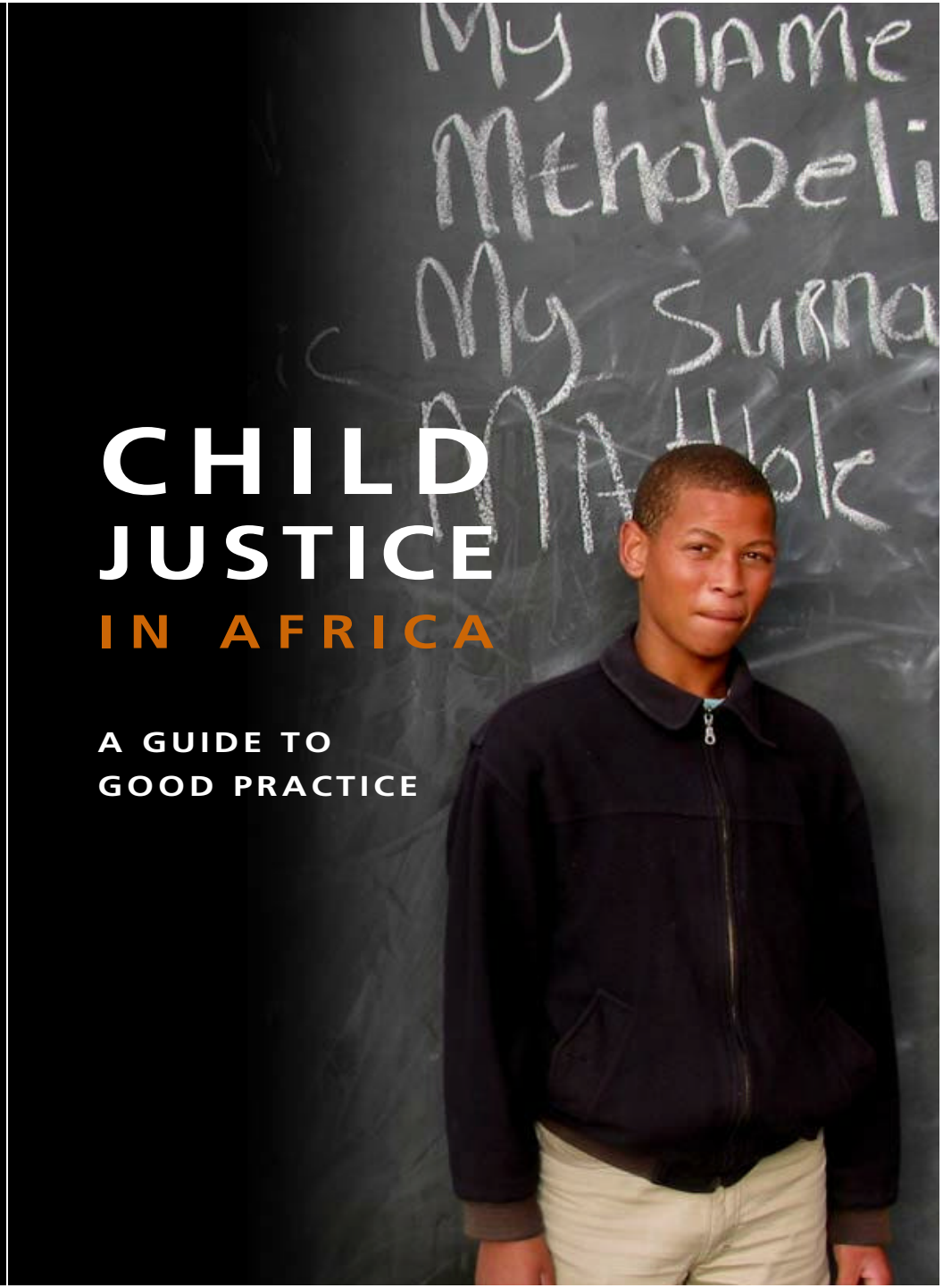
CHILD JUSTICE IN AFRICA

A GUIDE TO GOOD PRACTICE

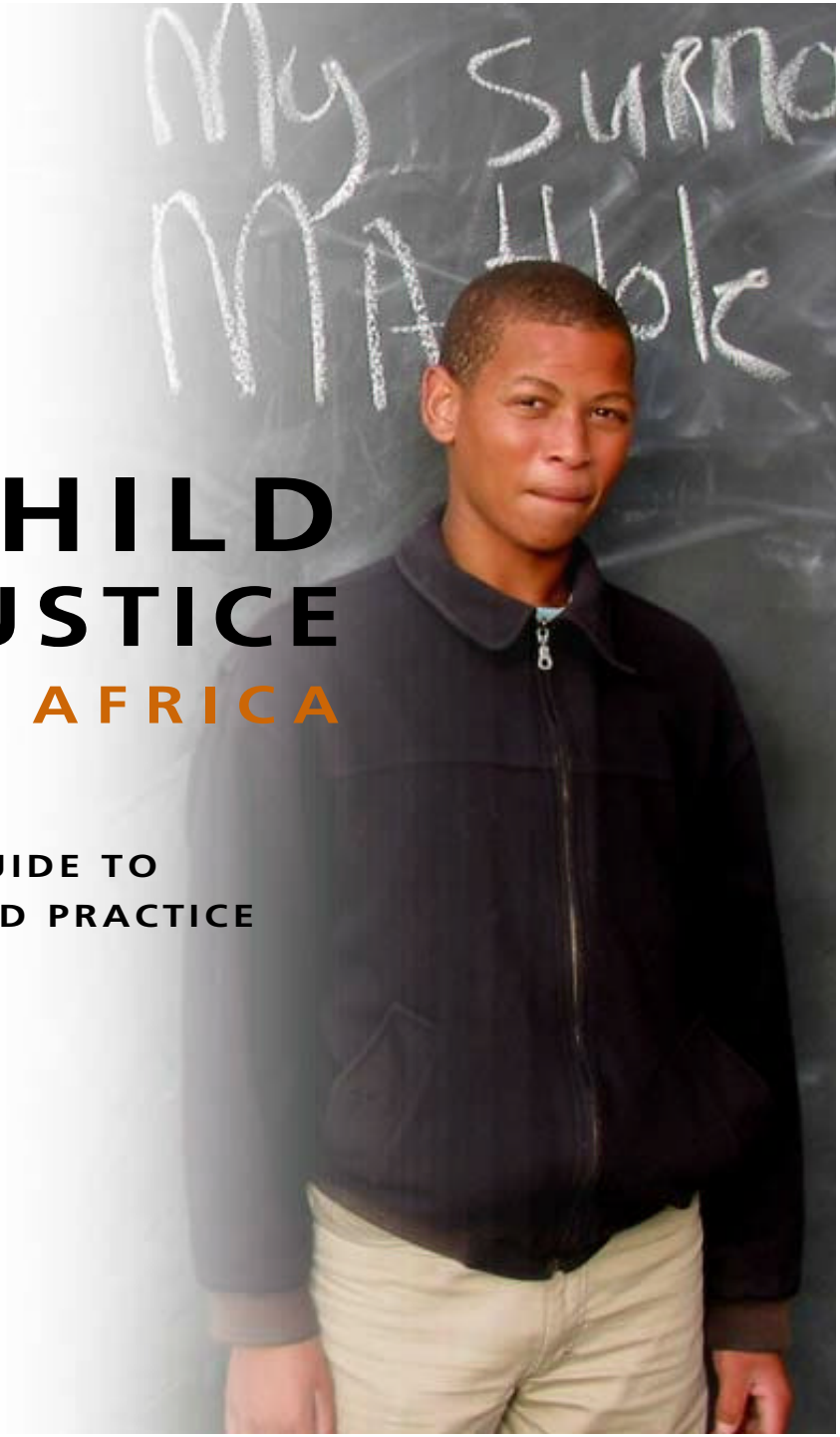


Biographies and acknowledgments

Hi Jenny
what USAID want to say

> This publication was made possible through support provided by USAID/South Africa Mission, under
> the terms of Award No. 674-0322-C-00-7091-00. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the
U.S. Agency for International Development.
>

COMMUNITY LAW CENTRE
University of the Western Cape



CHILD JUSTICE IN AFRICA

A GUIDE TO GOOD PRACTICE

FOREWORD

Child justice is well researched as far as concepts and theories are concerned; however, very little concrete literature exists on the situation of child justice in Africa, although some documentation of South African research is available. There is virtually no research into practical aspects of child justice systems in South Africa or Africa. Therefore, in so far as this volume documents 'best practice' examples pertaining to a number of child justice issues, drawn from a wide variety of African countries and contexts, it is embarking on an examination of practical knowledge that is long overdue.

The publication is suitable for use by policy makers, non-governmental organisations and persons concerned with the implementation of child justice reforms. This benefits not only the new South African system, but also the wider African context as it highlights innovative local practices that can be replicated between African countries, bearing in mind contextual issues. This is especially crucial in the light of the current child justice law reforms currently underway or already undertaken in a number of African countries.

In addition, the value of such a book in the climate of regional co-operation and collaboration is immeasurable. Africa is now united in a human and child rights culture established by the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child. By focusing on child justice practice in the wider African context, the South African justice system can be informed and strengthened and at the same time expand on its regional obligations.

Finally, 2002 saw the first sitting of the Committee of Experts on the African Charter on the Rights and Welfare of the Child. A publication of this nature will be invaluable to the Committee in assessing the country reports of member States. In this context, it can serve as a resource on examples of best practice solutions to combating crime within the framework of a child justice system. Documented examples can serve as a yardstick to see how countries measure up in their practical responses to children in conflict with the law.

Professor Lullu Tshiwula
Vice-Rector: Student Development and Support
University of the Western Cape

2nd Vice President of the Committee of Experts on the African Charter on the Rights and Welfare of the Child

PART ONE

THE DEVELOPMENT OF CHILD JUSTICE IN AFRICA


Ek sal laks my wense moet waar ka
Ek sal bly is my famiel moet By my is.
Desirée

INTRODUCTION

Julia Sloth-Nielsen

Africa's problems and difficulties are legion. They include poverty, lack of employment opportunities, lack of infrastructure and resources, high debt loads, war and armed conflicts, large numbers of displaced peoples, the scourge of HIV/Aids, and growing lawlessness in some parts of the continent as traditional social structures dissipate in the wake of urbanisation. Specifically as regards children, the HIV/Aids pandemic has resulted in ever growing numbers of orphans, many of whom have become street children, who need to commit offences in order to survive.

The intention of this book is not, however, to detail the nature and intensity of Africa's problems. Rather the project was conceived as a way of focusing on solutions, on examples of best practice in the emerging transformation of the child justice[1] processes and policies that are sweeping the continent.

From Nigeria to Kenya, from South Africa to Uganda, novel initiatives to implement the letter and spirit of the children's rights agenda within the sphere of children in trouble with the law have mushroomed in the immediate past. As Africans, we can learn much from sharing positive experiences, particularly where solutions are premised on local rather than imported knowledge and practice. Common problems can be addressed, useful ideas replicated, borrowed good practice adapted and traditional and culturally appropriate heritage fostered; and all this within the context of the limited resources available on this continent. As Celia Petty and Maggie Brown assert:

> *[In] view of the depth of cultural,economic and institutional differences it is questionable how much African States and other developing countries can learn from theory and practice evolved in the North.*[2]

PURPOSES OF THIS PUBLICATION

The renewed interest in children's rights, child justice and penal reform in Africa generally – and in South Africa in particular – can be directly linked to the desire to infuse criminal justice reform with a child-rights approach. Derived from the need to ensure the implementation of the Convention on the Rights of the Child at the domestic level, the starting point for many countries (South Africa included) was the absence of a separate system to deal with the special needs of children in conflict with the law. In South Africa, the formal process of law reform and, coupled with that, a variety of institutional improvements (see, for example, chapter 12, Probation Officers as Role players), was launched shortly after the democratic dispensation ended apartheid in 1994 and, with that, the country's isolation from the United Nations community. Ratification of international treaties soon followed and, with the involvement of the South African Law Reform Commission, new legislation was prepared over a period of some years.[3]

Similar law reform processes are underway in a number of African countries, such as Malawi, Lesotho and Namibia. Mozambique, too, is intending to embark on the drafting of dedicated child rights legislation. There has been a notable crossover of ideas, based on site visits, student liaison, and networking between non-governmental organisations involved in both policy making and service delivery in the child justice field – to name but a few areas of recent collaboration.

This sharing and collaboration can itself be regarded as best practice – the similarity of contexts in the African environment makes it easier to replicate ideas and programmes that have worked well elsewhere in our region. The recent establishment of a networking consortium on child justice in East Africa is yet another exciting development designed to facilitate the deepening specialisation and expertise amongst the various role players involved in this field.

