, compensation or symbolic restitution; and
- (c) any other measure, including a sanction referred to in section 73 if such sanction has not been imposed as the sentence to be suspended, which is appropriate to the circumstances of the child and in keeping with the principles of this Act, and which promotes the children's reintegration into society.

(5) 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 the period satisfied that any conditions imposed have been fulfilled, the court may decline to impose a sentence and may discharge the child: Provided that the conviction may be recorded as a previous conviction or the presiding officer may act in accordance with the provisions of section 64(1).

Sentences with a restorative justice element

75. (1) A sanction involving a restorative justice element which is available as a sentence for the purposes of this Act includes referral of the child concerned to appear at a victim-offender mediation, a family group conference or other restorative dispute resolution process at a specified time on a specified date and at a specified place.

(2) The decisions or agreements reached at a process referred to in subsection (1) and instituted in terms of this section must be referred back to the child justice court or other court acting in terms of the provisions of this Act -

- (a) within 14 days if the child concerned is in detention; or

(b) within 21 days if the child concerned is not in detention to be taken into account in the consideration of an appropriate sentence.

(3) Where the officer presiding in a child justice court or other court passing sentence in terms of this Act does not agree with the terms of the decision or agreement reached at a process referred to in subsection (1) and imposes a sentence which differs in a material respect from that agreed to or decided upon, he or she must note the reasons for deviating from the agreement or decision on the record of the proceedings.

(4) Where an agreement or decision is not reached at a process referred to in subsection (1), the matter must be referred back to the officer presiding in a child justice court or other court acting in terms of the provisions of this Act for imposition of a sentence.

Sentences involving correctional supervision

76. (1) Correctional supervision as 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 be imposed as a sentence for the purposes of this Act: Provided that this sentence may not be imposed on a child below the age of fourteen years.

(2) The whole or any part of a sentence referred to in subsection (1) may be postponed or suspended with or without conditions as referred to in section 74(2), on condition that the child performs a service for the benefit of the community as referred to in section 73(1), or on condition that the child attend a specified centre for a specified purpose as referred to in section 73(k).

Sentences involving a residential element

77. (1) No sentence involving a residential element may be imposed upon a child unless the presiding officer is satisfied that -

- (a) the seriousness of the offence justifies such a sentence;
- (b) the protection of the community justifies such a sentence;

- (c) the severity of the impact of the offence upon the victim was of such magnitude that such a sentence is justified; and
- (d) the child has failed to respond previously to non-residential alternatives.

(2) A presiding officer imposing any sentence involving a residential element on a child must note the reasons for handing down such sentence on the record of the proceedings and communicate such reasons to the child in language that he or she can understand.

(3) A sanction involving a residential element which is available as a sentence for the purposes of this Act includes -

- (a) 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 nights, with a maximum of 60 nights for the duration of the programme; and
- (b) referral to a residential facility as defined in section 1(xvi), and subject to the conditions set out in section 78.

Referral to a residential facility

78. (1) Where a sentence referred to in section 77 is a referral to a reform school, such sentence 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 to a reform school for longer than two years may be imposed where the child is a child below the age of sixteen years who would otherwise have been sentenced to imprisonment, and where the offence is so serious as to warrant such sentence.

(3) A child referred to in subsection (2) who, at the time of sentence is below the age of sixteen years, may not be permitted to reside in a reform school beyond the age of eighteen years.

(4) A child referred to in subsection (1) who is sixteen years or older at the time of sentence, may be permitted to reside in a reform school until expiry of his or her sentence.

(5) A sentence to a reform school may not be extended by administrative action and any application for the extension of the duration of the sentence should be considered by the court which imposed the original sentence.

(6) Where a sentence referred to in section 77 is a sentence of imprisonment, such sentence may not be imposed unless -

- (a) the child is fourteen (or sixteen) years of age or above; and
- (b) substantial and compelling reasons exist for imposing a sentence of imprisonment because the child has been convicted of an offence which is both serious and violent or because the child has previously failed to respond to alternative sentences, including residential sentences other than imprisonment.

(7) No sentence of imprisonment may be imposed on a child in respect of an offence listed in Schedule 1.

(8) Where a sentence referred to in section 77 is a sentence of imprisonment, the whole or any part of that sentence may be suspended on one or more of the conditions referred to in section 74(2), on condition that the child perform service for the benefit of the community as referred to in section 73(l), or on condition that the child attend a specified centre for a specified purpose referred to in section 73(k), or on condition that the child undergoes correctional supervision as referred to in section 76.

(9) No sentence of imprisonment may be imposed on a child in terms of this Act for a period exceeding 15 years on any charge, and where a child is sentenced to periods of imprisonment on more than one charge and the sentences cumulatively amount to more than 15 years, the sentences must be served simultaneously.

(10) 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: Provided that where a child fails to comply with any condition imposed in relation to any other sentence, such child may be brought before the child justice court for reimposition of an appropriate sentence, which may include a

sentence of imprisonment.

(11) Any period of time that a child has spent in prison while awaiting trial must be deducted by the presiding officer from any period of imprisonment imposed as a sentence.

(12) Nothing contained in this Act must be construed as precluding the Commissioner of Correctional Services from placing a child under correctional supervision as referred to in section 276(1)(i) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Monetary penalties

79. No monetary penalty payable to the state may be imposed as a sentence by a child justice court or other court acting in terms of the provisions of this Act: Provided that if a penalty involving a fine and imprisonment in the alternative is prescribed for an offence, the presiding officer may impose a sentence referred to in section 73(a)(i), (ii) or (iii), but not the alternative of imprisonment.

Prohibition on certain forms of punishment

80. (1) No sentence of life imprisonment may be imposed on a child under the age of eighteen years.

(2) A child who has been sentenced to attend a reform school may not be detained in a prison whilst awaiting designation of the place where the sentence will be served.

CHAPTER 9: LEGAL REPRESENTATION

Principles relating to legal representation

81. (1) A legal representative representing a child in terms of this Act must -

(a) allow the child to give independent instruction on the manner in which the case is to be conducted;

- (b) clearly explain the child's rights and responsibilities in relation to any proceedings under this Act in which the child is involved to him or her in language which he or she can understand;
- (c) encourage informed decision-making by explaining possible options and the consequences of decisions;
- (d) promote diversion where appropriate whilst ensuring that the child is not unduly influenced to acknowledge guilt;
- (e) ensure that all time periods or delays throughout the case are kept to the minimum and that remands are limited in number and period of time between each remand;
- (f) ensure that the child is able to communicate in his or her own language, and in cases where the legal representative does not speak the same language as the child, ensure that an interpreter is used who should also be apprised of these principles; and
- (g) become acquainted with the local options for diversion and alternative sentencing.

Appointment of a legal representative

82. (1) A child may have legal representation at any stage of proceedings under this Act.

(2) A child must be advised that he or she has the right to legal representation by a police officer in terms of section 15(1)(c)(iv) and (v) and 15(2), by a probation officer in terms of section 27(5)(b)(iv) and (v), by the inquiry magistrate in terms of section 38(3)(c) and (d) and by the child justice magistrate in terms of section 56(1)(c) and (d).

(3) The child, his or her parent or an appropriate adult may appoint a legal practitioner of own choice and is responsible for the payment of such services.

(4) When 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, established under section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969), to appoint a legal representative to represent the child.

(5) After the appointment of a legal representative referred to in subsection (4), the child justice court must refer the matter to the Legal Aid Board for evaluation and a report thereon.

(6) The Legal Aid Board must, subject to the provisions of the Legal Aid Guide referred to in section 3A of the Legal Aid Act, 1969, evaluate the matter and compile a report thereon, which report must be in writing and must include -

- (a) particulars of the financial circumstances of the child, his or her parents or an appropriate adult;
- (b) whether any other legal representation at the expense of the state is available or has been provided;
- (c) any other particulars which, in the opinion of the Legal Aid Board, have to be taken into account.

(7) The report referred to in subsection (6) must be submitted by the Legal Aid Board to the child justice court who must make a copy thereof available to the child justice court.

(8) After consideration of the report referred to in subsection (6), the child justice court may order that the costs of the legal representation be recovered from the parent or appropriate adult.

(9) After the finalisation of the preliminary inquiry, if a legal representative has not yet been appointed and the child, his or her parent or an appropriate adult has indicated that they do not intend to select a legal representative of own choice as referred to in subsection (3), such child must be provided with a legal representative appointed to assist him or her in accordance with section 3 of the Legal Aid Act 1969, (Act No. 22 of 1969) if -

- (a) the child is remanded in detention;
- (b) charges are to be instituted in the child justice court or any other court acting in terms of this Act in respect of any offence.

