

Article

40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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Article 37(b) of the CRC

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

Submissions on minimum sentences

*In December 2004, Article 40 examined the decision in **Brandt v S**, the case in which minimum sentences for 16 and 17 year olds were disallowed. This marked a recognition by the Supreme Court of Appeal that minimum sentences were not appropriate for children.*

However, recently the Department of Justice and Constitutional Development introduced an amendment bill, revising the minimum sentences legislation of 1997. It specifically makes minimum sentences applicable to 16 and 17 year olds in relation to certain scheduled offences.

In response to this the Child Justice Alliance made a submission to the Portfolio Committee on Justice and Constitutional Development. This article sets out the main arguments contained in the submission.

Unconstitutionality

In its submission the Child Justice Alliance argued that clause 51 (6)(a) of Bill 15 of 2007 is unconstitutional and violates South Africa's international obligations.

The section in question reads as follows:

“(6) This section does not apply in respect of a person who was under the age of—

(a) 16 years at the time of the commission of an offence contemplated in subsection (1) or (2)(a) or (b);”

It is the Child Justice Alliance's submission that the section violates the rights contained

EDITORIAL

As the 5th anniversary of the parliamentary tabling of the Child Justice Bill approaches (August 2007), there is some reason for optimism regarding its finalisation. A very positive development in relation to the Child Justice Bill was the recent call by the National Director of Public Prosecutions, Vusi Pikoli, that the Bill should urgently be dealt with by parliament. This recognition of the need for the Bill by the head of a key criminal justice institution signals that government is actively pursuing the passing of the Child Justice Bill. After lamenting the inaction regarding the Bill for so long, Article 40 welcomes this public statement clearly reflecting the necessity of a legislative framework for children in conflict with the law.

Despite this, however, there is reason for concern regarding children accused of serious scheduled offences. The Department of Justice and Constitutional Development has recently introduced the Criminal Law Amendment Bill 15 of 2007 which seeks to revise the minimum sentencing legislation of 1997. Of relevance to children is the fact that the Bill disregards the decision in *Brandt v S* and makes minimum sentences in relation to certain offences directly applicable to children aged 16 and 17 years. This edition of Article 40 contains the submission by the Child Justice Alliance opposing such amendment.

The fact that there is a need to move away from a "tough on crime" approach towards children, even where they face serious charges, is illustrated by the report on the Children in Organised Armed Violence (COAV) project, which appears on pages 7-9. The move away from a punitive approach to a more interventionist one is also echoed in the public perception survey undertaken by Youth Justice in Action, the results of which are published in this edition.

in sections 28(1) (g) and 28(2) of the bill of rights as it makes minimum sentences applicable to 16 and 17 year olds.

There are various arguments based on rights contained in the constitution as well as case law that justify the assertion that the section is unconstitutional.

Section 28(2) of the bill of rights

This section reads as follows:

"A child's best interests are of paramount importance in every matter concerning a child".

In South African law, this is a right that all children enjoy (*Minister of Welfare and Population Development v Fitzpatrick* 2000(3) SA 422 (CC)). It is more than a principle.¹

In addition, it is now well established that section 28(2) is highly relevant to the exercise of a court's sentencing discretion and a court, when sentencing a child, is obliged to consider that child's best interests. Of relevance is the case of *Brandt v S* [2005] 2 All SA 1 (SCA) where the court stated:

"In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of proportionality; the best interests of the child; and, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time."

In order for a court to take the best interests of a child into account in sentencing, the court must be able to exercise its discretion and the requirement that a minimum sentence must be imposed on 16 and 17 year olds as required in clause 51(6)(a) of the amendment bill is contrary to the right contained in section 28(2).² The need for a court to take the child's best interests into account and adopt an individualized approach was set out in the case of *S v Kwalase* 2000 (2) SACR 135(C) where the court stated as follows:

"The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the sentencing judicial officer must structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community."

Section 28(1)(g) of the bill of rights

The section states:

Every child has the right "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..."

The imposition of a minimum sentence on a child as contemplated in section 51(6)(a) not only envisages the imposition of a minimum sen-

¹ The principle is recognized in international law: Article 3 of the CRC and Article 4 of the African Charter on the Rights and Welfare of the Child.

² Section 28(3) of the bill of rights defines a child to be a person under the age of 18 years.

tence as a measure of first resort but the very nature of minimum sentences also means that the detention will not be for the shortest appropriate period of time as the minimums are in fact very long.