As the Committee on the Rights of the Child has pointed out on numerous occasions, legislative provisions can go only some of the way towards creating child-friendly processes and procedures. The ultimate test is whether the intentions of legislatures find actual expression in the practice and delivery of appropriate services to children. It is because the *application* of laws and policies at grassroots level can be of more importance to the protection of the rights of children in conflict with the law than the actual formal legal provisions themselves that the Community Law Centre's Children's Rights Project embarked upon this study. Its main aim was to investigate, identify and profile best practices to supplement law reform initiatives, to promote replication and to inspire stakeholders across government and non-governmental sectors to engage in institutional improvements.

It was with these objectives in mind that the selection of areas for inclusion in this publication was made. Topics relate chiefly to programme delivery, to the expansion of services to children and to embedding human rights practice in criminal justice processes. Law simply provides the regulatory framework.

As the chapters in this publication show, discretion and human choices can be exercised at many points of the criminal procedure – from the arrest of a child by the police, to decisions about trial and detention, until the conclusion of proceedings, sentencing (or the determination of another outcome). In most countries, South Africa included, many of these choices are already built into existing law and practice in one form or another. An additional intention of this publication is, therefore, to inspire the more creative and participative exercise of discretion by role-players coming into contact with children in trouble with the law, to the benefit of the children they serve.

BEST PRACTICE

The themes selected for consideration in the ensuing chapters cannot be regarded as exhaustive of all issues falling within the child justice context. They have been selected for their relevance across a broad range of regions and contexts, both urban and rural. They traverse situations where there is access to resources, training and personnel, as well as contexts where resources are in short supply. They span an extensive spectrum of issues common to child justice systems in the developing world.

The criteria for the inclusion of the selected examples highlighted in the text were based on the following principles:

- Whether the example or practice gives particular expression to international standards and instruments
- Whether the practice is efficient and effective
- Whether the practice or example can be replicated in similar situations or in diverse contexts
- Whether an evaluation or analysis of the project or practice has been conducted
- Whether vulnerable or marginalised groups or minorities are targeted
- Whether the example indicates a trend which improves access to justice or streamlines the delivery of justice-related services
- Whether the example furthers the implementation of children's rights in a specific context

1 The term 'child justice' is used in South Africa's Child Justice Bill 49/2002. It was considered that it avoids the negative associations and labelling inherent in the more commonly used phrase 'juvenile justice'; it is, therefore, used throughout this manual.

2 Petty, Celia & Maggie Brown [1998]: 10

3 At the time of writing, the Child Justice Bill (4 of 2002) is at an advanced stage of the Parliamentary process. The Bill has been substantially reworked by the Parliamentary Committee since the draft proposed by the South African Law Reform Commission saw the light of day.

BACKGROUND TO THIS STUDY

The work reflected in the following chapters is based on a variety of research methodologies. First, desk top audits of existing materials were undertaken, including internet-based publications and conference reports. This aspect of the research focused beyond the borders of South Africa and included previously published material, especially excerpts derived from the journal *Article 40*, a dedicated intersectoral publication produced quarterly by the Community Law Centre since 1999. *Article 40* concentrates on good practice developments, and provides an ideal source of material for inclusion in a more permanent volume such as this.

Second, many of the researchers undertook field trips, first within the various geographical areas of South Africa and, additionally, further afield to countries like Zambia, Nigeria, Ghana, Kenya and Uganda. These countries are experiencing transitions similar to that in South Africa and, within the child justice sector, there is a drive to Africanise responses to vulnerable children as well as to create opportunities for shared learning in African contexts. Finally, international best practice and theoretical material has not been ignored in the preparation of this volume, particularly as criminal justice processes were, in the past, based on European and British models, and professional developments continue to be influenced by the prevailing international standards.

CONCLUSION

The authors hope that this volume will guide further improvements in practice and speed up transformation of child justice systems at local level. It is not intended as the final word on the good management and delivery of services to children in trouble with the law. Rather it attempts to review the current state of the practice of child justice in Africa, with particular reference to South Africa.

CHAPTER ONE

THE INTERNATIONAL FRAMEWORK

CHAPTER ONE

THE INTERNATIONAL FRAMEWORK

Julia Sloth-Nielsen

The primary instrument guiding the development of child justice is the United Nations Convention on the Rights of the Child (1989), which gives substantial guidance to countries seeking to enhance the delivery of children's rights-based services and programmes. The Convention is seen as the overarching framework for a child rights approach. It contains an elaborate set of guidelines for maintaining human rights standards in child justice systems and for the administration of child justice itself. This means that countries are obliged to give effect to its provisions – by means of laws, policies and practices designed to further the Convention's goals.

The implementation of the Convention is overseen by the Committee on the Rights of the Child, a body of international experts chosen in such a way as to represent a variety of geographical, linguistic and religious communities. The Committee receives reports from States that have ratified the Convention, detailing the progress they have made towards implementing its various provisions. The Committee's representatives have recently been increased from a body of ten to a body of 18 members, due to the burdensome workload experienced. In recent times, the Committee has embarked on the practice of issuing 'General Comments' in relation to themed issues, to expand upon the approach that should be followed by States.

GUIDING PRINCIPLES OF THE CONVENTION

Best interests of the child

First and foremost, the UN Convention is premised on the 'best interests of the child' [4] principle as a primary consideration in all matters concerning children. This principle guides the application of all other principles of the Convention, including those relevant to child justice. Its application is not limited to decisions made by courts of law: the best interests of the child must be broadly applied to administrative decisions, policy formulation, diversion measures and so forth.

Non-discrimination

Next, the principle of non-discrimination[5] is regarded as being central. Children should not be discriminated against on a wide variety of grounds, including gender, ethnic or social origin, race, disability or any other status. Again this principle underpins approaches to all the other rights enshrined in the Convention, and so applies in the child justice field as well.

Child participation

Third, children's right to participate in matters affecting their interests is regarded as an innovative way of recognising that children are individual bearers of human rights and not mere objects of concern or recipients of welfare. Article 12 of the Convention provides as follows:

> *1 States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2 For this purpose, 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.*

This provision has obvious relevance to child justice in that, insofar as judicial proceedings are concerned, children must be given the chance to participate in all decisions and, when in court, should preferably enjoy competent legal representation.

4 Article 3
5 Article 2

The Legal Development Centre in Kampala, Uganda accommodates graduates (who are required to perform a one-year training programme prior to entering legal practice) at the legal aid clinic affiliated to the Centre. A good number of the graduates choose to work with child offenders, giving advice to children in remand homes or in court. As a result of the achievements of this programme, the Centre is gaining widespread recognition for its work with children and for the high quality research it produces.

The right to survival and development

The last founding principle in terms of which the Convention's rights must be applied is the right to survival and development.[6] This principle concerns itself broadly with children's wellbeing, including their rights to health, welfare and social services, recreation and leisure, protection from violence and harm and so forth. It is a principle with broad application in the child justice sphere, especially where children have been deprived of their liberty. Children deprived of their liberty are notoriously vulnerable to threats to their physical and psychological wellbeing: conditions in detention facilities frequently do not meet the minimum standards required by other guiding international instruments such as the Standard Minimum Rules for Children Deprived of their Liberty, approved by the United Nations in 1990.

In addition to the above general principles, which apply to all the rights detailed in the Convention, two substantial articles deal with the specifics of child justice. These are articles 37 and 40 of the Convention, which are considered in the next two sections of this chapter.

Cruel, inhuman or degrading treatment or punishment

Article 37(a) of the Convention requires that States Parties ensure that:

> *No child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.*

This provision has found expression in a number of best practice developments in Africa. For instance, corporal punishment as a sentence for young offenders was ruled contrary to the constitutions of both South Africa and Zambia in 1995 and 1999 respectively. In the Zambian case of John Banda v The People(HPA/6/1998), the court ruled that:

> *This sentence of corporal punishment cannot be sustained as it is inhuman,degrading and barbaric in nature…Article 15 of the Constitution is couched in very clear and unambiguous language,that no person shall be subjected to torture or to inhuman degrading punishment or other like treatment.*

The sentence of whipping was abolished as a punishment in Namibia, and is not a competent sentence under the Kenyan Children Act (passed in 2002), nor under the Ugandan Children's Act of 1996. In 1995, it was abolished as a sentence by the Constitutional Court in South Africa in the well known case of S v Williams[7].

Life imprisonment without the possibility of parole offends against the principle that children should be deprived of their liberty for the shortest period of time only (see the discussion of Article 37(b) below). A sentence

6 Article 6
7 1995 BCLR 861 CC
8 See S v Nkosi 2002 (1) SACR 135 (T); also discussed in Volume 4 [2001] Article 40: 4-5.

from which a child will never be released cannot be regarded as detention for the shortest period of time, as it offers no opportunity to reconsider whether continued imprisonment is necessary. Similarly, a life sentence without parole does not take account of the possibilities of reintegrating the child into society once the goals of the sentence have been achieved. The South African courts have gone so far as to hold that, even where the release on parole for a person serving a life sentence is a possibility, such sentences should not be imposed unless it can be shown at the time of sentencing a youthful offender that there are exceptional circumstances: in other words, that there are no reasonable prospects of eventual rehabilitation.[8] In effect, since it is impossible to predict at the time of sentencing whether the rehabilitation of a child may occur over an extended period of time, this statement can be regarded as posing a significant barrier to the sentence of life imprisonment for children.

As regards the shielding of children against ill-treatment generally, examples of practices and policies designed to afford protection abound. Two signal developments that illustrate this are experiences with monitoring the treatment of children in detention in various settings. The child-friendly court project in Lusaka, Zambia, began improving conditions of treatment for children in police cells by appointing dedicated police officials to see to children's needs. In addition, the cells at the police stations were renovated to provide protection from the elements and blankets were acquired. Specialised training on children's rights in Zambia is to be mainstreamed into the routine training programme at the Police Academy, and manuals to encourage knowledge of both law and rights-based attitudes to children have been completed for use in this endeavour (see further chapter 11, Police as Role players).

At another level, monitoring the overall delivery of services to children is regarded as essential to protecting children's rights, especially those of detained children. This has been recognised by the Committee on the Rights of the Child on numerous occasions. In many places, specific child justice monitoring mechanisms have been established to ensure that the human rights of children are protected.

Detention as a last resort

Article 37(b) requires States parties to ensure that:

> *No child shall be deprived of his liberty unlawfully or arbitrarily. The arrest detention or imprisonment of the child shall be in conformity with the law and shall be used as a last resort and for the shortest appropriate period of time.*

The first part of this provision reflects an international standard that may be found in numerous international legal documents, such as the International Covenant on Civil and Political Rights (1966). However, a significant improvement in international standards has been brought about by the incorporation of the 'last resort' and 'shortest period of time' standards. These principles originated with the 1985 Beijing Rules for the Administration of Juvenile Justice, which were unanimously approved by the UN General Assembly. As 'soft' (i.e. non-binding) law, the Beijing rules carry only persuasive weight. They have, however, been influential in the development of the provisions of the Convention on the Rights of the Child and in shaping the comments of the Committee on the Rights of the Child. They have also informed judgements in the South African courts.

A singular problem throughout Africa is how to ensure that the detention of children is indeed in conformity with the law. In domestic legal systems, a prohibition on detention in police custody for longer than a specified period (usually 48 hours) is routine. After this, the child must be brought before a court. Also, there must be limits on the minimum age at which a child may be deprived of his or her liberty. This means that children below that age cannot be detained in police custody without violating the principle that detention must be in conformity with the law.

The rule that detention should be a last resort and used only for the shortest appropriate period of time has been included as a principle in the South African Constitution.[9] This means that the period for which deprivation of liberty has been ordered can be tested against the constitutional requirement by higher courts. A good example is provided by the judgement of *S v Kwalase*,[10] which reviewed a sentence of imprisonment imposed upon a youthful offender. The judge said:

> *[p]roportionality in sentencing juvenile offenders (indeed all offenders), as also the limited use of deprivation of liberty particularly as regards juvenile offenders, are clearly required by the South African Constitution . . . [and with] due regard to the provisions of international instruments relating to juvenile justice.* ***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*** *(author's emphasis).*

This statement has been quoted with approval in many subsequent cases, illustrating the important role that this principle derived from international law has begun to play in shaping domestic law and practice.

The treatment of children deprived of their liberty

Article 37(c) requires that:

> *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes account the needs of a person of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*

The treatment of children deprived of their liberty with due concern for their dignity and their age-related needs poses enormous challenges when children are held in police cells or prisons in most places in South Africa and Africa, especially where they are still facing trial and have not yet been convicted or sentenced. These institutions are notoriously child-unfriendly and physical conditions leave much to be desired. The solution that has emerged is to encourage the development of separate penal institutions for youthful offenders and secure care facilities for awaiting trial children who cannot be released into the care of parents or guardians.