(10) The inquiry magistrate must cause a child referred to in subsection (9) to be taken on the same day that the preliminary inquiry is finalised to a legal aid officer performing

functions in terms of the Legal Aid Act, 1969 (Act No. 22 of 1969) for purposes of the appointment of a legal representative.

(11) The legal representative referred to in subsection (10) must be appointed in writing and the legal aid officer referred to in the said subsection must -

- (a) furnish the child concerned with the name and contact details of such legal representative; and
- (b) make an appointment for the child to consult such legal representative as soon as possible.

(12) Where a child is in detention as referred to in subsection (9)(a), the legal representative appointed in terms of that subsection must, within seven days of receiving instructions to represent such child, consult with the child at the place where he or she is being held: 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

83. (1) A child requiring legal representation in terms of the provisions of section 82(9)(a) and (b) may not waive the right to legal representation, except where the child is charged with an offence listed in Schedule 1 and such child is not in detention.

(2) Where a child described in section 82(9)(a) and (b) declines to give instructions to his or her appointed legal representative, this factor must be brought to the attention of the inquiry magistrate or the officer presiding in the child justice court, as the case may be, whereupon the court must question the child to ascertain the reasons for the child's declining to give instructions to the legal representative and note such reasons on the record of the proceedings.

(3) If, after questioning the child in terms of subsection (2), the court is of the opinion that such application would be appropriate, the child may be given the opportunity to make a fresh application to the Legal Aid Board.

(4) If the questioning in terms of subsection (2) reveals that the child does not wish to have the assistance of any legal representative, the court must instruct a legal representative appointed in terms of section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969) to attend all future hearings, address the court on the merits of the case and note an appeal if, at the conclusion of the trial, an appeal is considered by the legal representative to be necessary.

Accreditation of legal representatives appointed by the Legal Aid Board

84. (1) A legal representative who is appointed by the Legal Aid Board in terms of section 82(4) for the purposes of representation of a child in terms of this Act must be accredited by the Legal Aid Board.

(2) In order to be accredited in terms of subsection (1), a legal representative must apply to the Legal Aid Board to be included on a specialised roster.

(3) The Legal Aid Board must create and maintain the specialised roster for legal representatives referred to in subsection (2) and may invite applications for accreditation.

(4) The Legal Aid Board, together with the professional associations, training institutions, universities and any other bodies or persons considered by the Legal Aid Board to be appropriate, must ensure -

- (a) that relevant information relating to child justice law and practice be regularly conveyed 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.

(5) The Legal Aid Board may -

- (a) limit the number of legal representatives to be included in the specialised roster referred to in subsection (3) to a number sufficient for child legal representation, in order to further the development of specialised child legal representation; and
- (b) remove any accredited legal representative from the specialised roster in consultation with the Office for Child Justice referred to in section 96 if good reasons for such removal exist.

(6) The Legal Aid Board must ensure reasonable regional and provincial access to specialised legal representation in terms of this Act.

CHAPTER 10: APPEAL AND REVIEW

Appeal by a child convicted in terms of this Act

85. In regard to an appeal by a child against any conviction or sentence handed down in terms of the provisions of this Act, the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) relating to appeal against convictions and sentences, with the changes required by the context, are applicable.

Automatic review in certain cases decided by child justice courts or other courts acting in terms of this legislation

86. (1) Any sentence which involves a residential element imposed on a child in terms of sections 77 and 78 and any sentence involving correctional supervision imposed on a child in terms of section 76 by a lower court or a Regional Court acting in terms of the provisions of this Act, must be subject in the ordinary course to review by a judge of the local or provincial division of the High Court having jurisdiction.

(2) Any sentence involving a residential element imposed in terms of the provisions of this Act which is wholly or partially suspended, is subject to review in terms of subsection (1).

(3) The review procedure referred to in subsections (1) or (2) must be deferred where a child has appealed against a conviction or sentence and has not abandoned the appeal, and must cease to apply with reference to such an accused when judgement is given.

(4) Each sentence on a separate charge must be regarded as a separate sentence for the purposes of rendering a sentence subject to the provisions of this section.

(5) 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.

- (6) A judge conducting a review in terms of this section has the power to -
- (a) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
 - (b) confirm, reduce, alter or set aside the sentence or any order of the lower court;
 - (c) set aside or correct the proceedings of the lower court;
 - (d) generally give such judgement or impose such sentence or make such order as the lower court ought to have given, imposed or made on any matter which was before it at the trial of the case in question;
 - (e) remit the case to the lower court with instructions to deal with any matter in the way in which the provincial or local division of the High Court may deem fit; or
 - (f) increase the sentence imposed by the lower court or impose any other form of sentence.

(7) A judge referred to in this section may receive any evidence or cause a subpoena to be served on any person to appear for the purposes of giving evidence.

Review in other instances

87. (1) Nothing contained in this Act must be construed as depriving a superior court of its inherent right to review irregularities in proceedings of lower courts.

(2) If, in any criminal case in which a child justice court or any other court acting in terms of this Act has imposed a sentence which is not subject to automatic review in the ordinary course, it is brought to the notice of a judge of the provincial or local division of the High Court having jurisdiction that the proceedings in which the sentence was imposed were not conducted in accordance with justice, such court or judge has the same powers as if the matter had been laid before that court or the judge concerned in terms of section 86.

Review of proceedings after conviction but before sentence

88. (1) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings have not been conducted in accordance with justice, he or she may, without sentencing the accused, record reasons for this opinion and transmit them, together with a record of the proceedings, to the registrar of the provincial division of the High Court having jurisdiction, who must cause the matter to be set down before a judge in chambers for review.

(2) The review referred to in subsection (1) must be conducted in the same way as automatic review in terms of section 86.

Suspension of execution of sentence

89. (1) The execution of any sentence may not be suspended by the noting of an appeal against the conviction or sentence or pending review unless the court which imposed the sentence releases the child concerned on conditions referred to in section 44(3),(4) and (5) or, in the case of a sentence not involving a residential element, suspends the operation of the sentence pending the finalisation of the 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.

Applicability of provisions of the Criminal Procedure Act, 1977

90. (1) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to -

(a) review and appeal in cases of criminal proceedings in lower courts as set out in Chapter 30 of that Act, subject to the provisions of sections 85 to 89 of this Act;

- (b) appeals in cases of criminal proceedings in superior courts as set out in Chapter 31 save for sections 304(4), 307, 316A and 323;
- (c) mercy and free pardon as set out in Chapter 32 of that Act, save for sections 325A and 326,

with the changes required by the context, are applicable to the provisions of this Chapter.

(2) In the event of any inconsistency between the provisions of this Act and the applicable provisions of the Criminal Procedure Act, 1977, as referred to in subsection (1), the provisions of this Act prevail.

CHAPTER 11: MONITORING OF CHILD JUSTICE

Setting up and regulation of district child justice committees

91. (1) An inquiry magistrate must convene a child justice committee in each magisterial district which must meet not less than four times annually.

(2) The following persons are required to attend the meetings of the child justice committee -

- (a) the inquiry magistrate;
- (b) the 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 Home Affairs; and
- (g) a person nominated by the Regional Court President of the region.

(3) The following persons or bodies may attend the meetings of the child justice committee -

- (a) persons, organisations or institutions providing diversion services;
- (b) persons, organisations or institutions able to assist in the provision of non-custodial

- placements for awaiting trial children;
- (c) persons, organisations or institutions concerned with the prevention of child offending or with provision of services to children who are at risk;
 - (d) persons, organisations or representatives concerned with places of safety, secure places of safety, or other state institutions relevant to the administration of child justice;
 - (e) representatives from community based organisations;
 - (f) representatives from the legal aid board, or persons concerned with the legal representation of children in terms of this Act; and
 - (g) 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 bona fide researchers.

Duties and role of child justice committee

92. The child justice committee must -

- (a) monitor the applications of police cautions in the area of its jurisdiction;
- (b) monitor the extent to which procedures relating to release from police custody before assessment are utilised;
- (c) receive and consider information from the police concerning the extent to which parents or appropriate adults were notified by the police prior to assessment;
- (d) receive and consider information pertaining to arrests of children within the jurisdiction;
- (e) monitor the situation of children in police custody pending the finalisation 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;
- (f) receive and consider the reports referred to in sections 29(5) and 30(4) from probation officers concerning the application of sections 29 and 30;
- (g) receive and consider reports from the probation officer or officers regarding the extent to which recommendations for diversion have been made;
- (h) support the development of diversion options appropriate to the district, and ensure the continued development of diversion and alternative sentencing opportunities;
- (i) seek to identify persons, representatives from communities or organisations, or community

police fora who are not in the full-time employ of the state, who can be regarded as appropriate adults for the purposes of assisting a child during pre-trial procedures, assessment, the preliminary inquiry or child justice court proceedings;

- (j) receive and consider reports from child justice magistrates concerning the extent to which children appearing in the child justice court were legally represented; and
- (k) endeavour to expand the range of alternative sentencing options provided for in this Act especially where formal programmes are not readily available or appropriate.