This was held in *Brandt v S* [2005] 2 All SA 1 (SCA), where the Court held that minimum sentences under the 1997 Criminal Law Amendment Act do not apply to children who were aged 16 or 17 years at the time that the offence was committed. The court in this case stated as follows:

"If the notional starting point for the category of offender envisaged in subsection 3(b) is that the minimum prescribed sentence is applicable, as the majority in the court a quo and the full bench in Makwetsja (supra³) suggest, then imprisonment (the prescribed sentence) would be the first resort for children aged 16 and 17 years in respect of offences covered by the Act instead of the last resort....[n]evertheless, on the approach of the majority in the court a quo and of the Transvaal Provincial Division in Makwetsja, a sentencing court would be unable to depart from the statutorily prescribed minimum unless the child offender establishes the existence of substantial and compelling circumstances. To this extent the offender under 18 would be burdened in the same way as an offender over 18. This would infringe the principle that imprisonment as a sentencing option should be used for child offenders as a last resort and only for the shortest appropriate period of time."

The right of a child to be detained as a last resort and for the shortest appropriate period of time was also addressed in *DPP KwaZulu Natal v P* 2006(1) SACR 243 (SCA) where the court stated:

"Having regard to s 28 (1) (g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'."

Therefore the Child Justice Alliance argued in its submission that section 51(6)(a) of Bill 15 of 2007 falls foul of section 28(1)(g) of the Constitution as it removes the discretion of a court to apply the right contained in section 28(1)(g) unless substantial and compelling reasons exist to do so, a situation that does not observe the spirit, import and obligation of section 28(1)(g).

South Africa's international obligations

South Africa has ratified both the United Nations Convention on the Rights of the Child (CRC) as well as the African Charter on the Rights and Welfare of the Child (ACRWC). Both of these instruments oblige states to adopt legislative, administrative or other measures to realise the rights contained therein (Article 4 of the CRC and Article 1 of the ACRWC).

Both of these instruments require states to respect the principle that in all actions concerning a child, the best interests of the child shall be the primary consideration (Article 3 of the CRC and Article 4 of the ACRWC).

The CRC explicitly states that the arrest, detention or imprisonment of a child shall be used only as a matter last resort and for the shortest appropriate period of time (Article 37 (b)).

In 2007 the United Nations Committee on the Rights of the Child released General Comment No. 10 (2007): Children's rights in Juvenile Justice (GC No. 10).

In relation to the best interests of the child principle, GC No. 10 states:

"[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice (repression/retribution) must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety."

In addition, in relation to the right of a child only be detained as a measure of last resort and for the shortest appropriate period of time, GC NO. 10 states:

"The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty...to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time. ...The Committee wants to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as the various and in particular long term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40(1) CRC⁴ ... In cases of severe offences by children, dispositions proportional to the circumstances of the offender and (the gravity) the offence may be considered, including considerations of the needs of public safety and sanctions, but in cases of children such considerations must always be outweighed by the need to safeguard the well-being and the best interests of and to promote the reintegration of the young person."

3 *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* (2004 (2) SACR 1) (T).

4 *States Parties recognize the right of every child alleged as, accused of, or recognized 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.*

In *Government of the RSA and others v Grootboom and others* 2001(1) SA 46 (CC) at para 29 et seq the Constitutional Court relied on general comments of this sort in interpreting the bill of rights. Therefore the General Comment is of direct relevance to the issue of whether section 51(6)(a) is unconstitutional.

Conclusion

Having submitted that section 51(6)(a) is unconstitutional and in conflict with South Africa's regional and international obligations by relying on judicial interpretation of sections 28(1)(g) and section 28(2)

of the bill of rights, as well as the interpretations made in the context of child justice applicable to South Africa's international obligations under the UN Convention on the Rights of the Child, the Child Justice Alliance then proposed to the Portfolio Committee on Justice and Constitutional Development that no minimum sentences should be applicable to persons who were under 18 years of age at the time of the offence.

YOUTH JUSTICE IN ACTION RESEARCH REPORT

The role of public perception in shaping juvenile justice systems

In February 2007 the KwaZulu-Natal's Youth Justice in Action released the above research report. The Youth Justice in Action (YJIA) Committee is made up of representatives of the KwaZulu-Natal YMCA Regional Office, Amanzimtoti YMCA and the Student YMCA at the University of KwaZulu-Natal (UKZN). The research was carried out by the Student YMCA at UKZN in September/October 2006 and Amanzimtoti YMCA in November/December 2006, with the support of the KZN YMCA Regional Office. The report was prepared by staff and volunteers from the participating associations and the regional office.