In some instances, the management and operation of South African secure care facilities have been outsourced to the private sector by provincial state departments; these offer useful vocational training, skills development and other programmes to the young people temporarily accommodated in these facilities. The secure care facility in Polokwane in Limpopo province is one such outsourced secure care facility. There children are offered arts and crafts, woodwork and catering training, amongst other skills and educational programmes. The secure care facility

9 In section 28(1)(g)
10 2000 (2) SACR 135 (C)

called New Horizons in the Western Cape allocates a sizeable percentage (more than 30%) of its budget to activities and programmes geared towards the development of the children in its care.

Access to legal and other assistance

Article 37(d) requires that:

> *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

The South African legal system has long embodied a unique system of review of lower court decisions in criminal matters. First, there is an automatic procedure whereby High Court judges sitting in chambers peruse sentences of imprisonment or suspended imprisonment imposed by lower court magistrates who have less than a minimum period of service on the bench. Second, there is generous scope for referring matters to the High Court outside of the automatic procedure for perusal by a judge. The remedy of review has proved a useful strategy in setting benchmarks for the implementation and reform of child justice practices, especially in the area of sentencing. The following case exemplifies the usefulness of the review procedure.

Case A863/99 (unreported) was brought before a High Court judge for review after a social worker discovered that two girls had spent a very long time – over a year – in prison, pending placement in a reform school to serve their sentences. Since there was, in fact, no reform school for girls in that province, the judge pointed out that, without this intervention, 'they will presumably continue to be incarcerated indefinitely'. The judge set aside the initial sentence as it was not in accordance with justice that a sentence be imposed when the sentencing officer was under a misapprehension as to the consequences that would follow.

Review proceedings of this kind (where the proceedings of a lower court are not in accordance with justice) can be brought to the attention of the High Court by anyone or body – NGO, paralegal organisation, friend or social worker, to give just a few examples. [11]

Administration of justice

The provisions of Article 40 of the Convention set a solid framework for the administration of justice in respect of children in trouble with the law. The first part of *Article 40* details the broad aims that should characterise the state response to child offenders. Principally, this includes recognising the:

> *need to treat an accused child 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.* [12]

There are numerous examples of excellence in practices designed to give effect to a non-punitive, re-integrative response to children accused of having offended. Diversion is a key mechanism here. Even where formal programmes do not exist, there are opportunities that can be explored by those encountering young people in conflict with the law.

Restorative justice programmes such as family group conferencing offer a valuable tool for promoting the reintegration of children in trouble with the law into their families and communities. A police official who, after receiving training on restorative justice, put the principles into practice, described one such family group conference as follows:

> *The second case that was referred was that of an attempted murder. Two white youths shot a coloured youth with a pellet gun. In this case the family of the victim were initially very angry. However, they did not give us any problems and attended the conference. They claimed the suspects had acted in this way towards their child because they, the accused, were white.... I was delighted with the outcome of the conference. The two families were really united. They stood in groups, shaking hands, and showed a spirit of reconciliation.* [13]

Specialised legislation and procedures

Article 40(3) of the Convention on the Rights of the Child contains three important aspects. First, it encourages state parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged to have infringed the law. This provision has been interpreted as underlying the need for the separation of children within the penal procedural system and, indeed, for separate legal provisions.

The provisions of Article 40(3) clearly encourage specialisation in the area of child justice, since they refer not only to laws and procedures, but also to the authorities tasked with applying them. Indeed, best practice and delivery of a child rights based service to children in trouble with the law can be achieved even in the absence of separate legislation or procedure. The Zambian experience shows that, although new legislation has not been drafted, the identification of a specific judge with an interest in children's rights to lead as presiding officer in a child friendly courts project[14] has spearheaded practical reforms. These have included the introduction of diversion programmes, lower pre-trial detention rates, pre-trial community service and shorter trial periods where children appearing in her court are concerned.

Minimum age of capacity

Second, Article 40(3)(a) requires States to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. This provision has resulted in many African countries revising the minimum age of capacity upwards. It is expected that South Africa's Child Justice Bill will, when finalised, similarly raise the minimum age from the present seven years, which is universally regarded as very low. Although the Convention on the Rights of the Child does not expressly require this, even in cases where young children above the minimum age are accused of offences, care should be taken to ensure that their criminal capacity is properly established.

The recent case of *S v Ngobesi* highlights[15] this. The case came before a judge on special review after a chief magistrate noted the age of a child convicted in his jurisdiction. The child was thirteen 13 years old, and therefore still subject to the presumption that he lacked criminal capacity unless this could be rebutted beyond reasonable doubt by the prosecution. During the trial, the prosecution did not raise the question of the child's criminal capacity directly; but the magistrate who convicted the child argued that the child's capacity could be inferred from the fact that he had run away from the scene of the crime. The review judge, however, disagreed, finding that the facts the magistrate cited related to the child's actions, not to his state of mind or capacity to act as he did. 'In no way was the cognitive capacity of the ... accused assessed, that is, his ability to resist temptation.' He could also have been affected by undue influence from the other (older) accused children. Since the state had not discharged the onus, the judge set aside the conviction.

11 See Article 40, Volume (3) November 1999, which discusses the case profiled above as well as the reported case of S v S 1999 (1) SACR 608 (WLD)

12 Article 40(1).

13 Article 40 Volume 4 (2) July [2002]: 7

14 With UNICEF assistance

15 2001 (1) SACR 562; discussed in Article 40 Volume 5(3) October [2003]: 6.

Diversion

Third, Article 40(3)(b) exhorts States, wherever appropriate and desirable, to encourage measures for dealing with children in trouble with the law without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected. It is this provision that lays the basis for the promotion of diversion, which entails channelling cases away from courts to a variety of programmes and other alternative courses of action. It has been argued that, because diversion has been included at international law level, it can no longer be treated merely as a discretionary service provided by welfare organisations, or as being solely dependent on the personal preference of individual prosecutors or magistrates or the goodwill of the police. In terms of the principle, States are obliged by their commitment to the Convention on the Rights of the Child to ensure that, at the very least, directives, guidelines or legislation are developed to promote the use of diversion.[16] South Africa's forthcoming child justice legislation will give formal legislative backing to diversion, as the Bill contains a substantial chapter on diversion.

Diversion is dealt with fully later in this volume. However, as the latter part of Article 40(3) clarifies, human rights and legal safeguards must also be protected where children are diverted away from judicial proceedings. This refers not only to the need to protect children's dignity during diversionary activities. It also means that, only where a child intends admitting the commission of an offence, should s/he qualify to be considered for diversion. In other words, the child who does not admit to the offence retains the right to have his or her innocence established in court proceedings (the right to be presumed innocent outweighs the desirability of diversion).

Alternative sentencing options

Article 40 (4) of the Convention on the Rights of the Child requires that

> *a variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate to both their circumstance and the offence.*

The application of this article finds expression in the development of a range of creative alternative sentencing options aimed at avoiding the institutionalisation of children. These alternatives to institutional care frequently draw on the same programmes as are offered as diversion options (see further chapter 8, Alternative Sentencing). However, it is worthy of note that Article 40(4) also mentions the possibility of options usually regarded as welfare interventions, such as care orders and foster care. Institutional care (as referred to in Article 40(4)) includes not only imprisonment, but also other forms of institutional care, such as referrals to reform schools, schools of industry, residential vocational or educational institutions and so forth. Again, in accordance with article 37 (b), any deprivation of liberty should be used only as a last resort.

The Kenyan Children's Act of 2002 probably goes the furthest of recently enacted laws towards the avoidance of incarceration; a significant provision outlaws any form of imprisonment for children subject to the Act.[17] Upon making a finding of guilt, a court may: put the child on a probation programme; commit the child to the care of an adult or a charitable institution; commit the child to a rehabilitation school or borstal institution; commit the child to counselling; place the child in an educational institution or vocational training; commit the child to community service; discharge the child, or arrange for a friendly settlement.[18]

In South Africa, the case of *S v Z*[19] laid down important principles for the sentencing of children, aspects of which complement the ideals contained in Article 40(4) of the Convention on the Rights of the Child. First, the view was expressed that the younger the child, the more inappropriate a sentence of imprisonment. Second, imprisonment is especially inappropriate in cases where the child is a first offender. And third, it was said that short-term imprisonment is seldom appropriate in cases involving juveniles. The judgment also encouraged the concept of what it termed 'monitoring and follow up' as an element of sentencing. It was suggested that fully suspended sentences that effectively end the minute the child walks away from the court cannot generally be regarded as suitable without some ongoing intervention. *S v Z* continues to play an influential role in the development of South African sentencing policy as far as children are concerned.

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The provisions of the Convention on the Rights of the Child are supplemented at regional level by the provisions of the African Charter on the Rights and Welfare of the Child.[20] This regional treaty entered into force in 1999, and will be overseen by a Committee of Experts that met for the first time in 2002.

With regard to child justice, the African Charter is more limited in scope than the Convention[21] Article 17(1) of the Charter provides that:

> *Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and the fundamental freedoms of others.*

Article 17(3)[22] defines the essential aim of this special treatment as being the child's 'reformation, reintegration into his or her family and social rehabilitation'. Underlying the notion of treatment, therefore, is the idea of restoring the child to his or her family and society – a key African value, as well as part and parcel of the founding ideology of restorative justice practitioners.[23] The provisions of the African Charter can be seen as paving the way for the expansion of restorative practices and policies in order to promote best practice in the administration of child justice in African contexts.

16 Sloth-Nielsen J [2001]: 252

17 G Odongo [2003a]: 3

18 Sections 190 and 191 of the Act.

19 1999 (1) SACR 427 (ECD), discussed in Article 40 Volume 1(2) 1999: 1.

20 South Africa ratified this Charter in 2000.

21 M Gose [2002]. For example, the Charter does not refer to diversion, nor to the need for alternatives to institutional dispositions. However, support for non-custodial responses to children in trouble with the law can arguably be inferred from the provisions of article 17(3), which are discussed next.

22 Article 17(2) contains a number of well-known procedural guarantees: such, as the prohibition against torture, the requirement that children be detained separately from adults and the presumption of innocence. Of note is the requirement that the public and press be excluded from juvenile court proceedings. This goes further than the Convention on the Rights of the Child (which requires only that the child's privacy be respected, and does not explicitly ban wider audiences from court proceedings).

23 In other words, it cannot be said that the Charter views treatment as indicating a pathology.

CHAPTER TWO

CHILD JUSTICE CONCEPTS

CHAPTER TWO

CHILD JUSTICE CONCEPTS

Jacqui Gallinetti, Lukas Muntingh and Ann Skelton

African countries have been giving serious thought to alternatives to imprisonment, arguing that the more traditionally accepted measures of restitution,compensation and (affordable) fines be adopted as the main penal measures in place of imprisonment,particularly as the African cannot appreciate a treatment like imprisonment which,if it benefits at all,is benefiting only the government,in total disregard of the victim and the African need to maintain social equilibrium.[24]

This chapter examines certain concepts that have become part and parcel of child justice systems subscribing to the rights and principles contained in the Convention on the Rights of the Child. Concepts such as diversion and restorative justice have been subjected to rigorous scrutiny in various texts, and require some discussion before their practical implications can be explored.

DIVERSION

Diversion involves the referral of cases away from formal criminal court procedures where there is enough evidence to prosecute.[25] As we saw in chapter one, the concept of diversion in cases involving children applies in terms of the United Nations Convention on the Rights of the Child. Article 40(3)(b) promotes the establishment of laws and procedures providing for measures to deal with children accused of crimes without resorting to judicial procedures.

Through diversion, a child who is accused of committing a crime is given the opportunity to take responsibility for his or her conduct and to make good for the wrongful action. Through this process, diversion may involve a restorative justice component, depending on the nature of the diversion.

Diversion may involve conditional or unconditional referral away from the criminal courts. This illustrates the flexible nature of diversion as a procedure aimed at achieving the best result for the individual child. An unconditional diversion may, for example, involve cautioning by a magistrate or presiding officer. A conditional diversion may involve referring the child away from formal court procedures, on condition that s/he attend a programme or undergoes a restorative justice process such as a family group conference. Furthermore, the outcome of such a conference may include referring a child to a particular programme: for example, a life skills programme.

It follows that there is a distinction to be made between formal programmes and informal diversion options. For example, a child might be diverted by being referred to a restorative justice practice such as a family group conference. This is not a formal diversion programme but rather a meeting between the child, his or her family, the victim and the community in order to achieve an outcome acceptable to all parties and restore harmony between them. Again, a part of the outcome might include an informal activity to be undertaken by the child and or by others participating in the family group conference.

A family group conference was called in the North-West province, a deep rural area in South Africa, in response to an assault by a child on her grandmother. The outcome required the family to cook a meal together in order to communicate their feelings and concerns.[26]

In this way, through diversion, families and communities can come up with an outcome that is acceptable to all parties without having to resort to a formal programme. This is particularly significant as formal programmes are not always readily available, especially in under-resourced or rural areas.