Powers of child justice committees

93. (1) A child justice committee may receive complaints concerning matters relevant to this Act from any person or organisation involved in or affected by the administration of child justice within its area of jurisdiction, and attempt to resolve such complaints.

(2) A child justice committee may refer a matter, complaint or question, where it deems necessary, to the Office for Child Justice referred to in section 96 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 child justice court or any other court acting in terms of this Act were not in accordance with justice as referred to in section 87(2).

Report to Office for Child Justice

94. The child justice committee must elect a chairperson on an annual basis, who must cause an annual report of the functioning of the child justice system in the district to be submitted to the Office for Child Justice referred to in section 96.

Remuneration

95. No remuneration is attached to attendance at meetings or performance of services for the child justice committee: Provided that a person acting on behalf of or at the request of the

committee as an appropriate adult 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) and is entitled to witness fees when attending a pre-trial procedure in terms of section 20 of this Act.

Establishment of the Office for Child Justice

96. (1) An Office for Child Justice is to be established.

(2) The Minister of Justice must appoint to the Office for Child Justice a member of staff from the Department of Justice, whose function it is to -

- (a) monitor and assess the policies and practices of the Department of Justice relevant to the implementation of this Act;
- (b) inquire generally into, and report on, any matter, including any law or enactment or any procedure relevant to child justice;
- (c) keep under review and make recommendations on the operation of this Act;
- (d) increase public awareness of matters relating to the administration of child justice;
- (e) encourage the development within the Department of Justice of policies and services designed to ensure the effective application of this Act;
- (f) on own initiative or at the request of the Minister, advise the Minister on any matter relating to the administration of this Act; and
- (g) contribute to the annual report of the Office for Child Justice referred to in subsection (5).

(3) The Minister of Welfare and Population Development must appoint to the Office for Child Justice a member of staff from the Department of Welfare and Population Development, whose function it is to -

- (a) monitor and assess the policies and practices of the Department of Welfare and Population Development relevant to the implementation of this Act, and in particular, in relation to the development of probation services, diversion, and alternative sentencing programmes;
- (b) inquire generally into, and report on, any matter in which the Department of Welfare and Population Development may have an interest, including any procedure relevant to 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 (5).

(4) The Minister of Justice must appoint to the Office for Child Justice a member of staff 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;
- (b) promoting the collection of adequate statistical information, including -
 - (i) information on the number of children arrested annually;
 - (ii) the number of police cautions applied in terms of this Act,
 - (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; and
 - (viii) convictions and sentences.

(5) The Office for Child Justice must produce an annual report on the operation of this Act, including such qualitative and statistical information as is relevant to enable decision-makers to review the progress made in implementation of the child justice system.

Other functions conferred on Office for Child Justice

97. (1) The Office for Child Justice has such other functions as are conferred on the Office by this Act or by the Ministers of Justice and Welfare and Population Development.

(2) Nothing in this Act authorises the Office for Child Justice to investigate any decision made by any child justice court or any other court acting in terms of this Act.

(3) The Office for Child Justice must receive and consider the annual reports of child justice committees referred to in section 94 from each district.

(4) The Office for Child Justice may be provided with such support staff as are necessary to fulfil its functions.

Submission of annual report

98. The Office for Child Justice must submit the annual report referred to in section 96(5) to the Ministers of Justice and Welfare and Population Development, and to the Parliamentary Portfolio Committees of Justice and of Welfare and Population Development.

National committee for child justice

99. (1) There must be a national committee for child justice, which must comprise -

- (a) the persons referred to in section 96(2) and (3);
- (b) representatives from the Departments of Education, South African Police Services, Home Affairs and Correctional Services; and
- (c) six other persons not in the full time employ of the state, with 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 legislation.

(2) The persons referred to in subsection (1)(c) must be appointed by the Ministers of Justice and Welfare acting jointly.

(3) The term of office of the persons referred to in subsection (1) must be two years.

(4) Persons serving on the national committee for the purposes of subsection (1) must not receive remuneration, save a fee to be determined by the Minister of Justice for attendance at meetings, and reasonable expenses incurred for the purposes of attendance at committee meetings.

(5) The national committee must meet no less than four times annually.

(6) The national committee must elect a chairperson, and keep minutes of meetings.

Functions of national committee for child justice

100. (1) The national committee for child justice must -

- (a) receive and consider reports from the persons referred to in section 96(2), (3) and (4); and
- (b) consider the annual report of the Office for Child Justice referred to in section 96(5) 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 Office for Child Justice;
- (d) assist the 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 12: GENERAL PROVISIONS

Certain convictions fall away as previous convictions

- 101.** (1) The record of any conviction and sentence imposed upon a child convicted of -
- (a) murder,
 - (b) rape,
 - (c) indecent assault involving the infliction of grievous bodily harm,
 - (d) robbery with aggravating circumstances,
 - (e) 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 R50 000,
 - (f) any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament,
- may not be expunged.

[NOTE: as far as the remainder of the section is concerned, the project committee puts forward the options set out below for consideration. It should be noted that if option 2 is to be introduced, the provisions of section 100(2) will have to be amended to provide for an expansion of the national committee for child justice's functions.]

Option 1

- (2) 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 after the expiration of a period of five years following the completion of the sentence: Provided that the applicant has not been convicted of an offence in the five year period.

Option 2

(2) In cases where a sentence not involving a residential element in terms of sections 73 and 75 has been imposed, the record of the conviction and sentence imposed upon a child must be automatically expunged after the expiration of a period of five years following the completion of the sentence: Provided that the applicant has not been convicted of an offence in the five year period.

(3) In cases where a residential sentence in terms of section 77 has been imposed, the record of the conviction and sentence may, after the expiration of the period of ten years after completion of the sentence, upon application in writing by the child or person to the national committee for child justice referred to in section 99, be expunged: Provided that the applicant has not been convicted of an offence in the ten year period.

(4) If, after considering an application referred to in subsection (3), the national committee for child justice referred to in that subsection decides to expunge the record, notice of such decision should be forwarded to the South African Criminal Bureau together with a direction that the said record be expunged.

Liability for patrimonial loss arising from performance of community service

102. (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 section 34 or section 73, 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 by reason of the patrimonial loss suffered by him or her.

(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 right 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 section 34 or section 73 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General: 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

103. (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 26;
 - (ii) comply with a summons to attend a preliminary inquiry in terms of section 40(1)(a) or (b); or
 - (iii) comply with a warning to attend proceedings as referred to in section 57;
 - (c) admits a child to a residential facility without the certification referred to in section 70(5);
 - (d) publishes information or reveals the identity of persons in contravention of section 66; or
 - (e) is a police officer and who contravenes the provisions of section 21(7) or 21(9) or fails to comply with a request by a probation officer in terms of section 28,
- is guilty of an offence.

(2) Any person convicted of an offence referred to in subsection (1), is liable to a fine not exceeding R500 or to imprisonment for a period not exceeding three months.

Applicability of provisions of the Criminal Procedure Act, 1977

104. (1) The general provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as set out in Chapter 33 of that Act, save for sections 332, 337, 344 and 345, with the changes required by the context, are applicable to the provisions of this Chapter.

(2) In the event of any inconsistency between the provisions of this Act and the applicable provisions of the Criminal Procedure Act, 1977, as referred to in subsection (1), the provisions of this Act prevail.

Repeal

105. Sections 50(4) and (5), 71, 72(1)(b), 73(3), 74, 153(4), 254, 290, and 291 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) are hereby repealed.

Regulations

106. The Minister of Justice, in consultation with the Ministers of Welfare and Population Development, Correctional Services and Safety and Security respectively, may make regulations relating to-

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the monitoring of the operation of this Act and the establishment of the Office for Child Justice; and
- (c) any other matter which may be necessary for the application of this Act.

Short title and commencement

107. This Act is the Child Justice Act, 19.., which takes effect on a date fixed by the President by notice in the *Gazette*.

Schedule 1

(Sections 11, 13, 22, 30, 31, 56, 70, 78, 83)

<p style="text-align: center;">Form A - Written Notice to Appear for an Assessment</p>

Assault where grievous bodily harm has not been inflicted.

Malicious injury to property where the damage does not exceed R1 000.

Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed 25 grams.

Theft, where the value of the property involved does not exceed R100.

Any statutory offence where the maximum penalty determined by that statute is a fine of less than R300 or three months imprisonment.

Conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2

(Section 22)

Public violence.

Culpable homicide.

Assault, including assault involving the infliction of grievous bodily harm.

Arson.

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.

Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000.

Theft, where the amount involved does not exceed R20 000.