Purpose of the research

This was to research the views of members of the public from all race groups, people working within the child justice system, and young offenders regarding their perceptions of young offenders and the child justice system, and to use this information to develop a campaign plan around these issues.

Research process

The survey done by the Student YMCA at UKZN was undertaken in the area of Bonella, a racially diverse community and in Umbilo. The Student YMCA advertised for assistance from students to carry out the survey in this community. The response was great and a workshop was held on the 26th of September 2006 where the YJIAC was introduced. There were also 5 participants from Sakhithemba Halfway House at

Amanzimtoti YMCA, 4 residents (ex-offenders) and a staff member (also an ex-offender). The group approached the different households, selected at random, in pairs and at the end of each day a feedback session was held to share observations. On 27 and 28 September 2006 surveys were carried out in Bonella. The last day of the surveys (29 September 2006) was spent in Umbilo, a residential area in a previously whites-only suburb, now with residents of all races. Surveys were also carried out in the local shopping centre but this proved quite difficult as people were not easily engaged with.

A group of students who had participated in the research assisted with collating the results of the surveys from both Bonella and Umbilo.

The Amanzimtoti survey was conducted in the Folweni community, Westville Prison and Excelsior facility in November and December 2006. The purpose of the survey was to solicit public opinion on young offenders, crime levels, and the views of both young offenders and child justice staff regarding the criminal

justice system in South Africa, opinions of young offenders regarding public perceptions, youth activities and possible solutions to the different social ills. The questions used were very similar to those asked by Student YMCA to allow for comparability of responses. The same questions were used for all groups interviewed, but were modified slightly depending on the group. Group sessions to discuss the questions were held with young offenders at Excelsior and Westville Prison, and with staff at Westville Prison. In Folweni the interviews were conducted on a door-to-door one-on-one basis and in small group discussions.

Results

Student YMCA

A total of 185 people were interviewed, 115 in Bonella and 70 in Umbilo. The proportion of respondents from each race group was

Black	-	87	Coloured	-	30
Indian	-	55	White	-	13

As the questions used in the survey were open-ended questions, after the surveys had been completed a group of researchers went through the survey forms and analysed what the common responses to each question were. The results of the surveys were then collated using these categories, with provision for "other" responses.

A number of questions were posed to the respondents and some included:

Do you think the justice system is appropriate for young offenders?

The majority of respondents from all communities did not think the justice system was appropriate for young offenders, but this response was significantly stronger in Bonella than Umbilo. In Umbilo the majority of black respondents considered the criminal justice system to be appropriate for young offenders.

Why? / Why not?

While a number of respondents felt the justice system was too easy on young offenders and they need to be punished, others felt they should be in juvenile justice centres rather than prisons. Other responses were that young offenders would be abused by other prisoners/warders in prison, they would commit more crimes in prison and be influenced

by other prisoners.

What, if anything, is the role community organisations play in integrating young offenders into the community?

A significant majority of people responded that community organisations are doing nothing to support integrating young offenders into the community, or they are not sure what, if anything such organisations are doing, although some communities in Umbilo were aware of a slightly higher level of support. Churches and mosques were the most common examples given of organisations providing support.

Would you be interested in a crime prevention or restorative justice programme in your neighbourhood?

The overwhelming response from all communities was in favour of a crime prevention or restorative justice program in their areas.

Some of the conclusions drawn from the research in this area include:

- Many of the people were compassionate.
- Most people don't think that the juvenile system is appropriate.
- Young offenders should not be put in prison but in centres, e.g. Boystown.
- Many are willing to be part of or become involved in crime prevention or restorative justice programs.
- Most are willing to forgive, though many said that it would depend on the crime.
- Most were not willing to forgive sexual offenders.
- The frustration at lack of facilities e.g. community centres or YMCA's for the youth plays a big part in crime occurrences.

Amanzimtoti YMCA

At the Excelsior facility 26 boys aged from 14 to 18 years were questioned. Some of the questions and responses were as follows:

What has been the impact of crime in your life / work / business or community?