24 Adayemi AA [1994]
25 Muntingh, L [1995]
26 Pule, B [2002]: 9

The benefits of diversion are many. Through diversion, a child may gain insight into the consequences of his or her actions, take responsibility for them and make good the harm caused (by, for example, compensating the victim or performing some sort of community service or service to the victim). Diversion allows for victim participation where appropriate and ensures that the child does not obtain a criminal record, thereby granting him or her the opportunity to forge a path in life, unburdened by the stigma of a criminal conviction.

Having noted the benefits, it is also useful to bear in mind certain potential dangers of diversion. These have to do with the accused person's right to a fair trial and due process. As noted at the beginning of this chapter, diversion involves the referral of cases away from the criminal justice system where suitable evidence for prosecution exists. It is, therefore, imperative that children are not diverted to a programme or other informal diversion option *in lieu* of the possibility of prosecution. In other words, if the state does not have sufficient evidence to prosecute a matter, it cannot resort to diverting the child as a 'second prize'. The state cannot absolve itself of the onus of proving the guilt of an accused beyond a reasonable doubt by making use of diversion to achieve a result it would otherwise not obtain. This would constitute a serious invasion of the accused person's right to be presumed innocent until proven guilty.

Likewise, an accused person's right to remain silent might potentially be compromised by the possibility of diversion. Diversion should be preceded by the child's acceptance of responsibility for his or her actions. There is a danger that a child could be unduly influenced into accepting responsibility for an offence at the expense of his or her right to remain silent. This right is inviolable; only a voluntary acceptance of responsibility gives credence to diversion procedures.

Diversion should be excluded where:
- **The child indicates that s/he intends to plead not guilty to the charge**
- **The child has not understood his or her right to remain silent and/or has been unduly influenced in acknowledging responsibility**
- **There is insufficient evidence to prosecute**
- **The child and his or her parents (or appropriate adult substituting for the parents) do not consent to diversion or the diversion option**[27]

REINTEGRATION

After a solemn public ceremony, we pronounce them enemies of the people,and consign them for arbitrary periods to institutional confinement on the basis of laws written many years ago. Here they languish until time has ground out so many weary months and years.Then, with the planlessness and stupidity only surpassed by that of their original incarceration,they are dumped back on society, regardless of whether any change has taken place in them for the better and with every assurance that changes have taken place in them for the worse. Once more they enter the unequal tussle with society. Proscribed for employment by most concerns, they are expected to invent a new way to make a living and to survive without any further help from society. (Menninger)[28]

On the streets of most African cities, we find children and young people wandering around looking for money, food or employment. When we visit prisons in Africa, we find children and young people who are either suspected of having committed crimes, or have already been convicted and are serving a sentence. In South Africa, for example, there are almost 5 000 children in prisons. It is also true that probably 99 percent of these children will be released,

27 UN Office for Child Justice [2003]
28 Menninger [1985]

and will return to the cities and communities from which they originate or where they are able to survive. However, the majority of these children will continue to live on the periphery of society and will not have access to the services and care that most children enjoy. They will continue to be marginalised, and it is more than likely that they will find themselves in conflict with the law once again. This cycle is well known to those who work with children in need of care and children at risk.

Conventionally speaking, 'reintegration' refers to working with prisoners and ex-prisoners who have committed crimes and have served, or are serving, a custodial sentence by providing programmes that aim to reduce re-offending through the provision of certain life and marketable skills. In the developing context, and particularly the African context, it is wise to cast the net somewhat wider when defining reintegration, and to recognise that reintegration services and programmes are also required for groups not normally associated with the above description. These include children and young people who have participated in armed conflicts and need to be demobilised, children who are living on the streets and orphans (as a result of HIV/Aids). This is motivated by the fact that these groups are also at particularly high risk of coming into conflict with the law: like offenders, they occupy space on the fringes of society. Whilst the needs of these groups may differ from child offenders to greater or lesser degrees, there are very strong similarities in terms of what is required to make them part of society again.

It should also be noted that reintegration services are not reserved only for children or young people who are released from prisons or institutions. These services will, in all likelihood, be required for most, if not all, children who have come into conflict with the law, or who show very clear indications of being at risk of doing so. Children who are diverted away from the criminal justice process and into structured programmes, such as those operating in Namibia, Zambia and South Africa, are in essence receiving reintegration services. Reintegration programmes should not be seen as an 'add-on' after the punishment has been meted out, but as the overall purpose of a justice system.

A number of terms are used in this field, such as development, rehabilitation, reintegration, corrections and so forth. Of these, the term 'rehabilitation' is probably the most popularly employed. It conjures up images of people (or children), who are kept in custody and isolated from society whilst undergoing some form of intensive therapeutic process aimed at producing a person who will, firstly, be able to refrain from crime and, secondly, operate as a balanced, law-abiding citizen. In recent times, the term 'rehabilitation' has become somewhat dated and has fallen out of favour with most practitioners, most likely because of its associations with the medical model. For the purposes of this and subsequent chapters, the term 'reintegration' will be used, as this most accurately reflects what it is that one should hope to achieve when working with the range of children described above.

Successful reintegration, therefore, refers to the development of the ability(ies) to deal with risk factors so as to function successfully in society, thereby improving the quality of life of the person and the community. Risk factors are regarded as those conditions or characteristics that may contribute to or result in re-offending. The most pertinent risk factors relate to:[29]

- social and economic environment
- individual skills and characteristics
- relationships with individuals and the community
- stigmatisation
- institutionalisation and socialisation in prison (or other institutions)
- physical environment

29 Lomofsky and Smith [2003]: ii

Social Exclusion Unit, United Kingdom

A similar view on risk factors and reintegration is taken by the Social Exclusion Unit (SEU), based in the Office of the Deputy Prime Minister in the United Kingdom. Although not an African example of reintegration, the model provides an insight into the establishment of innovative practices in the field. It should also be noted that, although the research described below refers to the reduction of re-offending amongst released (adult) prisoners, its applicability to children and young people is obvious, as is its relevance in other fields when dealing with marginalised people. Social exclusion is a shorthand term for what may happen when people or areas suffer from a combination of linked problems, such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown.[30]

SEU research has shown[31] that prisoners tend to have a history of social exclusion and effective marginalisation. In practical terms, this means that the life histories of many people behind bars are characterised by disproportionate exclusion from certain social resources and services. When we compare the extent of social exclusion of prisoners with that of the general population, the picture that emerges points to a life history, often beginning at a very early age, where the individual for one or more reasons has been excluded or pushed away from a resource or service to which the general population had reasonable access.

Compared with the general population, prisoners are:

- thirteen times as likely to have been in care as a child
- thirteen times as likely to be unemployed
- ten times as likely to have been a regular truant
- two and a half times as likely to have had a family member convicted of a criminal offence
- six times as likely to have been a young father, and
- fifteen times as likely to be HIV positive

The study found that the basic skills of many prisoners are very poor: 80 percent have the writing skills, 65 percent the numeracy skills and 50 percent the reading skills of (or below the level of) an eleven-year-old child. Drug and alcohol misuse is above the norm amongst prisoners; 60 to 70 percent of prisoners were using drugs before imprisonment. Over 70 percent suffer from at least two mental disorders. Twenty percent of male and 37 percent of female sentenced prisoners have attempted suicide in the past.

The position is often even worse for eighteen to twenty year-olds, whose basic skills, unemployment rate and background of school exclusion are one-third worse than those of older prisoners. Despite high levels of need, many prisoners have been effectively excluded from access to services in the past. It is estimated that about half of all prisoners had no general medical practitioner before they came into custody; prisoners are over twenty times more likely than the general population to have been excluded from school, and one prison drugs project found that, although 70 per cent of those entering the prison had a drug misuse problem, 80 percent of these had never had any contact with drug treatment services. There is also a considerable risk that a prison sentence might actually make the factors associated with re-offending worse. For example, one-third of prisoners lose their houses while in prison; two-thirds lose their jobs; over one-fifth face increased financial problems, and over two-fifths lose contact with their families.

There is also a real danger that their mental and physical health will deteriorate further, that their life and thinking skills will be eroded, and that non-users will be introduced to drugs. By aggravating the factors associated with re-offending, prison sentences can prove counter-productive as a contribution to crime education and public safety.

Successful reintegration programmes, therefore, need to be acutely aware of a number of factors:

30 Social Exclusion Unit [2002]
31 Social Exclusion Unit [2001]

- Acknowledging the history of the person concerned, and accepting that successful reintegration is or can be time-consuming and may have its set-backs
- Acknowledging that one programme or approach will not work for all
- Working in a comprehensive and holistic manner, and not overemphasising one risk factor
- Acknowledging that different individuals take different skills or resources from the same programme and that the results may therefore be varied

RESTORATIVE JUSTICE

Restorative justice is both a new and an ancient paradigm of justice and has recently been given increasing attention by lawmakers and justice practitioners in a number of countries around the world. Although new as a theory in criminal justice thinking (it emerged in the late 1970s), it is also an old paradigm, because theorists and practitioners have drawn on traditional justice systems around the world to develop the theory and practice of restorative justice.

Some descriptions of restorative justice:

- Restorative justice emphasises the ways in which crime hurts relationships between people who live in a community
- Restorative justice gives crime victims more opportunities to regain their personal power by stating their own needs
- Restorative justice has offenders taking personal responsibility for their actions, and then working actively to repair the harm that they have caused to the victims and the community – making things as right as possible[32]

Prisons were brought to Africa by the colonisers. However, if we look back into the history of countries like Great Britain, France and Portugal, they too did not originally use imprisonment as a sentence. Rather, when crimes were committed in these countries, Western law emphasised the need for offenders and their families to settle with victims and their families.[33] Compensation was considered more important than punishment in Saxon law[34]. In medieval times, an offence was not considered a crime against the state as it is in Western legal systems today, but as a crime against the victim and the victim's family. In the eleventh and twelfth centuries, however, the monarch and later the state began taking over as the main protagonist in criminal matters, hence the use of the familiar terms *Rex versus* and State *versus*. This effectively removed victims as major role players in the criminal justice system; the old processes of settlement or restitution were replaced with the practice of meting out pain or punishment to the offender. The punishments were quite barbaric: public humiliation, torture and death.

The introduction of imprisonment as a sentence was originally intended as a measure of reform.[35] Before the eighteenth century, prisons or dungeons were used mainly to accommodate those awaiting trial. The idea of using imprisonment as a sentence was linked to the idea of 'penitence' – the offender was expected to spend time in seclusion thinking about his or her sins; thus some prisons in North America were called penitentiaries. This development was really the beginning of what later came to be called the 'rehabilitation' approach. However, the real focus of prisons today is more on punishment than rehabilitation, on keeping communities safe from criminals who are perceived as dangerous. The real reason for sentencing more and more people to prison is that criminal justice systems in most countries are, by and large, retributive in nature.

32 Centre for Restorative Justice and Mediation [1996]
33 Van Ness and Heetderks [1997]: 7
34 Hamilton [1979]: 2
35 Zehr [1990]: 120

By the 1970s, criminal justice theorists were becoming disillusioned. Some far-sighted people began to take a new look at the issues and, out of this search for a new way of looking at justice, researchers and practitioners found themselves referring back to some traditional methods. The modern theory of restorative justice began to emerge in the late 1970s and was developed during the last two decades of the twentieth century. The original writers were American, British and European. Soon, however, an interesting trend began to emerge. Countries that still had a living history of indigenous justice began to take the forefront. In New Zealand, for example, Maori traditions were used as the basis for a new way of dealing with child offenders – known as the 'family group conference'. In Canada, the traditions of the First Nations people were drawn on in the use of 'sentencing circles'.[36]

Restorative justice indicators

- There is a recognition that crime affects victims, communities and offenders and creates an obligation to put things right as far as is possible
- All affected parties should be part of the response to the crime, including the victim if s/he wishes
- The victim's perspective is very important in deciding how to put right the harm
- The community ensures that laws are carried out in a way that is sensitive to culture
- Crime is seen as an act against another person, rather than an act against the state. The state requires that the problem be resolved, but leaves the primary responsibility for resolving it up to the directly affected party
- Restoring relationships or repairing the harm becomes the primary goal of criminal justice, rather than punishment for its own sake
- Controlling crime is done mainly by the community and its members

Examples of restorative justice processes practised in different parts of the world include:

Mediation (victim-offender mediation):
Mediation offers victims and offenders the opportunity to meet one another with the assistance of a trained mediator to talk about the crime and come to an agreement on steps toward justice. This type of programme can be used in cases where the parties are in dispute over a matter that is not necessarily criminal.

Conferencing (family group conferencing or victim offender conferencing):
Conference participants include not only the victim and offender but also their families or support groups, with a facilitator to assist them. Victim offender conferencing reflects the principles of restorative justice. These principles focus on the harms that have been done and the resulting implications. They also emphasise the collaboration of key stakeholders: victim, offender and community. This type of programme can be used for diversion, child protection and suitable criminal cases.