Any offence under any law relating to the illicit possession of dependence producing drugs.

Forgery, uttering or fraud, where the amount concerned does not exceed R20 000.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

To be handed to accused and parents of the accused.

Form A - Written Notice to Appear for an Assessment

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
CAS No/CR No:	Police Station and Area:	

To: _____; and/or _____
 (Accused Name) (Parent, Guardian, Family Member, Appropriate Adult)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

Particulars of charge:

Accused is alleged to have committed the offence of: _____

in that upon or about the _____ day of _____ of _____ (year) and at or near _____

the accused did unlawfully _____

You are therefore hereby called upon in terms of section 12 (1) (b) of the Child Justice Act to appear for an assessment

at _____

_____ (Place and Address), on ____/____/____ (date)

at _____ (Time) to see _____ (person)

Warning: Should you fail to comply, a warrant for your arrest will be issued, and you may be arrested. You may, further, be found guilty of an offence and be liable to a fine not exceeding R500 or to imprisonment for a period not exceeding 3 months.

 Signature of Issuing Officer: Full Name of Issuing Officer
 Police Officer/ Probation Officer/ Magistrate (*Delete where not applicable*)

For Information Purpose:
 Please bring the following to the assessment:

(7) Proof of Age: Birth Certificate, Identification Documents, Passport, Baptism Certificates, School Registration Forms

(8) Other Reports on the child and family such as: school reports, medical records etc

(9) Any extra information or documents to determine the best course of action for the future

(10) Your parents

To be kept by the police officer or other person empowered to serve the written notice and handed to the probation officer responsible for the assessment.

Form A - Written Notice to Appear for an Assessment

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
CAS No/CR No:	Police Station and Area:	

To: _____; and/or _____
 (Accused Name) (Parent, Guardian, Family Member, Appropriate Adult)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

Particulars of charge:

Accused is alleged to have committed the offence of: _____
 in that upon or about the _____ day of _____ of _____ (year) and at or near _____

 the accused did unlawfully _____

You are therefore hereby called upon in terms of section 12 (1) (b) of the Child Justice Act to appear for an assessment

at _____

_____ (Place and Address), on ____/____/____ (date)

at _____ (Time) to see _____ (person)

Warning: Should you fail to comply, a warrant for your arrest will be issued, and you may be arrested. You may, further, be found guilty of an offence and be liable to a fine not exceeding R500 or to imprisonment for a period not exceeding 3 months.

 Signature of Issuing Officer:
 Police Officer/ Probation Officer/ Magistrate (*Delete where not applicable*)

 Full Name of Issuing Officer

For Information Purpose:
 Please bring the following to the assessment:

- (a) Proof of Age: Birth Certificate, Identification Documents, Passport, Baptism Certificates, School Registration Forms
- (b) Other Reports on the child and family such as: school reports, medical records etc
- (c) Any extra information or documents to determine the best course of action for the future
- (d) Your parents

Form A - Written Notice to Appear for an Assessment

For Official Purposes Only

I, _____, The undersigned certify that I have served this written notice to appear for an assessment upon the within - named person by:

a) delivering a true copy to him/her personally; or

b) delivery as he/she could not be found, a true copy to: _____ a person apparently over the age of 16 years and apparently residing or employed at the place of residence/ employment/ business;

(delete whichever is not applicable)

at _____

The nature and meaning of this written notice was explained to the recipient thereof.

Time: _____ Day: ____ Month: ____ Year: _____.

Place: _____

Signature of Delivering Officer

Signature of Recipient

Full Name: _____

Full Name: _____

Capacity: _____

For information purposes

When giving this summons to someone other than the accused, it should be explained that both the parents and the child should be given the written notice as soon as possible

Form B - Summons to Appear for an Assessment

To be handed to accused and parents of the accused.

Enquiries: Tel No:	Date:	Date Stamp
CAS No/CR No:	Police Station and Area:	

To: _____; and/or _____
(Accused Name) (Parent, Guardian, Family Member, Appropriate Adult)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

Particulars of charge:

Accused is alleged to have committed the offence of: _____
in that upon or about the _____ day of _____ of _____ (year) and at or near _____
_____ the accused did unlawfully _____

You are therefore hereby summoned in terms of section 12 (2) of the Child Justice Act to appear for an assessment

at _____

_____ (Place and Address), on ____/____/____ (date)

at _____ (Time) to see _____ (person)

Warning: Should you fail to comply, a warrant for your arrest will be issued, and you may be arrested. You may, further, be found guilty of an offence and be liable to a fine not exceeding R500 or to imprisonment for a period not exceeding 3 months.

Signature of Clerk of Court:

Full Name of Clerk of Court

For Information Purpose:

Please bring the following to the assessment:

- (5) Proof of Age: Birth Certificate, Identification Documents, Passport, Baptism Certificates, School Registration Forms
- (6) Other Reports on the child and family such as: school reports, medical records etc
- (7) Any extra information or documents to determine the best course of action for the future
- (8) Your parents

To be kept by the police officer or other person empowered to serve the written notice and handed to the probation officer responsible for the assessment.

Form B - Summons to Appear for an Assessment

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
CAS No/CR No:	Police Station and Area:	

To: _____; and/or _____
(Accused Name) (Parent, Guardian, Family Member, Appropriate Adult)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

Particulars of charge:

Accused is alleged to have committed the offence of: _____
in that upon or about the _____ day of _____ of _____ (year) and at or near _____
_____ the accused did unlawfully _____

You are therefore hereby summoned in terms of section 12 (2) of the Child Justice Act to appear for an assessment

at _____
_____ (Place and Address), on ____/____/____ (date)
at _____ (Time) to see _____ (person)

Warning: Should you fail to comply, a warrant for your arrest will be issued, and you may be arrested. You may, further, be found guilty of an offence and be liable to a fine not exceeding R500 or to imprisonment for a period not exceeding 3 months.

Signature of Clerk of Court:

Full Name of Clerk of Court

<p>For Information Purpose: Please bring the following to the assessment:</p> <ul style="list-style-type: none">(a) Proof of Age: Birth Certificate, Identification Documents, Passport, Baptism Certificates, School Registration Forms(b) Other Reports on the child and family such as: school reports, medical records etc(c) Any extra information or documents to determine the best course of action for the future(d) Your parents
--

Form B - Summons to Appear for an Assessment

For Official Purposes Only

I, _____, The undersigned certify that I have served this summons to appear for an assessment upon the within - named person by:

a) delivering a true copy to him/her personally; or

b) delivery as he/she could not be found, a true copy to: _____ a person apparently over the age of 16 years and apparently residing or employed at the place of residence/ employment/ business;

(delete whichever is not applicable)

at _____

The nature and meaning of this written notice was explained to the recipient thereof.

Time: _____ Day: ____ Month: ____ Year: _____.

Place: _____

Signature of Delivering Officer

Signature of Recipient

Full Name: _____

Full Name: _____

Capacity: _____

For information purposes

When giving this summons to someone other than the accused, it should be explained that both the parents and the child should be given the written notice as soon as possible

Form C1 - Reasons why alternatives to arrest could not be used

Enquiries:	Date:	
Tel No:		
CAS No/CR No:	Rank and Full Name of Police Officer:	<i>Date Stamp</i>
Police Station and Area:	Service No. of Police Officer:	Tel No. of Police Officer:

To: _____ (Inquiry Magistrate)

Court Number: _____ Name of Court: _____ Magisterial district: _____

Details of the Accused:	
Name:	Date of Arrest: (mm/dd/yyyy)
Charge:	Time of Arrest: (eg.13:45:PM)

Declaration by Arresting Officer:

I, _____ (Police Officer) hereby state that alternatives to arrest as contemplated in section 12(1)) of the Child Justice Act could not be used for the following reason/s:

- (e) The arrest of the child was necessary and alternatives to arrest could not be used because there was a substantial risk of the child harming him/herself or others. It was believed that there was a substantial risk of this happening for the following reason:

- The arrest of the child was necessary and alternatives to arrest could not be used to secure his/her attendance at an assessment because assessment was not available for the following reason/s:

- The circumstances surrounding the crime are serious and the risk of the child escaping from custody would be a danger to the community. The following are the circumstances surrounding the crime are:

- The arrest of the child was necessary and alternatives to arrest could not be used for the following other reason:

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

For information purposes:
Alternatives to arrest include the following:

- a) Requesting the child to accompany the police officer to the place where assessment can be affected;
- b) written notification for the child and, if available, the parents or family of that child to appear for assessment at a place and on a date and at a time specified in the written notice (use Form A);
- c) granting of a recognisance by a police officer at the place of arrest, recording it in the pocket book of the police officer concerned, and informing the probation officer on a Form E2 of the granting of such recognisance
- d) accompanying the child to his or her home, where a written notice or summons can be given to the child and his or her parents or an appropriate adult ;
- e) opening a docket for the purposes of consideration by the Director of Public Prosecutions as to whether the matter should be set down for the holding of a preliminary enquiry or the institution of charges

Form C 2- Reasons why child could not be released from police custody
--

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
CAS No/CR No:	Rank and Full Name of Police Officer:	
Police Station and Area:	Service No. of Police Officer:	Tel No. of Police Officer:

To: _____ (Inquiry Magistrate)

Court Number: _____ Name of Court: _____ Magisterial district: _____

Details of the Accused:	
Name:	Date of Arrest: (mm/dd/yyyy)
Charge:	Time of Arrest: (eg. 13:45:PM)

Declaration by Arresting Officer:

I, _____ (Police Officer) hereby state that the child could not be released from police custody in terms of section 23 of the Child Justice Act for the following reason/s:

The circumstances surrounding the crime are serious and the risk of the child escaping from custody would be a danger to the community. The following are the circumstances surrounding the crime :

The parents or family of the child could not be traced and the child could not be released on his/her own recognisance because:

The child has previously attempted to abscond or failed to appear at a court hearing where he/she was an accused.