Young people at the holding facility reported that their involvement in criminal activities has caused them to lose their families, friends, trust and respect. These young people have lost hope for a future and the possibilities of a normal life as young people as they are stigmatized and not given a chance to prove their potential. Due to their involvement in crime, their communities are scared to have them around even if they try to demonstrate that they have changed. These young people have resorted to life on the streets where they are exposed to physical, emotional and psychological abuse. In the streets they are also exposed to drugs, which then cause them to become irresponsible and land up in prison.

Once these young people land up in prison, they believe that the courts give them harsh sentences and once sentenced for petty crimes, they are imprisoned with hardened criminals that mentor them to the next level of criminality. While incarcerated with hardened criminals who may be older than them, these young people sometimes get assaulted and are forced to perform sexual acts.

What are your feelings about the juvenile justice system in South Africa?

When young people were asked about the juvenile justice system in

South Africa they had mixed feelings and ended up responding by saying that the system is both good and bad. These young people said that the system is bad because they commit petty crimes that could have been sorted out without throwing them in prison but they get put away for a long time. They made mention of the Khulisa Diversion Programme as a positive thing that the system has enabled but still pointed out that the programme is for people from in and around Durban which makes it difficult for young people from far away to benefit. They also pointed out that young people are held awaiting trial for a long time before they appear in court.

Eleven staff members from Westville prison were also questioned. These officials stated that young offenders do not have access to information and lack resources to advance themselves while in prison. Officials also complained about the lack of co-operation between management and staff. On this point officials gave the example of the computers that were donated by the Department of Education two years ago which were still not being used as there was no proper handover from the Department of Education to the Department of Correctional Services.

In addition, 13 offenders at Westville Prison aged between 18 – 35 years were interviewed. When asked why they thought young people get involved in a life of crime, they said that it was due to the fact that some of them had to leave school early due to poverty with no prospect of getting decent jobs, boredom, involvement in drugs, inability of parents to help them keep up with their peers, greed and youth unemployment. Inmates felt that public perception plays a role in the sentencing of young offenders or any person that is assumed to have committed a crime. They said that society views certain crimes as worse than others, and require that magistrates and judges impose heavy sentences. The justice system and the community do not give support to young offenders, but assume the worst instead.

In Folweni 81 residents aged between 14 – 75 years were interviewed. Most community members commented on the whole justice system as one that does not work. It was said that even sentencing is not heavy enough and it is only the poor that end up in jail, but those who have the financial means are “in today and bailed out tomorrow”.

Some of the respondents also said that young people who get arrested and serve time in prison, come out as hardened criminals.

The conclusions drawn from the research in these areas included:

- Young people in Excelsior and Westville prison are willing to change but the environment is not cultivated for them to do so.
- Prison staff want to help young people incarcerated but there is a problem of trust between them and the young offenders.
- There is a great need for an organization that could lobby and advocate for young people at risk and young offenders in and out of prison.

Conclusion

Although the communities in which the surveys were conducted have been severely affected by crime, the majority of respondents were compassionate towards the situation of young people within their communities, identifying that there are very few facilities and activities for young people. Informal sports are the most common form of recre-

ational activities. They also identified “economic crimes” as the major form of crime in their areas and that unemployment and poverty were significant factors in causing young people to become involved in crime. Substance abuse, boredom and peer pressure were also identified as significant factors, as well as broken homes. Young offenders also identified peer pressure to have fancy clothes and possessions, and greed as motivating factors to become involved in crime.

The majority of respondents did not consider the juvenile justice system to be appropriate for young offenders, with many people considering prisons to be more likely to turn young offenders into hardened criminals and that young offenders should be dealt with in specialised juvenile justice centres rather than prisons.

The overwhelming response of all groups was in favour of crime prevention and/or restorative justice programmes in their areas. Young offenders also complained about the lack of capacity of the diversion and restorative justice programmes which do exist, which means many young offenders miss out on the opportunity to participate in these programmes. The need for organizations working with young offenders, prison staff, communities and young offenders to work together was also strongly emphasised.

The research demonstrates that although there was some understanding by many people in the communities surveyed of the issues facing young offenders and recognition that the current juvenile justice system is not appropriate, there is still a need to work on educating the public on the advantages of alternative approaches to youth crime focused on prevention, rehabilitation, re-integration and non-institutionalisation. There is also a need to work with communities to establish more activities for young people and crime prevention and restorative justice programmes in their areas. It will be important to work closely with other organisations to achieve these outcomes.