Circles:
Circles are facilitated community meetings attended by offenders, victims, their friends and families, interested members of the community and (usually) representatives of the justice system. They are based on traditional practices found in Canada.

Impact panels (victim-offender panels):
An impact panel is made up of groups of victims and offenders who are linked by a common kind of crime, but are not each other's victims or offenders.

36 Consedine [1999]

An important conference took place in Uganda in September 1996, where forty African countries agreed to the Kampala Declaration on Prison Conditions in Africa and the plan of action linked thereto. Some of the commitments included were:

- petty offences should be dealt with according to customary practice or mediations without recourse to the formal system, provided this meets the human rights requirements and parties agree
- there should be recompense to the victim: financial or through work done
- there should be a study of successful African models and a feasibility study on using them in other countries

AFRICAN TRADITIONAL APPROACHES TO CONFLICT RESOLUTION

Retributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.[37] *(Bishop Desmond Tutu)*

Informal justice systems

Restorative justice academics have underscored the fact that this approach accords well with indigenous conflict resolution approaches. The focus in a small, cohesive community is on rebuilding relationships that have been damaged by the wrongful actions of a member or members of that community. The search for harmony and healing is common to many indigenous justice systems, including those systems that existed in South Africa prior to colonisation. Some customary courts, known as *Izinkundla*, *Izigcawu* or *Makgotla*, are still used in South Africa today, mostly in rural areas. Putting the emphasis on 'problems' rather than offences, these structures hear the stories of the parties involved and then make decisions about outcomes. The outcomes aim to heal relationships and ensure restitution or compensation to victims. Symbolic gestures such as the sacrifice of animals and the sharing of a meal indicate that the crime has been expiated and the offender can now be reintegrated. Thus, in some African countries, traditional courts are still part of an informal system to which people take their disputes directly, rather than going to the police.

Not all informal justice systems are fully traditional systems, however.[38] In some countries, popular forums based or modelled on traditional systems have grown out of a lack of faith in colonial or imposed systems. In others, non-governmental organisations or even governments have developed dispute resolution structures that are used as alternatives to the formal system.

African traditional approaches influencing restorative processes at a national level

The link between traditional justice and restorative justice processes is not only relevant to crimes or disputes between individuals. In two prominent examples, African traditional approaches have formed the basis of processes aimed at resolving the harms arising from conflicts at a national level.

The first of these is the Truth and Reconciliation Commission in South Africa. The spirit of *ubuntu*[39] has been described as having been at the heart of the decision to go the route of the Truth and Reconciliation Commission in South Africa. The 1993 interim constitution set out the rationale for the Truth and Reconciliation Commission. Its 'post-amble' made the claim that this document, which represented the final agreement by the negotiating parties, provided a foundation whereby South Africans could transcend the divisions of the past – which had generated violations of human rights and had led to a legacy of hatred, fear, guilt and revenge. The post-amble went on to say:

> *These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.*[40]

The second example is the use of *Gacaca* in Rwanda. *Gacaca* means grass, and refers to 'a meeting of neighbours seated on the grass for the purpose of settling litigation between the inhabitants of the neighbourhood'.[41] Having realised that it might take decades to bring all the people accused of committing crimes during the genocide to trial, the government set up a commission to make recommendations. The Commission recommended that the new tribunals be based on the traditional system of justice in Rwanda, in which members of the public should participate by providing evidence and deciding on the appropriate penalties. *Gacaca* in post-conflict Rwanda was thus reintroduced as a way of dealing with the large numbers of people awaiting trials in the formal system. Several hundred young people – who were children between the ages of fourteen and eighteen years at the time the genocide occurred – will benefit from this process.

Although neither of these processes is fully restorative, they both demonstrate an inclination on the part of African countries to find their own solutions – based loosely on traditional approaches – in order to promote healing.

37 Cited in Martha Minow [1998]: 81
38 Penal Reform International [2001]
39 Humanity towards others
40 Constitution of South Africa, Act 108 of 1996
41 Penal Reform International [2001]

CHAPTER THREE

POLICY DEVELOPMENT: CHANGE AND REFORM WITHIN EXISTING JUSTICE SYSTEMS

CHAPTER THREE

POLICY DEVELOPMENT: CHANGE AND REFORM WITHIN EXISTING JUSTICE SYSTEMS

Julia Sloth-Nielsen

In much of Africa, juvenile justice reforms have been initiated in the absence of a comprehensive legislative framework. South Africa provides what may be the best example of this. Commencing with the introduction of a life skills diversion programme in 1992 – presented to some 200 children in one province of the country – diversion has spread geographically to all South African provinces. During 2001/2, more than 16 000 children were accepted onto the diversion programmes of the National Institute for Crime Prevention (NICRO).[42]

Similarly, the practice of the pre-trial assessment of arrested children by a social worker or probation officer developed organically after the concept was first piloted in the Western Cape province of South Africa in 1994. Assessment became the preferred model for ensuring that children's parents were traced as quickly as possible, exploring the possibility of diversion, and minimising the use of pre-trial detention. It found legislative recognition when the concept was recognised in amendments to the Probation Services Act of 1991, which came into effect in 2002 (see further, Chapter 12).

The question probed in this chapter is how individuals and groups, civil society organisations and government actors can – in the absence of a legal or regulatory framework – spearhead reforms which can serve as the catalyst for change.

In Zambia, the process of change was kick-started when a consultant was engaged by UNICEF to undertake a comprehensive situation analysis of the institutions and processes linked to juvenile justice. The situation analysis highlighted strengths and weaknesses peculiar to the Zambian system – from the need to upgrade police cells and facilities at the reform school, to the fact that the legal framework (although extremely dated) could be regarded as progressive when viewed against a child rights approach. The situation analysis led immediately to the formation of an intersectoral child justice forum, an open-ended group of stakeholders, chaired by a magistrate with a keen interest in child justice reform. With ongoing technical support from UNICEF, a number of key interventions followed, including the establishment of a child-friendly court and the upgrading of cells for children at three police stations. All police stations were then instructed that arrested children should be detained centrally at one of the upgraded police stations. According to interviewees, two key aspects set transformation in motion: the comprehensive situation analysis, which pinpointed areas of practice that would result in immediate and measurable improvements in children's best interest, and the constitution of the intersectoral child justice forum, which took ownership of the process. Considerable buy-in from government personnel and structures was also heralded as having contributed significantly to the success of the initiative.

The above description also illustrates that it is sometimes preferable for transformation to *precede* legislative reform, so that proposals can be tested and adjusted where necessary. The Zambian model did not arise from scratch; rather, concepts and practices from the sub-region were proposed for adaptation to the Zambian environment. Thus a manual for the police, originally written for Namibian conditions, was redrafted for a Zambian audience, with appropriate amendments to general sections (e.g. that dealing with international standards) to accommodate Zambian police orders, rules and legislation.

Another example of change being spearheaded in collaborative fashion comes from Nigeria, where a project was initiated by the Nigerian Human Rights Commission, the Constitutional Rights Project, UNICEF and the international non-governmental organisation, Penal Reform International (PRI). The process began with a study undertaken across Nigeria's six geopolitical zones, looking particularly at young people in remand homes, approved schools and borstals[43] and those detained in prisons and police cells.[44] After this, a National Working Group on Juvenile Justice Administration was formed, and a draft concept paper developed and debated at zonal conferences. Further, a course manual for law enforcement officials working with juvenile offenders was drafted, as well as a guide for trainers. All this preceded the signing into law of the Nigerian Child Rights Bill, which, as at June 2004, had not yet been passed by Nigeria's House of Assembly.

There is one difficulty associated with the fact that, so often, reforms are driven by individuals with a particular commitment to improving the human rights of children in conflict with the law. This is that, having gained expertise and participated in establishing the necessary networks and contacts, they may seek career improvements or be promoted out of their original positions. As more specialised services – such as one-stop child justice centres – are established, staff members are faced with difficult choices about whether to continue in the field, or go back to the mainstream functions within their departments, where formal career prospects for promotion are available.

In the field of diversion, the impetus and skills for innovation have often begun in the voluntary and non-governmental sector. A recent audit of different types[45] of diversion programmes, youth development programmes that can be harnessed as diversion options, and their geographical spread and specific 'target market'[46] was undertaken on behalf of the South African government by a UN technical assistance project.[47] The results show clearly the continued role of the non-governmental sector in delivering and developing programmes to expand access to diversion.[48] In other countries, too, the delivery of community-based alternatives to prosecution and institutionalisation has frequently been developed through referrals to the non-governmental sector. This is because government officials have, by and large, lacked the capacity to deliver diversionary programmes to young people at risk. The skills and training, not to mention the orientation of state social workers towards the production of documentation and reports, have acted against the possibility of bureaucrats becoming involved in the day-to-day organisation of diversion – for example, organising sessions on anger management for teenagers; taking groups on camp into wilderness areas; providing art therapy, and so forth. The non-governmental and voluntary sector are far better placed organisationally to engage in more creative, and less office-bound, activities with the children concerned. There are, however, notable exceptions, as illustrated by the example below.

In Limpopo province in South Africa, a chief probation officer with a post graduate qualification focused on youth justice has, over a period of two years, developed access to programmes in six regions of the province. He himself travels between the towns concerned to present the content of the life skills sessions to diverted youth as part and parcel of his daily work. In so doing, he is reaching into remote areas where non- governmental organisations have no presence.

Ideally, the state and its officials should continue to play a regulatory role in this field: not only because of the requirements of Article 40(3) of the Convention on the Rights of the Child, which requires state parties to ensure the provision of alternative responses to judicial proceedings for children in trouble with the law, but also to protect children from potentially harmful or exploitative

42 Wood C [2003]: 11

43 a prison for boys who are too young to be sent to an ordinary prison

44 See J Gallinetti 'Child Justice reform in Nigeria' Article 40 Volume 5(3): 10 – 11.

45 Such as life skills programmes, mentorship programmes, wilderness or adventure therapy programmes and arts, crafts and music-oriented programmes.

46 E.g. the age of the children or the fact that they had had committed certain types of offences (such as sexual offences)

47 The UN Office for Child Justice, which was in operation from 2000 – 2003.

48 The Guide to Diversion contains the list of diversion possibilities, at www.childjustice.gov.za.

practices. The regulatory role may include maintaining a database of accredited diversion service providers, ensuring that adequate records of diversions are kept and promoting the development of specialised diversion options for groups of children in conflict with the law who require individualised services.[49]

USING DISCRETION

Even without the existence of legislation dealing directly with child justice, there is much scope within current procedural systems for choices to be made and decisions taken which contribute to a reform agenda. Starting with police discretion, there is an opportunity at the very first step to use alternatives to arresting children, thereby ensuring that the deprivation of liberty happens only as a last resort. An interesting example of the development of specialised police practice can be seen in Lusaka in Zambia, where policewomen based at the three police stations designated to receive children (see above) have taken their own initiative in developing alternatives to incarceration. With the full backing of their commanding officers, they have used bail bonds to ensure the release of children, as well as effecting closure of cases after giving the children 'a good talking to' where minor offences are concerned (see further Chapter 11, Police as Role players).

FOCUSSING ON SERVICES

When discussing reform and child justice, one is frequently confronted by responses that focus exclusively on the demand for more and better equipped facilities, such as remand homes, borstals, detention facilities and so forth. There are indeed situations where physical improvement is sorely needed, or where lack of access to facilities results in violations of children's rights. These include detention in adult prisons and, a particular cause for concern, the prevalence of breaches to the minimum standards of humane detention, including access to clean water, basic sanitation, food, warmth where this is needed and so forth.

However, it must be countered that reformers in the child justice sphere on the continent have accomplished much in the absence of expensive building programmes.[50] Redirecting the focus of efforts towards the nature, substance and timely delivery of services to children in trouble with the law is as likely to have at least an equal impact. These issues are explored more fully next.

The nature of services

Throughout the continent, the delivery of services to children accused of offending rests on a range of sectors and stakeholders. There are good practical examples of where change has come about through concerted efforts to do things differently without necessarily requiring more resources.

A prime example is the proposed introduction of a new procedure to be termed the preliminary inquiry in South African child justice. The Child Justice Bill of 2002 provides for a pre-trial case conference with the primary objective of promoting access to diversion at the earliest possible opportunity: that is, before a child appears in court for the first time. The case conference will be convened by a magistrate; other role players will include the prosecutor and the probation officer, who will have completed an assessment of the child's social history and the circumstances surrounding the commission of the offence.