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form D - Assessment of Age

Enquiries: Tel No:	Date:	Rank and Full Name of Investigating Officer:
CAS No/CR No:	Police Station and Area:	Telephone Number of Investigating Officer:
Court Case Number:	Court:	Probation Officer Case Number:
Probation Officer Full Name:	Probation Officer Service Office:	Probation Officer Telephone Number:

To: _____ (Inquiry Magistrate/ Other Designated Court/ Prosecutor)
 _____ (Court)

Details of the Accused:	
Name:	Telephone Number:
Residential / Postal Address:	
Sex:	<input type="checkbox"/> Male <input type="checkbox"/> Female

The following evidence was obtained related to Age: (Please use a **X** to indicate)

- Valid Birth Certificate / Identity Document / Passport
- Any other form of registration of birth, identity or age
 - _____ acknowledged by department of Home Affairs
 If Yes, please explain: _____

- Previous determination of age
- Statement from parents/family/other, having direct knowledge of age
- Secondary Documentary evidence:
eg. Baptismal certificate, clinic cards, school registration forms

(Please attach copies of all relevant certificates/ documentation/ statements)

OPINION:

* On the grounds of the above-mentioned, and the accused's general appearance, his/her age is assessed at being between ___ and ___ years. The most probable age is: ___ years, ___ months, and ___ days. This date of birth is therefore given as ___/___/___ (mm/dd/yyyy).

* On the grounds of the above-mentioned, it is not possible to determine the age of the child.

Signature of Probation Officer

_____/_____/_____
Date (mm/dd/yyyy)

Date Stamp

Form E1 - Informing Probation Officer of Arrest of a Child

(NB: To be sent to probation officer within 12 hours of arrest of a child)

Enquiries: Tel No:	Date: (mm/dd/yyyy) Time: (eg:13:45:PM)	<i>Date Stamp</i>
CAS No/CR No:	Police Station and Area:	

To: _____ (Probation Officer)

Service Office: _____ Fax No: _____

Please be informed that the child mentioned below has been arrested on:

___/___/___ (Date: mm/dd/yyyy) at _____ (Time eg13:45:PM).

The child is currently being held at: _____ (place of detention)

 _____ (address) _____ (Telephone Number)

The child will be brought for an assessment:

at: _____
 _____ (Place)

on ___/___/___ (Date: mm/dd/yyyy) at _____ (Time:eg 13:45:PM)

to see: _____ (Probation Officer)

The child's family has/has not been warned/ summoned and will/will not appear for this assessment:
(delete which is not applicable)

Details of the Accused			
Name:			
Residential / Postal Address:			
School / Work Address:			
Telephone Number:	Home:	Work:	
Occupation (or Grade if schooling):			
Date of Birth (dd/mm/yy):	___ / ___ / ___	Age:	
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female	

Form E1 - Informing Probation Officer of Arrest of a Child

Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____
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Form E1 - Informing Probation Officer of Arrest of a Child

Details of Parent/ Guardian/ Family of the Accused		
Name:		
Residential / Postal Address:		
Work Address:		
Telephone Number:	Home:	Work:
Occupation:		
Relationship to accused		
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____

Particulars of charge:

Accused is alleged to have committed the offence of: _____

in that upon or about the _____ day of _____ of _____ (year) and at or near _____

the accused did unlawfully _____

Other information relevant to assessment (eg. circumstances of offence; impact or injury to victim; previous dealings with this child; other cases pending against this child; etc.): _____

Signed on this _____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form E2 - Informing Probation Officer of Use of Alternatives to Arrest of a Child

(NB: To be sent to probation officer within 72 hours of use of alternative to arrest of a child)

Enquiries: Tel No:	Date: (mm/dd/yyyy) Time: (eg:13:45:PM)	<i>Date Stamp</i>
CAS No/CR No:	Police Station and Area:	

To: _____ (Probation Officer)

Service Office: _____ Fax No: _____

Please be informed that the child mentioned below has been:

- Requested to accompany the police officer to a place where the assessment can be affected
- Given a written notification has been issued for the child to appear at an assessment
- granting of a recognisance by a police officer at the place of arrest
- accompanying the child to his or her home, where a written notice can be given to the child and his or her parents or family

(Tick which is applicable)

The above was done at: ___/___/___ (Date: mm/dd/yyyy) at _____ (Time eg13:45:PM).

The child has been informed to appear for an assessment:

at: _____

_____ (Place)

on ___/___/___ (Date: mm/dd/yyyy) at _____ (Time:eg 13:45:PM)

to see: _____ (Probation Officer)

The child's family has/has not been warned and will/will not appear for this assessment: *(delete which is not applicable)*

Details of the Accused			
Name:			
Residential / Postal Address:			
School / Work Address:			
Telephone Number:	Home:	Work:	
Occupation (or Grade if schooling):			
Date of Birth (dd/mm/yy):	___ / ___ / ___	Age:	
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female	
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____	

Form E2 - Informing Probation Officer of Use of Alternatives to Arrest of a Child

Details of Parent/ Guardian/ Family of the Accused		
Name:		
Residential / Postal Address:		
Work Address:		
Telephone Number:	Home:	Work:
Occupation:		
Relationship to accused		
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____

Particulars of charge:

Accused is alleged to have committed the offence of: _____

in that upon or about the _____ day of _____ of _____ (year) and at or near _____

the accused did unlawfully _____

Other information relevant to assessment (eg. circumstances of offence; previous dealings with this child; other cases pending against this child; etc.): _____

Signed on this _____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form F1 - Police Caution without Conditions

Enquiries: Tel No:	Date:	Rank and Full Name of Investigating Officer:
CAS No/CR No:	Police Station and Area:	Telephone Number of Investigating Officer:
Probation Officer Full Name:	Probation Officer Service Office:	Probation Officer Case Number:
Probation Officer Telephone Number:		Police Station Caution Reference No.

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

As you have admitted to committing the above crime, and are taking responsibility for your actions, you are being given a chance. You are hereby reprimanded. You are warned not to commit the offence again. A copy of this formal caution will be sent to the Provincial Commissioner of Police. A record of your offence will be kept there for a period of 2 (two) years. Should you commit another offence, this present caution may influence the way you are dealt with.

Cautioning Details:

People present:

Parents	<input type="checkbox"/>
Guardian	<input type="checkbox"/>
Probation Officer	<input type="checkbox"/>
Other	<input type="checkbox"/>

Details: _____

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

<h1>Form F1 - Police Caution without Conditions</h1>
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Referral of Caution Details to Commissioner of Police

Police Officer: Tel No:	Date:
Station:	Area:
Police Station Caution Reference No:	

To: _____ (Police Commissioner)

Details of the Accused:	
Name:	
Residential / Postal Address:	
Telephone Number:	
Sex:	<input type="checkbox"/> Male <input type="checkbox"/> Female
Age:	
Identity Number:	
Offence:	

I, the undersigned do acknowledge that _____ (Name of child) was formally cautioned in the manner described and the consequences of his / her behaviour were explained to him / her.

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form F2 - Police Caution with Conditions

Enquiries: Tel No:	Date:	Rank and Full Name of Investigating Officer:
CAS No/CR No:	Police Station and Area:	Telephone Number of Investigating Officer:
Probation Officer Full Name:	Probation Officer Service Office:	Probation Officer Case Number:
Probation Officer Telephone Number:		Police Station Caution Reference No.

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

As you have admitted to committing the above crime, and are taking responsibility for your actions, you are being given a chance. You are hereby reprimanded. You are warned not to commit the offence again. A copy of this formal caution will be sent to the Provincial Commissioner of Police. A record of your offence will be kept there for a period of 2 (two) years. Should you commit another offence, this present caution may influence the way you are dealt with.