For a full copy of the report: contact Pam Hartgerink on 031 – 3049272 or email her at pam@kznymca.org.za



COAV CITIES PROJECT: *An update*

by Cheryl Frank and Samantha Waterhouse¹

As previously written in *Article 40*, Volume 8 Number 1 (July 2006), during 2002 Viva Rio and the Institute for Social and Economic Research (ISER) produced innovative research on armed child and youth workers in Rio de Janeiro's drug factions. With the support of Save the Children Sweden, DFID UK and the Ford Foundation, Viva Rio designed and co-ordinated a 10 country comparative research study of Children in Organised Armed Violence (COAV), which included South Africa. Completion of the 10 country study and further information collected and posted on www.coav.org.br has demonstrated that as with the involvement of children in the drug factions of Rio de Janeiro, there are causal and functional similarities between traditionally defined 'child soldiers' in situations of armed conflict and children and youth in organised armed violence from within the countries studied. In 2005, Viva Rio and

the International Action Network on Small Arms (IANSA) worked with local partners² for the establishment of working groups consisting of key actors in four municipalities affected by organised armed violence, all of which were covered by the international study. These localities are: Niteroi (Brazil); Zacatecoluca (El Salvador); Medellin (Colombia); and Cape Town (South Africa).

Phase 1: Preparatory and Stakeholder Mobilisation

The preparatory phase of the project was undertaken in Cape Town between September and December 2005. This consisted of two parts: a series of meetings with relevant government and civil society stakeholders and the completion of a rapid assessment.

Phase 2: Issue Prioritisation and Stakeholder Commitment

A workshop was held in November 2005 to review the findings of the rapid assessment and plan for project activities in 2006. This workshop identified five thematic areas for policy discussions in 2006, and noted specific issues that needed to be addressed in relation to each area. The workshop also addressed the question of how children and youth could be engaged in the process and a child participation study was recommended in this regard.

¹ Cheryl Frank is the Executive Director of RAPCAN. Samantha Waterhouse is the Advocacy Manager of RAPCAN.

² Local partners were Viva Rio in Niteroi (Brazil); IUDOP (Instituto Universitario de Opinión Pública of the Universidad Centroamericana "José Simeón Cañas") and FESPAD (Fundación de Estudios para la Aplicación del Derecho) in Zacatecoluca (El Salvador); Corporación Paz y Democracia in Medellin (Colombia); and Institute for Security Studies in Cape Town (South Africa).

Phase 3: Strategy Formulation and Implementation

A series of five thematic meetings were held in 2006. The schedule of activities was as follows:

NO.	THEME OF MEETING	STAKEHOLDERS INVOLVED	DATE OF MEETING
1.	Strengthening information and research strategies relating to children's involvement in gangs and youth violence.	16 participants – Representatives from: • Government departments • Research institutions	10 February 2006
2.	The role of the criminal justice departments in responding to children's involvement in gangs.	40 participants – Representatives from: • Government departments • Research institutions • Non-governmental organisations • Community-based organisations	10 May 2006
3.	Law reform relating to children's involvement in gangs.	14 participants – Representatives from: • Government departments • Research institutions • Non-governmental organisations	14 June 2006
4.	Exploring the role of social services in responding to children's involvement in gangs.	27 participants – Representatives from: • Government departments • Research institutions • Non-governmental organisations • Community-based organisations	28 June 2006
5.	Intervention programmes relating to children and gangs	45 participants – Representatives from: • Government departments • Research institutions • Non-governmental organisations • Community-based organisations • Schools • School clinics	16/17 November 2006

Phase 4: Follow-up and Consolidation

The policy recommendations emanating from the 5 thematic meetings/workshops were developed into a draft policy paper by the local partner. This was presented to a meeting of the key stakeholders in December 2006.

During the series of five thematic meetings/workshops, recommendations emerged in relation to the five selected thematic areas, as well as in relation to other issues. Due to the nature of the themes that were selected, many of recommendations overlap with other thematic areas, or related directly to another thematic discussion. What follows is a summary of the key recommendations emanating from the COAV project.

A. Programme Delivery

There are already many interventions implemented by government relating to working with children, youth and families in respect of prevention, early intervention, diversion and reintegration. There is a need to raise the quality of these interventions and for these to be made more effective. The following activities were identified:

- Promote the principle that no one single programme or intervention will resolve the complex problems being faced. Solutions need to be multi-faceted and multi-layered. This includes discouraging the application of commonsense solutions to these problems.
- Ensure that programmes are planned and designed with due consideration for evidence-based intervention strategies.
- Ensure that practitioners are properly trained to deliver the programmes.