The university-based economic research unit, *Afrec*,[51] undertook the costing of the proposals. It was concluded that this initial procedure would result in substantial overall cost savings, due to the likelihood of faster processing of diversion cases, the resultant lowering of court loads, and less recourse to detention facilities. There would also be less spent on transporting children between detention facilities and courts, as far fewer cases would remain 'in the system'.[52] Although the preliminary inquiry has not been officially introduced as the legislation is still being debated, the economists based their conclusions on data gathered at the Stepping Stones One-Stop Child Justice Centre, where a broadly similar way of working had been put into practice, with exactly the abovementioned positive improvements.

Another pertinent example that shows that changes can be made to the way services are provided to children at no expense to the system comes from Ghana, where police who investigate reported crimes where the offender is alleged to be a child wear plain clothing rather than uniforms.[53] This approach is less intimidating and more 'child friendly'. Nor can one underestimate the enormous impact of the attitudes of role players in ensuring child friendly services to children in conflict with the law; a positive and committed outlook really does not require fiscal resources.

> *I have been a prosecutor for almost ten years, but have been engaged with children exclusively for a relatively short period of time. Only now do I experience a feeling of real job satisfaction. For the first time I now believe that I am involved in a process where I am actually making a positive difference in the lives of others. Children and their parents leave our court with a sense of hope.*[54]

The substance of services

A child-friendly orientation can frequently be achieved with common sense and a simple awareness of children's level of age and maturity – again factors that lie outside the realm of resource constraints. An obvious example is the use of simplified language to explain procedures, rather than the formal and legalistic language that children are not familiar with.

Children who participated in a consultative process when South Africa's Child Justice Bill was in preparation made the following remarks, providing telling hints as to how an atmosphere and the attitude of people with whom they come into contact can affect their perceptions of the harshness or otherwise of the service they receive:[55]

> *Courts should be friendlier and child like with colour posters, paint and sweets.*
>
> *They must speak so that we can listen.*
>
> *Someone should be on hand to explain what is going on.*
>
> *I was afraid to speak because of the clothes. They are adults, all of them.*
>
> *They were speaking big words that I don't understand. I was very frightened.It was a very cold atmosphere.*
>
> *I was beaten up and forced to admit some other things which I don't know. I had no chance to tell my side of the story.*

The author of the report of the process concluded that:

> *It is evident from what the children said that the formality of the courtroom situation often inhibits their ability to speak freely. Their poor understanding of the proceedings results in a situation where they are left with a sense of disempowerment and of not being heard. The adversarial nature of adult court proceedings appears to have the effect of putting the child on the defensive, with the truth only being used as a last resort.*[56]

49 See the provisions of the South African Child Justice Bill 49/2002

50 It has also been pointed out that building programmes as the core element of reform creates '[t]t danger of institutional overextension....Modern Western-style systems for dealing with young offenders require an institutional infrastructure and body of trained professionals that is beyond the means of poorer developing countries; and where short- term investments are made in parts of the system -- for example, constructing new remand centres or reformatories -- children are likely to suffer later when maintenance and other costs can no longer be met.' Petty C & M Brown [1998]: 129.

51 Barberton C with J Stuart [1999]

52 Quoted in the South African Law Reform Commission Report on Juvenile Justice (2000) at par 5.18.

53 Kassan D [2003]

54 Prosecutor at the Mangaung One-Stop Child Justice Centre, quoted in Article 40 Volume 4(4): 6

55 See Community Law Centre [1999] and the report of the follow up consultation conducted in 2001-2 in L Ehlers 'Consultation with Children on the Child Justice Bill' Article 40 Volume 4(1): 6-7.

The timing of services

Many gains for children's rights can be made simply by speeding up decision-making processes. One of the key common characteristics of child justice systems throughout Africa is the length of time it takes to process trials. This means that children often spend lengthy periods in welfare facilities and prisons, awaiting the conclusion of their cases.

In Uganda, one commendable project has been dubbed the 'chain-linked' project. Its aim is to improve the efficiency of the criminal justice system, particularly as regards the easing of case backlogs and congested court diaries. This entails a regular meeting of judicial officers, the police, the prisons department, probation and social welfare and NGO representatives. Some of its positive effects are that prison authorities have been sensitised on the law prohibiting the imprisonment of children, and that it has become possible for more trials involving accused children to 'jump the queue' more often. The 'chain-linked' project has resulted in improved coordination, co-operation and communication between the various players, speedy trials, decongestion in places of custody, police cells and prisons and a positive influence on the attitude of those working in the criminal justice system.[57]

At New Horizons Place of Safety near Cape Town,[58] social and child care workers take a keen interest in the progress of cases involving children who have been remanded to await trial at their facility. They routinely telephone courts, legal representatives and prosecutors to plead for ongoing cases to be expedited – reportedly with a fair measure of success.

Pre-trial screening soon after arrest (or assessment, as it is termed in South Africa), with a view to the speedy collation of as much social history and information as possible concerning the commission of the offence, has been widely shown to enable speedier prosecutorial decision-making on issues such as releasing children on bail or into the care of parents, as well as diversion.[59] It can be argued that the development of assessment services by probation officers results in a more effective expenditure of state resources than the establishment of elaborate staff quotas to compile pre-sentence reports, due to the high impact of early intervention (see further Chapter 12).

Creating local networks for rural support

Some of the most positive initiatives of recent years have seen the expansion of nodes where child justice services exist to rural and more far flung areas, where the capacity and infrastructure to bring about reform is lacking. As early as 1999, *Article 40* carried a report entitled 'Taking transformation from big cities to gravel road communities – a rural outreach programme', which described how the staff at the Stepping Stones One- Stop Child Justice Centre were making regular visits to neighbouring towns and rural areas to conduct awareness-raising training exercises and offer support and advice.[60] The workshops focussed, amongst other things, on innovative diversion initiatives that rural role-players (probation officers, prosecutors and members of the public) could use. The team also underscored the principles of restorative justice and the need for early intervention.[61]

This trend towards providing wider support from a regional base has continued with the establishment of two further one-stop child justice centres, in Mangaung in the Free State province, and Port Nolloth[62] (near the border between South Africa and Namibia). One of the stated objectives of Mangaung is:

> *to act as a training centre for the Free State province to empower all role players to upgrade the standard of services to children and to ensure that children in rural areas and poverty stricken areas receive equal treatment and can benefit from restorative justice.*[63]

A further welcome trend is the expansion of programmes for children who have formally attracted the attention of the criminal justice system to 'at risk' children in communities. At the Port Nolloth One-Stop Child Justice Centre, which serves a proportionately small number of arrested children (given the low population figures in that community), the objectives for service delivery include crime prevention programmes to be presented at schools and community meetings, as well as holiday programmes for secondary school learners from the wider region, consisting of HIV/Aids awareness, leadership programmes, substance abuse awareness and information on criminal justice procedures.[64] A programme developed to further the aim of providing prevention[65] services at the Mangaung Centre was titled 'From Scars to Stars', which is also used as a diversion programme.[66] Its features include: focusing on problem-solving; drugs awareness; information about sexuality; decision-making – the 'do's' and 'don'ts' of life;[67] a motivation programme,[68] and conflict resolution.

These examples demonstrate that child justice initiatives can, and often do, occur in the absence of reforming legislation. Nevertheless, child justice laws are a necessary requirement for a consistent, credible and authoritative system of justice. The following chapter examines the progress of legal reform in various African countries.

56 Report of consultation with children conducted in 2001-2 in L Ehlers 'Consultation with Children on the Child Justice Bill' Article 40 Volume 4(1): 7

57 G Odongo [2003b]

58 The operation of this awaiting trial facility has been outsourced to private sector management and staff by the relevant government department.

59 Sloth-Nielsen J [2001]: 219-221

60 Article 40 Volume 1 (3) November 1999: 9

61 It was suggested that, due to the relatively low numbers of child offenders in rural areas, the most successful programme was pre-trial community service. Tasks that were assigned to diverted children in the months following the training included laying stones on potholes on rural roads, painting clinics and cutting grass in municipal grounds.

62 The wider regional services being offered from the Port Nolloth base are discussed immediately below.

63 Article 40 Volume 4(4): 3

64 'Update on Port Nolloth One-Stop Child Justice Centre' Volume 5(2) Article 40 July 2003: 1-3.

65 At the outset, it was decided that a certain proportion of the work time of all child and youth care and social workers at the centre would be devoted to preventative services.

66 Moraka C 'From scars to stars' Article 40 Volume 4(4) December 2002: 4.

67 'They are shown that it is easy to make decisions, but making the right ones requires skills and knowledge. They are made aware that they must take responsibility for the choices they make' Article 40 Volume 4(4) December 2002: 4

68 'The programme teaches them how to be a winner in life, how to believe I themselves, to know their values, have a vision, set goals and plan for the future' Article 40 Volume 4(4) December 2002: 4.

CHAPTER FOUR

LAW REFORM INITIATIVES IN AFRICA: TURNING PRINCIPLES AND POLICY INTO LAW

CHAPTER FOUR

LAW REFORM INITIATIVES IN AFRICA: TURNING PRINCIPLES AND POLICY INTO LAW

Julia Sloth-Nielsen

GHANA

Ghana was the first African country to ratify the United Nations Convention on the Rights of the Child – on 29 June 1990. However, although Ghana enacted its Children's Act in 1998, the Ghanaian Juvenile Justice Bill is still before Parliament.[69]

Child rights regulations in respect of the 1998 Children's Act in Ghana were passed in 2002. In terms of the Act, child justice panels have been established to deal with minor criminal complaints against children. The victim and the offender are invited to appear before this community-based body, which is empowered to resolve disputes in a traditional way. Proceedings are informal and are often held in a member's house or garden. The child protection team at district level mentors and monitors the panel's work. The opinion is that the panels are working well, and that communities are once again feeling empowered to resolve their own disputes.[70] (See further, chapter 7, Integration).

Ghana's Juvenile Justice Bill has as its main objective to provide a juvenile justice system to protect the rights of children and provide for young offenders in accordance with international standards in the Convention on the Rights of the Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).[71]

Apart from introducing a number of reforms (such as specialised courts and diversion), the Bill also proposes (in section 32) a prohibition on the sentencing of children to imprisonment.[72] This blanket prohibition is a bold step aimed at preventing the extremely negative impact that children experience as a result of imprisonment, and gives particular expression to Article 37(b) of the Convention on the Rights of the Child.

The Bill also places certain limitations on how long a child may be kept in a detention centre. This is also regarded as a positive development as it will facilitate reintegration by limiting institutionalisation, a known risk factor. The maximum periods for detention at a centre are stipulated in the Bill and are dependent on the age of the juvenile. For example, the period of detention for a juvenile under the age of sixteen years may not exceed three months; for a juvenile over sixteen but less than eighteen years, the period may not exceed six months; for a person over eighteen but less than 21 years, the period of detention may not exceed 24 months. Where the offence is considered serious, the period of detention may not exceed three years.[73]

SOUTH AFRICA

South Africa's child justice reform process has resulted in the Child Justice Bill presently before Parliament. The Bill provides explicit and elaborate provisions for diversion, procedures relating thereto and minimum standards. Both family group conferencing and victim offender mediation are included as diversion options.[74]

The law-making process began when the Minister of Justice asked the South African Law Reform Commission to include an investigation into child justice in its programme. A project committee was set up and began work in 1997. A consultative method of law-making was followed. The Child Justice Bill was the culmination of this process. It was tabled before Parliament in 2003 and is expected to be passed during 2004.

The Bill includes the following as part of the objectives clause:

The objectives of the Act are to promote *ubuntu* in the child justice system through-

(i) fostering of children's sense of dignity and worth;

(ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community;

(iii) supporting reconciliation by means of a restorative justice response; and

(iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of the Act.

One of the aims of the new system is to divert as many children as possible. All forms of diversion depend on the child acknowledging responsibility for the offence. Children who do not do so will be referred for trial where they can plead not guilty. In cases where their liberty may be at risk, they will be guaranteed legal representation.

Every child coming into the system must be assessed by a probation officer within 48 hours of arrest. At this stage, those charged with petty offences can be diverted by a prosecutor. Those charged with more serious crimes must go to a preliminary inquiry, which will be chaired by a magistrate and take the form of a case conference – the main purpose of which is to promote the use of diversion. The prosecutor and the probation officer will attend this inquiry, as will as the child and his or her family. Certain very serious offences, such as murder and armed robbery, will be excluded from the possibility of diversion.

Diversion is a core component of the new system, and the draft Bill offers two 'levels' of diversion. Level one includes programmes that are not particularly intensive and are of short duration. These rely to a large extent on the family and the community as a resource; children are referred back to their families under an order directing them to do or not to do certain things. Level one includes apology, restitution and compensation. The second level, however, contains programmes of increasing intensity, which can be set for longer periods of time. The clear intention in setting out a range of options in this way is to encourage those working in the system to use diversion in a range of different situations, even for relatively serious offences. Children can be referred to family group conferences, victim offender mediation and 'other restorative processes', the outcomes of which are determined by the process itself.