Cautioning Details:

People present:

Parents	<input type="checkbox"/>
Guardian	<input type="checkbox"/>
Probation Officer	<input type="checkbox"/>
Other	<input type="checkbox"/>

Details: _____

The following are the conditions of your caution:

- Verbal apology to parents / victim
- Written apology to family / victim
- Hand back _____
- Give the following item in place of the stolen/damaged item: _____
- Fix or repair _____
- Assist to fix or repair _____
- Attend school regularly - no truancy
- Police officer to monitor situation
- Write a letter/essay/poem about experience

Form F2 - Police Caution with Conditions

- attend a lecture by _____ on ____/____/____ (mm/dd/yyyy) at ____:____:____
(time: eg 13:45:PM) at _____ (venue)
- Perform ____ hours (specify: 10 - 30 hours) of community service at _____ (Place)
- Other: _____

(tick appropriate)

The above will be completed by ____/____/____ (date: mm/dd/yyyy). (no longer than 2 months from date of caution _____ (parent/ guardian/ suitable adult) will be responsible for monitoring your progress and will give feedback to _____ (police officer) at _____ (telephone number) or at the _____ police station at _____ (address)

by the ____/____/____ (date: mm/dd/yyyy).

Should you fail to comply with the above conditions, your case will be referred back to the probation officer to decide what further action to take in terms of the Child Justice Act.

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form F2 - Police Caution with Conditions

Referral of Caution Details to Commissioner of Police

Police Officer: Tel No:	Date:
Station:	Area:

To: _____ (Police Commissioner)

Details of the Accused:	
Name:	
Residential / Postal Address:	
Telephone Number:	
Sex:	<input type="checkbox"/> Male <input style="margin-left: 100px;" type="checkbox"/> Female
Age:	
Identity Number:	
Offence:	

I, the undersigned do acknowledge that _____ (Name of child) was formally cautioned in the manner described and the consequences of his / her behaviour were explained to him / her. The following were the conditions of his/her caution:

- Verbal apology to parents / victim
- Written apology to family / victim
- Hand back _____
- Give the following item in place of the stolen/damaged item: _____
- Fix or repair _____
- Assist to fix or repair _____
- Attend school regularly - no truancy
- Police officer to monitor situation
- Write a letter/essay/poem about experience
- attend a lecture by _____ on ___/___/_____ (mm/dd/yyyy) at ___:___:___
(time: eg 13:45:PM) at _____ (venue)
- Perform ___ hours (specify: 10 - 30 hours) of community service at _____ (Place)
- Other: _____

(tick appropriate)

Form F2 - Police Caution with Conditions

The above will be completed by ____/____/____ (date: mm/dd/yyyy). (no longer than 2 months from date of caution _____ (parent/ guardian/ suitable adult) will be responsible for monitoring your progress and will give feedback to _____ (police officer) at _____ (telephone number) or at the _____ police station at _____ (address) by the ____/____/____ (date: mm/dd/yyyy).

Should you fail to comply with the above conditions, your case will be referred back to the probation officer to decide what further action to take in terms of the Child Justice Act.

Signed on this ____ day of _____ the year _____

Signature of Police Officer

Full Name of Police Officer

Rank of Police Officer

Service Number of Police Officer

Form G - Requisition Form

Enquiries: Tel No:	Date:	Rank and Full Name of Investigating Officer:
CAS No/CR No:	Police Station and Area:	Telephone Number of Investigating Officer:
Preliminary Inquiry Number: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case Number:
Probation Officer Full Name:	Probation Officer Service Office:	Probation Officer Telephone Number:

To _____ (Arresting Officer/ Other police officer)

Police Station: _____ Fax No: _____

Police Area: _____ Tel No: _____

You are hereby requested in terms of section 28 of the Child Justice Act to:

- (35) bring a child forthwith from police custody for assessment;
- (36) obtain documentation relevant to proof of a child's age from a specified place or specified person;
- (37) notify a specific parent or an appropriate adult to appear at an assessment in the manner prescribed in Form A;
- (38) transport or ensure the transport in order to secure the attendance of a parent or an appropriate adult at the assessment

(tick appropriate)

The following are the details required for you to perform your tasks: *(only fill in where appropriate)*

Details of child:
 Name of child: _____ Where in Police Custody: _____
 _____ (name of police station and address)
 Telephone number of police station: _____ CR/CAS No: _____

Details of documentation required and where it can be obtained from:
 Obtain the following documentation relevant to proof of the child's age:
 (Please use a **X** to indicate)

- Valid Birth Certificate / Identity Document / Passport
- Any other form of registration of birth, identity or age acknowledged by department of Home Affairs such as: _____
- Statement from parents/family/other, having direct knowledge of age
- Secondary Documentary evidence:
 eg. Baptismal certificate, clinic cards, school registration forms
(Please bring copies of all relevant certificates/ documentation/ statements)

this can be obtained from: _____ (person) at _____
 _____ (place and address)

Detail of person to be notified of assessment:
 Name of person: _____ (contact details specified in attached Form A)

Form G - Requisition Form

Details of person to be transported to assessment:
 Name _____ They can be found at _____
 _____ (address).
 Tel No: _____ Other Contact details: _____

Assessment Details:

Place of assessment: _____
 Date of assessment: ____/____/____ (mm/dd/yyyy)
 Time of assessment: _____ (13:45:PM)
 Probation Officer: _____
 Telephone Number: _____

Details of the Accused			
Name:			
Residential / Postal Address:			
School / Work Address:			
Telephone Number:	Home:	Work:	
Occupation (or Grade if schooling):			
Date of Birth (dd/mm/yy):	____/____/____	Age:	
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female	
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____	

 Signature of Probation Officer

____/____/____
 Date (mm/dd/yyyy)

Date Stamp

Form H - Assessment Form

Enquiries: Tel No:	Date:	Rank and Full Name of Investigating Officer:
CAS No/CR No:	Police Station and Area:	Telephone Number of Investigating Officer:
Court Case Number:	Court:	Probation Officer Case Number:
Probation Officer Full Name:	Probation Officer Service Office:	Probation Officer Telephone Number:

To: _____ (Prosecutor/Attorney General)

_____ (Court)

Details of the Accused			
Name:			
Residential / Postal Address:			
School / Work Address:			
Telephone Number:	Home:	Work:	
Occupation (or Grade if schooling):			
Date of Birth (dd/mm/yy):	____ / ____ / ____	Age:	
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female	
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____	
		Residence Status: _____	

Details of Parent/ Guardian/ Family of the Accused			
Name:			
Residential / Postal Address:			
Work Address:			
Telephone Number:	Home:	Work:	
Occupation:			
Relationship to accused			
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female	
Nationality:	<input type="checkbox"/> South African	<input type="checkbox"/> Other Specify: _____	

Form H - Assessment Form

Family Composition	
Father:	
Mother:	
Children:	
Family Background:	
Previous Social worker involvement: <input type="checkbox"/> Yes <input type="checkbox"/> No If yes who was the social worker and what was the nature of their involvement with the family?	

Details of an Appropriate Adult		
Name:		
Residential / Postal Address:		
Work Address:		
Telephone Number:	Home:	Work:
Occupation:		
Relationship to accused		
Sex:	<input type="checkbox"/> Male	<input type="checkbox"/> Female

Ecomap of Accused Family/ description of family relationships and support systems:

Form H - Assessment Form

Arrest Details	
Date arrested (dd/mm/yy):	
Reason for Arrest:	
First Appearance:	
SAP Station:	
Arresting Officer	
Investigating Officer	
Where is the child currently living: <ul style="list-style-type: none"> • Parent • Guardian • Appropriate adult • Place of Safety • Secure Care • Police Custody Physical Address: _____ Tel No: _____	
Arrested Alone: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, please state names and ages of co-accused: _____ _____ _____	

Does the child acknowledge responsibility for the crime:
 Yes No

If Yes, what are his/her reason for committing the crime: _____

—

-

Has the child had any previous contacts with the criminal justice or child care system?:
 Yes No

If Yes describe: _____

-

Does the child have Legal Representation: Yes No

If Yes, please state Name: _____

Telephone number: _____

Form H - Assessment Form

Developmental Assessment

Describe the "Belonging" needs of this child and how the planned intervention aims to strengthen this child's sense of belonging:

Describe the "Mastery" needs of this child and how the planned intervention aims to strengthen this child's sense of competency and capacity:

Describe the "Independence" needs of this child and how the planned intervention aims to strengthen this child's independence:

Describe the "Generosity" needs of this child and how the planned intervention aims to strengthen this child's generosity:

Form K1 - Supervision and Guidance Order

Recommendations of the Probation Officer

(1) No Further Action Taken

(1) Formal Caution

Child to be referred to _____ police officer for a formal caution with/without conditions to be administered (*delete where not applicable*)

(1) Diversion

Recommendation for Diversion Programme: Yes No

Motivate: _____

If Yes, Diversion Programme recommended:

YES PTCS FGC Journey Other: _____

(1) Placement

Recommendation for placement of child in:

- Care of Parent or an Appropriate Adult
- Place of Safety
- Secure Care Facility
- Residential Facility

Motivation / Details: _____

—

Contact Details at Placement:

Contact Person: _____

Relationship to Child/ Name of Facility _____

Address: _____

Telephone Number: _____

Signature of Probation Officer

_____/_____/_____
Date (mm/dd/yyyy)

Date Stamp

Form K1 - Supervision and Guidance Order

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under the supervision and guidance of _____ (name of mentor).