- Ensure that programmes are monitored and evaluated, and that practitioners are appropriately skilled for these activities.
- Sustain programmes for longer periods of time in communities.
- Special attention needs to be given to the use of volunteers and lay people for the provision of these services. The appropriateness of this needs to be assessed in relation to different programmes and issues such as skills and remuneration also need to be addressed.

B. Co-ordination of Government Efforts

There is a need to use an established structure, or establish a new structure to co-ordinate government efforts to deliver services to children and families. This structure needs to ensure the following:

- There is an audit of intervention programmes in order that each department becomes aware of the programmes run by other departments.
- There is no duplication of efforts.
- There is appropriate geographical targeting of interventions.

- Programmes reach high levels of quality through implementing the recommendations noted above.

C. Law Reform

Special attention needs to be paid to the Child Justice Bill and the Prevention of Organised Crime Act.

Children's Voices

Part of the project involved eliciting the opinions and experiences of children in Cape Town regarding gangs and organised armed violence. This research was undertaken by the Human Sciences Research Council and producing significant insights.³

Although the majority of incidents raised in focus group discussions with children dealt with violence perpetrated by gangs, the report indicates that not all violence discussed was as a result of gang activity and that the children also indicated being exposed to violence that resulted from alcohol use, jealousy and domestic violence, corporal punishment in school and rape perpetrated by teachers.

In the consultation with children on gangs in the Western Cape, children in all of the focus groups indicated that they were exposed to extremely high levels of violence in their communities. Children made the following statements:

There near us, they shoot nearly every day. They rob you there.

Like you see it everyday. It's not something new.

Someone was shot as they walked right next to me. But you can't do anything at the time.

Most of our friends belong to gangs.

The house next to us is like totally open because they know each other, so they come and sit there and just sell drugs.

Shootings. You can't go where you want to go. You can't walk where you want to walk.

The report also indicates that some children noted that gang members would take revenge against people who defied them, reflecting a sense of helplessness in the inability to protect themselves.

... And if you run after him, maybe he might get you some other time.

... If you don't have money, that's how it is now, but they're going to watch you. They're going to remember you.

The children indicated that gang activity also took place at their schools, and the report notes that schools were seldom described by the children as safe places.

So-called gangsters, during interval, some of them walk past the children and sell drugs or cigarettes. I've seen that happening.

And some days we're too frightened to walk to school because they're just shooting.

The gangsters arrived at school; there was someone who is not part of the gang, but he was carrying a gun. The mission was to take the gun from that person. There was a fight about the gun, eventually there were gunshots.

The ongoing exposure to gangs led to the children being familiar with elements of gang culture and activities. They were aware of the presence of gang territories, dress code, tattoos and manner of walking and talking. The children experienced a high level of fear of gangs and this influenced the chances of them reporting crime to the police. They also indicated frustration based on the limitations that gang activity places on their lives.

You must be scared to go to your friend. ... and I now must be scared to go there because anything can happen.

So it's very dangerous for me to go out and tell the police that they are selling drugs. That's why a lot of people don't go to the police even though they know where they are selling these things and what they're doing there. The community knows everything but they are scared to go.

... You put your life in danger because he will come and kill you and your parents.

Yes, we are living in fear of the gangs, everyday.

The issue of girls' vulnerability to rape was raised by the girls, and the researcher notes that "girls were very conscious of the danger of rape, while boys mentioned the possibility of rape only in relation to girls that they knew".

The children indicated that they believed it unlikely that gangs could be done away with, noting that "it's impossible" and that this would result in a war situation in which "everybody will be attacking everybody". They noted that little or nothing could be done and that: "it's a difficult thing to end"; one child explained: "you see, now guns are everywhere".

Conclusion

Much has been reported and written about children in conflict with the law in South Africa, yet the issue of children involved in serious and violent offences remains one that requires a great deal of research and specific interventions. Although this project only examined a specific issue relating to violent offences committed by children, namely organized armed violence, it is valuable in that it initiated meaningful discourse on this particular phenomenon within child justice.

³ Ward, C.L. 2006 "It feels like it's the end of the world": Cape Town's young people talk about gangs and community violence. Report to the Institute for Security Studies on the child participation study in support of the COAV Cities Project. Cape Town, South Africa: Human Sciences Research Council.