The Bill includes detailed procedures for the setting up and running of family group conferences. A probation officer (a social worker employed by the Department of Social Development) is responsible for convening the conference as speedily as possible, and not more than 21 days after the decision that such a conference must take place. Those who are entitled to attend a family group conference are: the child and his or her parent or an appropriate adult; any other person requested by the child; the probation officer; the prosecutor; a relevant police official; the victim and, where the victim is under the age of 18 years, his or her parent or guardian and other family member(s); a member of the community in which the child is normally resident; the legal representative of the child, and any other person authorised by the probation officer to attend the conference.

The family group conference is empowered to regulate its own procedure and to make such plan as it deems fit, provided that it is appropriate to the child and family and is consistent with the principles contained in the legislation. The plan must specify the objectives for the child and the family, as well as the period within which they are to be achieved. It must contain details of the services and assistance to be provided to the child and family, and include such other matters as are relevant relating to the education, employment, recreation and welfare of the child.

According to the Bill, family group conferences can be used as diversion options prior to trial. Moreover, the court can stop the proceedings in the middle of a trial and refer the matter to a family group conference. The court can also, after conviction, send the matter to a family group conference to determine a suitable plan, which the court can then make into a court order for the purpose of sentencing. The Bill includes provisions for the failure of family group conferences, as well as for non-compliance with the plan arising from the conference.

The effects of imprisonment and institutionalisation are well documented[75], and placing a restriction on the

69 Unpublished article by Odongo GO [2003b]: 8

70 Kassan D [2003]

71 Kassan D [2003]: 3

72 Kassan also notes that section 32 appears to be at variance with S 46(1)(d), which provides for a maximum period of detention of three years in a correctional facility.

73 Kassan D [2003]: 7

74 Odongo [2003d]: 14

use of custodial sentences for children forces sentencing officers to investigate and consider other sentencing options – options that will keep the child in the community or at least keep the period of detention to a minimum. In South Africa, all the indications are that a proposed prohibition on prison sentences for children under the age of fourteen years – as initially provided for in the Child Justice Bill – will *not* be accepted by Parliament. In order to give expression to the international instruments and, more importantly, to increase the potential for successful reintegration by limiting institutionalisation, countries need to adopt and implement legislation that reflects this goal.

UGANDA

Uganda was one of the first countries to embark on law reform to bring its laws into line with the Convention on the Rights of the Child. The Children's Statute contains both child protection issues and child justice issues. Its general approach is to ensure that families and communities are fully involved and that the formal system is brought in only as a last resort. (See further Chapter 6, Diversion).

KENYA

In 2001, Kenya's Children's Act introduced a new legal framework for dealing with children and their rights, including children in trouble with the law. The new Children's Act places the twin issues of child welfare and juvenile justice firmly within the ambit of the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international law instruments, as is evident in the due process safeguards detailed in the section dealing with juvenile justice.[76]

The Kenyan Children's Act does not contain express provisions for diversion; nor did the repealed Kenyan Children and Young Persons Act.[77] Despite this, the repealed legislation gave trial magistrates the discretion to make a number of orders, including returning the child to the parents, or requiring a parent or guardian to exercise proper care and guardianship of the child.[78] The new Act provides for an array of options by means of which the court may deal with juvenile criminal proceedings, particularly in relation to alternative sentences. In addition, it establishes a National Council for Children's Services with wide-ranging functions and powers; this is an opportunity to develop various programmes to promote the rights and welfare of the child, which may include diversion programmes. The Director of Children's Services is given various powers under the Act: these include collaborating with private and public agencies on social programmes and mediating in family disputes involving children.[79] (See further Chapter 6, Diversion).

CONCLUSION

The law reform efforts underway throughout Africa hold much promise for establishing child-based standards for the administration of justice where children are in conflict with the law. There can be no doubt that the expansion, by their inclusion in law, of alternatives to incarceration and to a host of new non- penal[80] or non-custodial sentencing options will provide a sound basis for reform processes aimed at the development of diversion and the 'decarceration' of institutions where children are currently held. In addition, legal reform can promote specialisation and the establishment of separate courts, forums and tribunals, the better to implement children's rights.[81]

But, as has been said in another context, legislation alone cannot produce well-trained, committed and motivated personnel;[82] nor can it grow locally appropriate, culturally relevant development interventions and programmes aimed at significantly altering the course of children's lives when they have clashed with the law. Here, the limitations of the law become patent. Yet, within existing systems (and without a vast injection of fiscal resources), much can be done to implement child justice reform, provided that there are individuals and organisations willing to make a difference.

75 See for example Gonin D [1993] 'La santé incarcéré. medicine et conditions de vie en détention', Paris: L'Archipel. Reported in Criminal Justice Matters No. 35 Spring 1999.

76 Section 186 of the Act

77 Chapter 141 of the Laws of Kenya

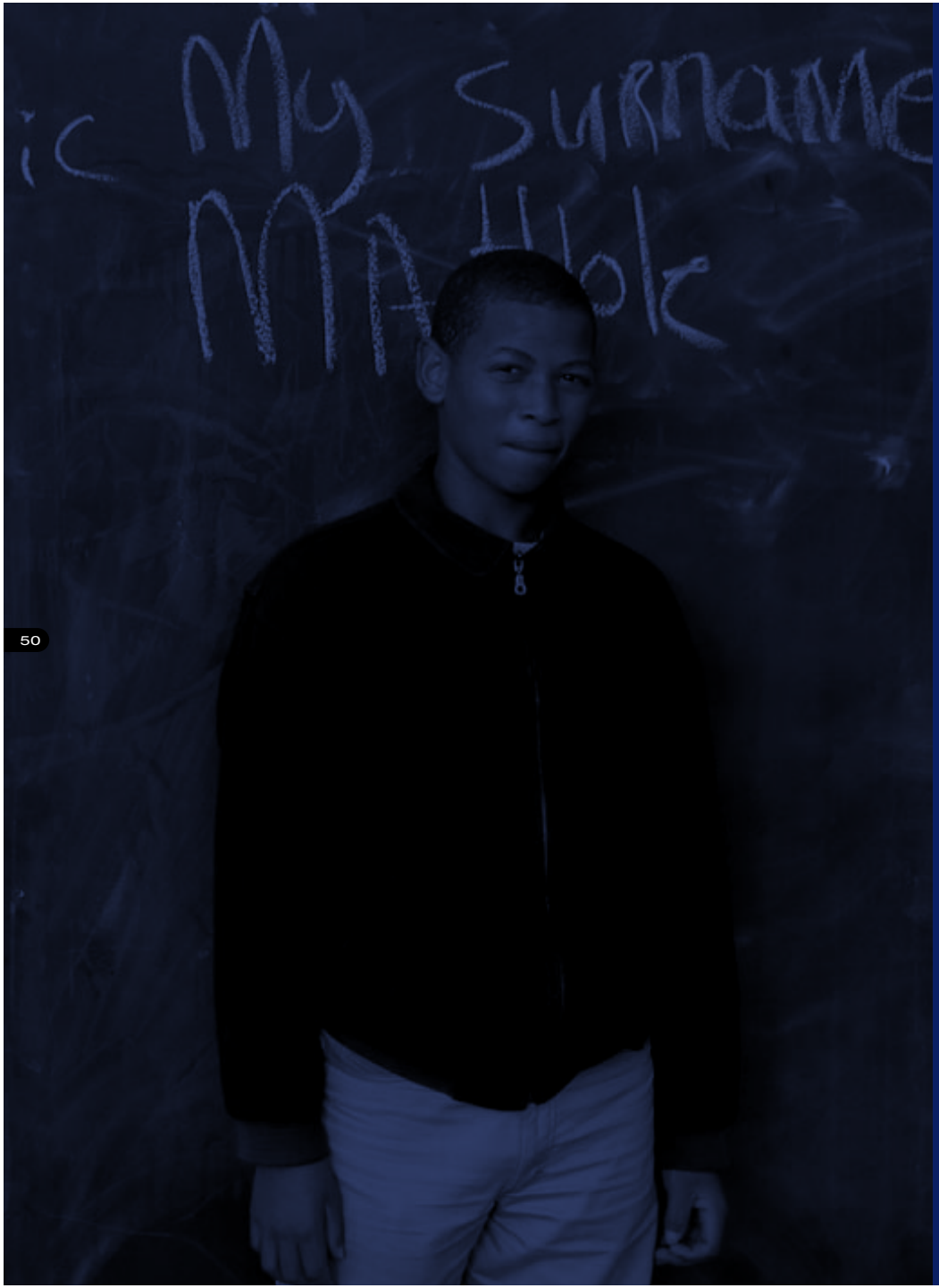
78 Section 25

79 Section 37

80 For instance, the Uganda Children Act of 1996, does not use the word sentence at all, preferring the less stigmatising word 'orders' Odongo [2003b]: 7. Similarly, the Kenya Children Act 2001 has been lauded for introducing an array of options which a court now has a discretion to impose upon convictions, and for placing a total ban of imprisonment as a sentence (along with a prohibition upon whipping). (See Odongo G [2003a]: 3, 4

81 Examples here are to be found in the Kenyan legislation, Ghanaian legislation, Ugandan law and in the provisions in South Africa's Child Justice Bill enabling, the expansion and extension of the services of one- stop child justice centres.

82 South African Law Reform Commission First Issue Paper on the Review of the Child Care Act par 11.6, quoted in Sloth-Nielsen J & B Van Heerden [1999]



PART TWO

CHILD JUSTICE INTERVENTIONS


I want
a sucses
Person in
Playing in high Places
by Khanjiso

CHAPTER FIVE

PARTICIPATION BY CHILDREN

Daksha Kassan

INTRODUCTION

As we saw in Chapter 1, the right of children to participate in matters that directly affect them is guaranteed by the Convention on the Rights of the Child and other instruments. Despite this, children's participation remains the most neglected and contested right.

There have, however, been various initiatives to ensure that the views and opinions of children are heard. This chapter will highlight some of these initiatives and examples, by focusing on the various ways in which children can be involved in matters that affect them and how their voices can be accessed in different settings.

PRACTICAL WAYS OF ACCESSING CHILDREN'S VOICES

The South African experience

The child justice law reform process in South Africa entailed an unusual degree of public participation. Numerous consultative workshops and dedicated meetings were held with specific interest groups. These workshops provided the project committee with the specialised knowledge and opinions they needed to move to the next stage. In addition, the committee felt the need to consult the views of children and, to this end, included child participation. The decision to consult children was an explicit attempt to ensure child participation in the process of drafting legislation that directly affected their interests. As it emerged, the children's inputs proved of great value in drawing up the final draft Bill.

Consultation with children occurred on two occasions. The first consultation was commissioned by the South African Law Reform Commission in 1999 and the second by the Child Justice Alliance[84] in 2001.

First child participation process

The South African Law Reform Commission (SALC) released a first draft of its legislative proposals in December 1998. In an effort to access the voices, opinions and views of children, the SALRC commissioned a non-governmental organisation (NICRO)[85] to consult with children in this regard.[86] Children, and especially children in contact with the criminal justice system, were recognised as important constituents whose opinions could play a vital role in the development of the Child Justice Bill.[87]

The participants were mainly children who had had some contact with the juvenile justice system. A control group of high school learners, who had never had prior contact with the criminal justice system, was also chosen to participate. The children involved in the study included:[88]

- Children in a diversion programme
- Children over the age of 14 years and awaiting trial in a place of safety
- Children under the age of 12 years and awaiting trial in a place of safety
- Children awaiting trial in prison
- Children serving a sentence in a reformatory
- Children serving a sentence in prison
- A group of grade nine learners who had never been in trouble with the law

The recruited children participated in a series of interactive workshops in which the specifics of the proposed Bill were debated. Participation was voluntary. Staff at the various institutions who engaged in this study (for example, staff at places of safety, prisons and so on) was asked to select or recruit children who were willing to participate in the process. They were also asked not to subject their choices to the types of crime committed or alleged, nor to home language. However, children had to be able to write and read since some of the exercises required written responses.

The children were grouped according to the various 'stages' of the criminal justice system. This was to establish whether there were any differences of opinion between those entering the system, those being tried, those being sentenced and those serving a sentence in an institution.[89] The inclusion of the control group made it possible to measure differences of opinion between this and the other groups. The inclusion of a group of children under the age of twelve years made it possible to gather the experiences and perceptions of very young children. There were ten children at most per group.

The children were asked to comment on certain key themes, in order to obtain specific information for the Project Committee.[90] Topics concerned the minimum age of prosecution and age determination, police powers and duties, assessment and referral, diversion, the proposed preliminary inquiry, the child justice court, sentencing, legal representation and the expunging of records.

The methods used to obtain the required information included role-playing, small group discussions, individual written feedback and the filling in of worksheets.[91] A total of 70 worksheets was processed and the responses reflected as percentages of the total sample. Children were also asked to share their personal experiences and make recommendations. For the children under 12 years of age, the workshops were less formal and made more use of role-play and fantasy.