You are to attend a meeting with your mentor by ___/___/_____ in order to develop a supervision and guidance plan. In this meeting the following will be decided:

- Frequency of meetings (you need to meet your mentor at least 2 times per month, but can meet him/her more regularly if you both so wish)
- Goals and a plan to reach these goals

The goals and plan will include the following

- School and Education
- Home and family relationships
- Friendships and relationships
- Contributing to the community and community life
- Sport and healthy living
- Spiritual life
- Other relevant aspects of your life
- Avoidance of other negative behaviour

This person will act as a mentor or peer role model to you. This person will be responsible for monitoring how you are moving away from a life of crime to a life of contributing to your family and community. This person will check how you are progressing at school, how you are getting on with your family, and what you are doing in your spare time as well as other aspects mentioned in your plan. You are encouraged to use this opportunity to move on with your life away from the past and towards a future which you can be proud of.

This supervision and guidance order shall cease to have effect after ___/___/_____ (mm/dd/yyyy)

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:

The purpose of this order is to facilitate a relationship between the child and his or her mentor/ peer role model. This cannot be achieved by an order alone, it requires commitment from both parties to find ways to make this relationship work.

Form K1 - Supervision and Guidance Order

Copy for person mentoring child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under the supervision and guidance of _____ (name of mentor).

You are to attend a meeting with your mentor by ___/___/_____ in order to develop a supervision and guidance plan. In this meeting the following will be decided:

- Frequency of meetings (you need to meet your mentor at least 2 times per month, but can meet him/her more regularly if you both so wish)
- Goals and a plan to reach these goals

The goals and plan will include the following

- School and Education
- Home and family relationships
- Friendships and relationships
- Contributing to the community and community life
- Sport and healthy living
- Spiritual life
- Other relevant aspects of your life
- avoidance of other negative behaviour

This person will act as a mentor or peer role model to you. This person will be responsible for monitoring how you are moving away from a life of crime to a life of contributing to your family and community. This person will check how you are progressing at school, how you are getting on with your family, and what you are doing in your spare time as well as other aspects mentioned in your plan. You are encouraged to use this opportunity to move on with your life away from the past and towards a future which you can be proud of.

This supervision and guidance order shall cease to have effect after ___/___/_____ (mm/dd/yyyy)

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
The purpose of this order is to facilitate a relationship between the child and his or her mentor/ peer role model. This cannot be achieved by an order alone, it requires commitment from both parties to find ways to make this relationship work. Should the child not be complying, please report this to the issuing officer.

Form K1 - Supervision and Guidance Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under the supervision and guidance of _____ (name of mentor).

You are to attend a meeting with your mentor by ___/___/_____ in order to develop a supervision and guidance plan. In this meeting the following will be decided:

- Frequency of meetings (you need to meet your mentor at least 2 times per month, but can meet him/her more regularly if you both so wish)
- Goals and a plan to reach these goals

The goals and plan will include the following

- School and Education
- Home and family relationships
- Friendships and relationships
- Contributing to the community and community life
- Sport and healthy living
- Spiritual life
- Other relevant aspects of your life
- avoidance of other negative behaviour

This person will act as a mentor or peer role model to you. This person will be responsible for monitoring how you are moving away from a life of crime to a life of contributing to your family and community. This person will check how you are progressing at school, how you are getting on with your family, and what you are doing in your spare time as well as other aspects mentioned in your plan. You are encouraged to use this opportunity to move on with your life away from the past and towards a future which you can be proud of.

This supervision and guidance order shall cease to have effect after ___/___/_____ (mm/dd/yyyy)

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months
 Level 3: More than 6 months but less than a year

Form K2 - Reporting Order

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to report to _____ (parent/ guardian/ suitable adult/ teacher community member/ police officer/ probation officer) ____ times (maximum 2 times per week) per week/ month between 9:00:AM and 11:00:AM/ 15:00:PM and 17:00:PM. . *(Delete where not applicable)*

You are to inform the person you are reporting to of what your activities have been since the last report. You are further ordered not to get into trouble during this order. This reporting order shall cease to have effect after ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Failure to report may result in a warrant for your arrest being issued and further steps being taken against you.

Form K2 - Reporting Order

Copy for person child is reporting to

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to report to _____ (parent/ guardian/ suitable adult/
teacher community member/ police officer/ probation officer) ____ times (maximum 2 times per
week)
per week/ month between 9:00:AM and 11:00:AM/ 15:00:PM and 17:00:PM. . *(Delete where not applicable)*

You are to inform the person you are reporting to of what your activities have been since the last
report. You are further ordered not to get into trouble during this order. This reportingorder shall
cease to have effect after ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Should the child not be complying, please report this to the issuing officer.

Form K2 - Reporting Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to report to _____ (parent/ guardian/ suitable adult/ teacher community member/ police officer/ probation officer) ____ times (maximum 2 times per week) per week/ month between 9:00:AM and 11:00:AM/ 15:00:PM and 17:00:PM. . *(Delete where not applicable)*

You are to inform the person you are reporting to of what your activities have been since the last report. You are further ordered not to get into trouble during this order. This reporting order shall cease to have effect after ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months
 Level 3: More than 6 months but less than a year

Form K3 - Compulsory School Attendance Order

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to attend _____ (name of school) in _____ (area)
every school day for the next ____ months until ____/____/____ (mm/dd/yyyy)

unless excused by _____ (teacher/ headmaster/ person monitoring this order) for reasons that are acceptable to the school and the education department.

You are further ordered to remain at school during ordinary school hours; perform school work as diligently as possible (including performing homework timeously); to demonstrate a co-operative attitude to the teachers; and participate in the following extra activities at school:

- the following sport/s: _____ (specify)
- the following other extra school activities _____ (specify)

This will be monitored by _____

in his/her capacity as parent/ guardian/ teacher/ probation officer/ other: _____(specify).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:

This order in no way means that you should not attend school on the completion of the date set out in the order, rather you are encouraged to continue attending school on the completion of this order. Failure to attend school during this order may result in further steps being taken against you.

Form K3 - Compulsory School Attendance Order

Copy for person monitoring order

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to attend _____ (name of school) in _____ (area)
every school day for the next ____ months until ____/____/____ (mm/dd/yyyy)

unless excused by _____ (teacher/ headmaster/ person monitoring this order) for reasons that are acceptable to the school and the education department.

You are further ordered to remain at school during ordinary school hours; perform school work as diligently as possible (including performing homework timeously); to demonstrate a co-operative attitude to the teachers; and participate in the following extra activities at school:

- the following sport/s: _____ (specify)
- the following other extra school activities _____ (specify)

This will be monitored by _____

in his/her capacity as parent/ guardian/ teacher/ probation officer/ other: _____ (specify).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:

This order in no way means that the child should not attend school on the completion of the date set out in the order, rather the child is encouraged to continue attending school on the completion of this order. Should the child not be complying, please report this to the issuing officer.

Form K3 - Compulsory School Attendance Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to attend _____ (name of school) in _____ (area)
every school day for the next ____ months until ___/___/___ (mm/dd/yyyy)

unless excused by _____ (teacher/ headmaster/ person monitoring this order) for reasons that are acceptable to the school and the education department.

You are further ordered to remain at school during ordinary school hours; perform school work as diligently as possible (including performing homework timeously); to demonstrate a co-operative attitude to the teachers; and participate in the following extra activities at school:

- the following sport/s: _____ (specify)
- the following other extra school activities _____ (specify)

This will be monitored by _____

in his/her capacity as parent/ guardian/ teacher/ probation officer/ other: _____ (specify).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
 Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months

Form K4 - Family Time Order

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to be at home by ___:___: (Time: eg.17:45:PM) every day until ___/___/___ (mm/dd/yyyy). This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). You are encouraged to use the time at home to progress towards a future you can be proud of.

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Failure to be at home by this time each day may result in a warrant for your arrest being issued and further steps being taken against you.