Prevention is better than cure:

The Child Rights Act and juvenile justice in Nigeria by Benyam D. Mezmur

The October 2003 (Vol.5 No.3) edition of Article 40 published a piece entitled Child Justice Reform in Nigeria. The piece discussed, in the main, part of the law reform process which was the Juvenile Justice Project that looked at juvenile justice administration with a view to implementation issues and the development of a juvenile justice policy for the country. This article briefly looks at the main legislation that accompanies the implementation and administration issues, namely the Child Rights Act (the "Act") which culminated partly from the processes discussed in the October 2003 edition. This update highlights some of the issues dealt with under the Act addressing the issue of juvenile justice and particularly the prevention of juvenile delinquency, within the context of an overarching child protection, child rights and child justice statute.

Background

With a total population of 131.5 million (UNICEF estimates, 2005), Nigeria at the same time also has the largest child population on the continent. Government itself reckons that "in reordering priorities and strengthening public management, no group deserves greater attention than the country's estimated 65.72 million children."¹

The number of children who come in conflict with the law has been on the rise in the country. Part of the reason could be attributed to the number of children who live and sleep on the streets, which has been increasing in most major urban areas in Nigeria. The physical, social and psychological problems of street children are truly daunting and as they lack basic resources with which to sustain healthy living, the possibility of coming into conflict with the law is high. The rise of juvenile crime is also partly attributed to the fact that about 700,000 children have lost one or both parents as a result of AIDS and it is projected that this number will increase to 2.5 million by the year 2010.²

Some of the main offences with which children are involved in include murder, manslaughter, rape, robbery, theft, receiving of stolen items, assault, truancy, public disturbance, and being beyond parental control (which, in the view of the CRC Committee, is a status offence and

should be abolished).³

Nigeria operates a three-tier federal system of government comprising the federal, state and local governments. There are 36 states and 774 local government areas, and a Federal Capital Territory, Abuja. State and local governments are in charge of the implementation of national policy as defined and monitored by the federal authority. Nonetheless, each state has its own government, laws and judiciary. The Shari'ah legal system operates in many states in northern Nigeria.

The old and the new legislation with emphasis on prevention

In 1943, the British colonial government passed the Children and Young People's Act (CYPA) as the main law on juvenile justice in Nigeria. At a later stage the CYPA was revised and incorporated into Nigeria's federal laws. Among others, under the CYPA, it is provided that the minimum age of criminal responsibility is a very low one- at 7 years. Contrary to international instruments, the law classifies only those people under 17 years as juvenile offenders. Juvenile court proceedings established under the CYPA barely respected the right to privacy of the child. In short, legal provisions of the Act fall short of the CRC and the African Charter on the Rights and Welfare of the Child, to which Nigeria is a state party.

Thus the need for more child rights centered legislation on juvenile justice was felt to be long overdue. A long journey⁴ towards achieving this culminated in the Child's Right Act in 2003.

The main provisions of this comprehensive Act are laid out in 24 parts, covering the four cardinal principles of the CRC: non-discrimi-

1 CRC Committee, *Second Periodic State Party Report*, CRC/C/70/Add.24, (2004), 11.

2 ANPPCAN Nigeria Chapter, <<http://www.anppcan.org/new/chapter%20profiles/nigeria.doc>> (accessed 21 June 2007).

3 CRC Committee, *Second periodic Report, List of replies*, CRC/C/RESP/72, (2005), 28.

4 Initiated during the military era in the 1990s, the bill suffered two major set backs before it was finally passed into an Act.

nation; the right to life, survival and development; the best interest of the child; and child participation. Part XX, sections 204 to 238 of the Act directly deal with juvenile justice.

The Act establishes the guidelines, rules and prohibitions regarding the apprehension, treatment, judicial processes, sentencing and detention of child offenders. Issues such as disposal of a case without resort to formal trial (section 209), investigation and initial contact with the child (section 211), adjudication (sections 213 - 232), and institutional and non-institutional treatment (sections 233- 237) are captured by the Act. Institutional reforms in the police, the judicial system and social policies regarding the enforcement and protection of the rights of the child, as provided for by the CRC, have drawn the attention of the legislator. The Act also places some degree of emphasis on the prevention of juvenile delinquency.