Form K4 - Family Time Order

Copy for Monitoring Person

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to be at home by ____:____: (Time: eg.17:45:PM) every day until
 ____/____/____ (mm/dd/yyyy). This will be monitored by _____ (parent/ an
 appropriate adult/ community member/ police officer/ probation officer). You are encouraged to use
 the time at home to progress towards a future you can be proud of.

Signed on this ____ day of _____ the year _____

 Signature of Issuing Officer
 Probation Officer/ Prosecutor/ Magistrate

 Full Name of Issuing Officer

For information purposes:
Should the child not be complying, please report this to the issuing officer.

Form K4 - Family Time Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered to be at home by ____:____: (Time: eg.17:45:PM) every day until
 ____/____/____ (mm/dd/yyyy). This will be monitored by _____ (parent/ an
 appropriate adult/ community member/ police officer/ probation officer). You are encouraged to use
 the time at home to progress towards a future you can be proud of.

Signed on this ____ day of _____ the year _____

 Signature of Issuing Officer
 Probation Officer/ Prosecutor/ Magistrate

 Full Name of Issuing Officer

For information purposes:
 Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months

Form K5 - Positive Peer Association Order

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to associate with the following person/s: _____

who are believed to be a bad influence on you. This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will

continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Should you be seen with one of this people, unless it is by accident or unavoidable, this may result in a warrant for your arrest being issued and further steps being taken.

Form K5 - Positive Peer Association Order

Copy for Monitoring Person

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to associate with the following person/s: _____

who are believed to be a bad influence on you. This will be monitored by _____ (parent/
an appropriate adult/ community member/ police officer/ probation officer). This order will

continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ___ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Should the child not be complying, please report this to the issuing officer.

Form K5 - Positive Peer Association Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to associate with the following person/s: _____

who are believed to be a bad influence on you. This will be monitored by _____ (parent/
an appropriate adult/ community member/ police officer/ probation officer). This order will
continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months

Form K6 - Good Behaviour Order

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under a good behaviour order. Under this order you are required to:

- Contribute to the smooth running of your home by
 - (1) Being home by ____:____:____ (time: eg 15:45:PM) every week day and
____:____:____ (time: eg 15:45:PM) every Saturday and Sunday unless given
permission by _____ to stay out later.
 - (2) Helping out at home by performing the following household chores: _____

 - (3) Respecting your parents/ guardians and listening to what they tell you to do
 - (4) Other: _____
 - Stop the following behaviours:
 - (1) Fighting with your siblings, or other persons living in the household.
 - (2) Associating with _____ (name/s of people
believed to be a bad influence)
 - (3) Visiting, frequenting or appearing at _____ (name of place)
 - (4) Other: _____
 - Attend school regularly, complete your homework timeously, and participate in the schools
activities including: _____
 - Attending the following religious activities: _____
 - Assisting _____ (person/ people in the community) with the
following chores: _____
 - Other: _____
- (tick appropriate)*

Form K6 - Good Behaviour Order

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

Form K6 - Good Behaviour Order

Copy for Person Monitoring Order

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under a good behaviour order. Under this order you are required to:

- Contribute to the smooth running of your home by
 - (1) Being home by ____:____:____ (time: eg 15:45:PM) every week day and
____:____:____ (time: eg 15:45:PM) every Saturday and Sunday unless given
permission by _____ to stay out later.
 - (2) Helping out at home by performing the following household chores: _____

 - (3) Respecting your parents/ guardians and listening to what they tell you to do
 - (4) Other: _____
 - Stop the following behaviours:
 - (1) Fighting with your siblings, or other persons living in the household.
 - (2) Associating with _____ (name/s of people
believed to be a bad influence)
 - (3) Visiting, frequenting or appearing at _____ (name of place)
 - (4) Other: _____
 - Attend school regularly, complete your homework timeously, and participate in the schools
activities including: _____
 - Attending the following religious activities: _____
 - Assisting _____ (person/ people in the community) with the
following chores: _____
 - Other: _____
- (tick appropriate)*

Form K6 - Good Behaviour Order

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:

Should the child not be complying, please report this to the issuing officer.

Form K6 - Good Behaviour Order

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby placed under a good behaviour order. Under this order you are required to:

- Contribute to the smooth running of your home by
 - (1) Being home by ____:____:____ (time: eg 15:45:PM) every week day and
____:____:____ (time: eg 15:45:PM) every Saturday and Sunday unless given
permission by _____ to stay out later.
 - (2) Helping out at home by performing the following household chores: _____

 - (3) Respecting your parents/ guardians and listening to what they tell you to do
 - (4) Other: _____
 - Stop the following behaviours:
 - (1) Fighting with your siblings, or other persons living in the household.
 - (2) Associating with _____ (name/s of people
believed to be a bad influence)
 - (3) Visiting, frequenting or appearing at _____ (name of place)
 - (4) Other: _____
 - Attend school regularly, complete your homework timeously, and participate in the schools
activities including: _____
 - Attending the following religious activities: _____
 - Assisting _____ (person/ people in the community) with the
following chores: _____
 - Other: _____
- (tick appropriate)*

Form K6 - Good Behaviour Order

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:

Maximum Period of Order:

Level 1: Three months

Level 2: More than three, but less than six months

Form K7 - Prohibition from visiting, frequenting or appearing at a specified place

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to frequent, visit or appear at _____ (place)

- between __:__:__(time) and __:__:__ (time: eg 13:45:PM)
- at any time

(tick appropriate)

Activities at this place or association at this place are believed to have a negative influence on you.

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Should you be seen at the place mentioned above, this may result in a warrant for your arrest being issued and further steps being taken.

Form K7 - Prohibition from visiting, frequenting or appearing at a specified place

Copy for Person Monitoring Order

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to frequent, visit or appear at _____ (place)

- between __:__:__(time) and __:__:__ (time: eg 13:45:PM)
- at any time

(tick appropriate)

Activities at this place or association at this place are believed to have a negative influence on you.

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
Should the child not be complying, please report this to the issuing officer.

Form K7 - Prohibition from visiting, frequenting or appearing at a specified place

Copy for Issuing Officer

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Probation Officer Case No:
Name of Issuing Officer	Probation Officer/ Prosecutor/ Magistrate <i>(delete where not applicable)</i>	Issuing Officer Tel No:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby ordered not to frequent, visit or appear at _____ (place)

- between __:__:__(time) and __:__:__ (time: eg 13:45:PM)
- at any time

(tick appropriate)

Activities at this place or association at this place are believed to have a negative influence on you.

This will be monitored by _____ (parent/ an appropriate adult/ community member/ police officer/ probation officer). This order will continue until ___/___/_____ (mm/dd/yyyy).

Signed on this ____ day of _____ the year _____

Signature of Issuing Officer
Probation Officer/ Prosecutor/ Magistrate

Full Name of Issuing Officer

For information purposes:
 Maximum Period of Order:
 Level 1: Three months
 Level 2: More than three, but less than six months

Form K8 - Correctional Reprimand

Copy for child

Enquiries: Tel No:	Date:	<i>Date Stamp</i>
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Name of Presiding Officer:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby reprimanded and ordered not to commit this crime again.

(other comments of presiding officer)

Signed on this ____ day of _____ the year _____

Signature of Presiding Officer

Full Name of Presiding Officer

For information purposes:

Through this order you are being given a chance because the court believes that the pattern of your life is not one of crime. This reprimand is being kept on record and should you commit another crime, this current reprimand may be used against you.

Form K8 - Correctional Reprimand

Copy for Presiding Officer

Enquiries: Tel No:	Date:	Date Stamp
Court Case No.: <i>(If applicable)</i>	Court: <i>(If applicable)</i>	Name of Presiding Officer:

To: _____ (Accused Name)

Contact Particulars:

Address:		
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female	Age:	Identity Number:

You are hereby reprimanded and ordered not to commit this crime again.

(other comments of presiding officer)

Signed on this ____ day of _____ the year _____

Signature of Presiding Officer

Full Name of Presiding Officer

For information purposes:

In issuing this reprimand the presiding officer should draw attention to the following:

- *The nature of the crime*
- *The harm caused to the victim*
- *The harm/ embarrassment and shame caused to the child's family*
- *The harm caused to the community*
- *The strengths of the child and the child's capacity to behave better in the future*
- *The consequences of doing this again*

The presiding officer is further encouraged to:

- *Ask the child to apologise to those present in the court who have been affected by the crime (victim, family etc.)*
- *Ask the child to apologise to those not present in the court who have been affected by the crime, where this is appropriate.*
- *Ask the child to make a verbal commitment/ pledge to not this crime again and to becoming a better citizen. (If necessary the presiding officer may need to lead the child in stating this commitment)*
- *Allow the parents/ guardian of the child room to reinforce the reprimand given by asking them if there is anything they would like to add to the reprimand or say to the child in the presence of the court.*