According to General Comment No. 10 of the UN Committee on the Rights of the Child (CRC Committee) on Children's Rights in Juvenile Justice (discussed in March 2007 edition, Vol.9 No.1 *Article 40*), one of the core elements of a comprehensive policy for juvenile justice is the prevention of juvenile delinquency (para. 15). The General Comment further highlights that it is obviously not in the best interests of the child if the child grows up in circumstances that may cause an increased or serious risk of becoming involved in criminal activities (para. 16). There seems to be a clear understanding on the part of the Nigerian government that a juvenile justice system which does not address the prevention of juvenile delinquency is doomed to fail.

A comprehensive reading of the Act indicates (both directly and indirectly) the incorporation of the principles of the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) that "the prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes."⁵ For instance, section 50 of the Act gives power to certain persons to bring children in need of care and protection before a court in a whole

range of cases such as when the child: frequents the company of a reputed thief; is an orphan; is found destitute; is found begging; accompanies any person when that person is begging or receiving alms; is lodging or residing in a house or part of a house used by a prostitute for prostitution; or is a child in relation to whom an offence against morality has been committed or attempted (section 50(1)).

The Act could also be lauded as progressive and focused on the prevention of children coming into conflict with the law as it expressly addresses the concept of children used by adults to commit offences (CUBAC). After explicitly prohibiting the use of children in drug-related crimes, the Act continues that "no person shall employ, use or involve a child in any activity involving or leading to the commission of any other offence not already specified in this Part of the Act". The Act attaches a sanction in the form of an imprisonment for a term of 14 years in case of contravention of this provision (section 26 (1) and (2)).

If programmes for the prevention of juvenile delinquency are to be successful, research should form the backdrop of any interventions. Accordingly, the Act expressly requires the federal and every state government to review and appraise periodically the trends, problem and causes of child delinquency and crime (section 238(1)(b)).

In its Second Periodic Report to the CRC Committee, the Nigerian Government also expressly emphasized that the machinery for monitoring and preventing juvenile crimes should be strengthened at all levels of society, with the goal of ensuring the minimization of offending or delinquent behavior.⁶ Government expressed its commitment to prevention policies facilitating the successful socialization and integration of all children, in particular through the family, the community, peer groups and schools. For instance, the establishment of counseling programmes in schools and communities are rightly identified as being major components of the juvenile justice policy and law.⁷

Conclusion

Nevertheless, the CRC Committee has noted with appreciation the efforts made by the state party to reform the juvenile justice administration.⁸ However, the administration of juvenile justice in Nigeria is faced with a range of challenges. Lack of capacity and training constitute two such challenges. In addition, the law-making process is not complete throughout the country, and only 14 of the 36 states have translated the provisions of the Act into state law. Even then, implementation of the Act is sometimes fraught due to the fact that Nigerian state and local governments represent a diverse range of ethnic groups and customs, notably the Shari'ah court system, which, as pointed out by the CRC Committee, "does not conform to international norms and standards."⁹

Implementation challenges aside, the Act deals extensively with the policy framework, institutional support and the procedures for juvenile justice administration in Nigeria. The government, the juvenile justice policy and the law, in particular, sensibly recognise that a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings. As the title to this piece suggests, indeed, prevention is better than cure – and it should be accorded the attention it calls for in any juvenile justice law reform process.

⁵ Article 1 of the Riyadh Guidelines, 1990.

⁶ Second Periodic Report (note 1 above), section 8.4.2, 131.

⁷ See generally Second Periodic Report (note 1 above), section 8.4.2, 131-133.

⁸ CRC Committee, Second Periodic Report, Concluding Observations, CRC/C/15/Add.257, (2005), para. 78.

⁹ As above.

NOTICE-BOARD



UPCOMING INTERNATIONAL CONFERENCES

The International Congress: Phenomena in Juvenile Delinquency: New penal forms

This conference will be held in Seville (Spain) from 6 – 7 November 2007. Registration must be before the 30 October 2007. For further details, e-mail andalucia2007@oijj.org

The 3rd World Congress on Children and Adolescents' Rights

This will be held in Barcelona (Spain) from 14 – 19 November 2007. Some of the participating speakers will include:

- Mrs. Wansley Walters, head of the Miami Dade Juvenile Service Department, United States.
- Mr. Manuel Dolz Lago, prosecutor for the Supreme Court, Spain.
- Mr. John Parry Williams, expert in juvenile justice, UK.

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