This first consultation, even though it was a relatively new experience in South Africa, proved an extremely valuable exercise for those involved in drafting the Bill. The information gathered certainly helped inform the eventual draft Child Justice Bill, which was published by the Project Committee in July 2000.

Second child participation process

In the light of the success of the first consultation and the valuable insights it supplied into gaps in the South African criminal justice system, it was decided that there was a need to build on the previous study and ascertain children's current experiences of the justice system, as well as their opinions on the Child Justice Bill, before its submission to Parliament.[92] This second consultation was commissioned by the Child Justice Alliance.

While the first consultation took place when the Bill was still in the form of a discussion paper and a number of options were being explored by the project committee,[93] the focus of the second consultation was on anecdotal experiences of the criminal justice system in its current form. The aim was to ascertain what (if anything) had changed over the past few years and to identify gaps and problems that would be rectified by the implementation of the Bill.[94] The purpose of the second consultation was also to inform parliamentarians and policy makers about the specific experiences of children at the hands of the criminal justice system, and to illustrate how the Bill would remedy these problems. Thus the two processes had very clear but different purposes.

Like the first process, the participants included children at various stages of the criminal justice system, together with a control group of children who had had no contact with the formal legal system. The children were selected from a range of institutions and schools in four South African provinces.[95] The methodology of the study echoed that used in the first consultation.

83 African Charter on the Rights and Welfare of the Child

84 The Child Justice Alliance was established at the beginning of 2001. It is made up of various individuals and organisations working in the area of child justice. Its purpose is to ensure that accurate information on child justice matters is made available to government and civil society in order to facilitate informed debate on the Child Justice Bill and ensure that the Bill is passed by Parliament. See further Chapter 15.

85 National Institute on Crime and Reintegration of Offenders

86 L Ehlers 'Children's Views on a New Child Justice System' In Article 40' Volume 2, August 1999: 6

87 L Ehlers 'Consultation with Children on the Child Justice Bill' In Article 40, Volume 4, Number 1, April 2002: 6.

88 Community Law Centre [1999]: 7

89 Community Law Centre [1999]: 7, 8

90 Community Law Centre [1999]: 8

91 Community Law Centre [1999]: 8

92 L Ehlers 'Consultation with children on the Child Justice Bill' In Article 40, Volume 4 (1) April 2002: 6 and Ehlers L [2002]: 6

93 L Ehlers [2002]: 7

94 L Ehlers [2002]: 7

95 These included the Western Cape, Eastern Cape, North West Province and Limpopo provinces. These provinces were selected because they provided a balance between well-developed and under-developed criminal justice infrastructure.

The children were consulted on topics such as age of criminal capacity, police powers and duties, detention of children and release from detention, assessment, diversion, the preliminary enquiry, the child justice court, sentencing, legal representation and records of conviction. Child-friendly worksheets were used to obtain specific information on each of the proposed stages of the new child justice system, the views of the children as well as individualised responses to particular experiences. These worksheets were not used as questionnaires for the children to fill in, but rather as guidelines for facilitators to use via a process of role-playing, information input and small group discussions.[96] The facilitators consisted of trained social workers from NICRO who had all received training in restorative justice, life skills facilitation and the specific content of the Child Justice Bill. A total of 165 worksheets was processed and the results reflected as a percentage of the total sample.

Lessons learnt from South Africa's child participation process

Consulting with children on law reform is a relatively new process in South Africa and proved extremely valuable in shaping new child justice legislation. In addition, the processes themselves presented various challenges and highlighted new lessons to be learnt by facilitators for future consultations with children. Some of these include:[97]

Language: The language used in the workshops was predominantly English, although this was often not the first language of the children. The children spoke a wide range of languages and it was not always possible to use a facilitator who could interpret. Hence, the language needed to be simplified as far as possible so that the children could understand and respond to the questions. Choice of language is thus a serious consideration when consulting with children.

Skills required of facilitators: The facilitators involved in the process were generally social workers with previous experience in working with children. They also needed to be adequately briefed before the process began so as to acquaint themselves with the content of the legislation. Because of the nature of the topic, they also needed to have the skill to distil the information, interpret the questions and the 'know-how' to phrase the questions so that the children could understand what was being asked. There were two co-facilitators: one facilitator to take down the information while the other facilitated the group; two facilitators also provided leeway to help encourage contributions from the less participative or 'shy' children during discussions.

Interpreting data collected: Once the information had been collected, the facilitators make certain that they had correctly interpreted what the children had said.

96 L Ehlers [2002]: 9.
97 Interview with L Ehlers on 28 August 2003

People often question whether children have the necessary insight and capability to engage in consultations on law reform. The following quote captures the essence of why such consultations are not only valuable, but necessary and perhaps even indispensable.

> *Let it not be thought that this study was purely an intellectual endeavour. This publication expresses how the children themselves experience the criminal justice system. Comments on the inadequacy of human rights education, abuse at the hands of the police and shady tactics by lawyers pepper the observations of participants. There is much that the human rights community in South Africa can learn from children's participation, which goes far beyond the bland formality of giving effect to Article 12 of the CRC. The views expressed here bring us face to face with the despair, terror and loneliness experienced by children in conflict with the law. They make us realise where we have failed – as parents, lawyers and citizens. But they also make us understand that, if their thoughts and opinions are genuinely consulted, if their thoughts are treated with dignity and respect, children will respond in a way that is rational, sensitive and imaginative. We must allow our children to speak. We must teach ourselves to listen.* [98]

There are other examples of how children's participation has been engaged in policy-making processes. For example, ACESS (the Alliance for Children's Entitlement to Social Security) organised child participation workshops in South Africa's nine provinces with the intention of engaging children's views on policy development relating to social security. The Department of Labour and Save the Children undertook a similar process, in order to gather information about the issue of child labour.[99]

LISTENING TO CHILDREN IN MOZAMBIQUE[100]

Consulting children on legal issues is a relatively new concept. However, the South African experience demonstrates that this can be an extremely valuable exercise for those involved in the process of law reform.

The overall objective in Mozambique was to undertake a legislative review of all laws, policy and practice relating to children in the country. This was achieved through an analysis and comparison of laws, policy and practice against international and regional instruments, as well as other African countries' legislation and policy. Cognisance was also taken of customary law and its influence.

In addition, in compliance with Article 12 of the Convention on the Rights of the Child, children and their parents were consulted in order to ascertain the views of Mozambican children on children's rights, and to enquire where they see gaps or obstacles in the realisation of these rights.

The children came from a range of different backgrounds. They were selected to participate in the focus group discussions based on their direct experience of a range of issues, ranging from child labour, orphan hood, trafficking, incarceration and sexual exploitation. Also included was a group of children with no direct experience of these issues. There were 65 participants in the study, seven of whom were adults. The largest group of children interviewed were in detention.

Facilitators were given training in the following issues: ethical considerations in child participation; communicating effectively with children, and using the research instruments

The children in the study were consulted on a wide range of topics. Each group discussion focused on a particular theme (e.g. child labour or children in detention). However, there were a number of cross-cutting issues that affected all the children in the study.

98 Julia Sloth-Nielsen in Community Law Centre [1999]
99 Clacherty [2003]
100Ehlers & Mathiti [2003]

Children were particularly concerned about the importance of education and the need to complete their schooling in order to achieve their goals. Many of these children were no longer at school, either because of their economic circumstances or their inability to access state resources and support.

Participants who were in prison at the time of the study spoke of the physical conditions in which they were being detained, as well as their treatment by state officials. Of particular concern was their lack of access to basic rights such as food and water. Moreover, it was clear that many of these children had been awaiting trial for lengthy periods of time, with little idea of when their cases would be finalised.

Another pattern that emerged was the close connection between irregular migration/trafficking within the country, child labour and sexual exploitation. Children in all the groups, except for those in the school group, mentioned that they had either voluntarily or involuntarily migrated from the rural provinces to the cities in search of work. In many cases this was the result of the promise of employment or a better life, which never transpired. These children then found themselves without an income, accommodation or support structures and seemed frequently to end up incarcerated or working in undesirable circumstances such as prostitution.

Although a specific focus group was conducted with orphans and abandoned children, a large percentage of the children in the prison, labour and sexual exploitation groups were also either orphans or had lost contact with their families. The children who were in the care of state orphanages at the time of the study had no real complaints with regard to access to resources. This finding should, however, be interpreted with some caution, given that most of them had very little idea of what children's basic entitlements are. The children in all the groups were unanimous in their opinion that, as far as orphans and abandoned children are concerned, street children are by far the most vulnerable group and have the least access to state resources of any kind. They also felt that this constituency is the most susceptible to exploitation, victimisation and abuse.

With regard to the HIV/Aids pandemic, it would appear that the children in the study had a very rudimentary knowledge of the disease and that children in the sex worker group were making minimal use of preventative measures to guard against transmission.

Overall, talking and engaging with these children was an enlightening experience as it highlighted a range of children's right issues that need the urgent attention of both government and civil society organisations. What is encouraging, however, is that, despite the hardships that they have suffered in their relatively short lives, these children's hopes and dreams are the same as those of children anywhere else in the world.

CONFERENCES

Another feasible and practical way of ensuring that the views of children are heard on matters that directly affect them is to invite them to conferences where such issues are discussed and allow them to make their contributions.

During July 2002, a National Conference on Juvenile Justice Administration was held in Nigeria. The main objective of the conference was to bring together representatives of stakeholders involved in the administration of child justice, in order to prepare the ground for reform in the system, using equity and human rights standards as benchmarks.[101] Children were invited to the conference and were allowed to present papers. The presence of children at the conference provided the participants and other delegates with a different perspective, giving them insight into how children experienced and viewed issues.

> *The active participation of children in all aspects of the conference was an eye opener to participants on the importance of allowing young ones to freely contribute their views on issues that concern them.* [102]

COURT PROCEEDINGS AND THE CHILD JUSTICE SYSTEM

When children come into conflict with the law or enter the criminal justice system, it is essential that they be provided with an opportunity either to express their views themselves or to do so via legal representatives. This right is guaranteed by the Convention on the Rights of the Child. The South African Constitution[103] provides that every person's right to a fair trial includes the right to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result. This right extends to every accused person and hence includes children. The legal representative will act on the child offender's instructions and will thus ensure that the child's voice is heard during the proceedings.

Currently in South Africa, the state-funded Legal Aid Board is largely responsible for providing legal aid services to the poor and indigent, especially in criminal matters. Whether or not an accused person qualifies for the services of the Legal Aid Board depends on his or her ability to meet the requirements of a means test and whether the instruction falls within the Board's mandate. However, the means test does not generally apply in the case of child offenders, as they usually do not have an income or the financial means to afford a private attorney.[104] Thus they automatically qualify for legal aid services from the Legal Aid Board.[105]

At Stepping Stones, the one-stop child justice centre in Port Elizabeth in the Eastern Cape,[106] the court has entered into an arrangement with the Legal Aid Board, which has designated one particular attorney to deal with all the referrals that come from the centre.[107] The intention is to ensure that the children receive proper legal services and are represented by an experienced attorney, who understands and is aware of all the existing programmes available for children, and can therefore provide the necessary and appropriate services to child offenders. This also provides consistency and promotes good working relationships and collaboration between the court personnel and the Legal Aid Board. Where the matter is to be diverted, no attorney is appointed. However, where the child offender enters a plea of guilty and the matter is serious, or where the matter is to proceed to trial, the magistrate at Stepping Stones will ensure that it is referred to the Legal Aid Board for the appointment of the designated attorney.

Despite some commendable efforts, the central principle of participation needs to find articulation at *all* levels of engagement with children's issues, from direct practice through to policy. Acceptance of this principle should dictate that the participation of children becomes an ongoing imperative as opposed to an *ad hoc* activity.

101National Human Rights Commission et al [2002]
102National Human Rights Commission et al [2002]:13
103Section 35(3)(g)

104 Telephone interview with staff member from Legal Aid Board, Gauteng Regional Officer on 4 November 2003. It should be noted that parents who can afford and offer to pay for a private attorney may do so.
105However, it should be noted that budgets also play a role in determining when such services can be rendered. For example, in some offices, legal aid services are not offered where it is certain that a sentence involving a residential requirement will be imposed. (Information obtained from staff member at Legal Aid Board).
106The Eastern Cape is one of the nine provinces in South Africa. Stepping Stones is the first one-stop child justice centre that was established as a result of proposals in the Child Justice Bill. One-stop child justice centres are intended to provide centralised services for children when they come into conflict with the law.
107 Telephone interview with Magistrate at Stepping Stones on 3 November 2003.

CHAPTER SIX

DIVERSION

CHAPTER SIX

DIVERSION

Jacqui Gallinetti

The concepts of diversion, restorative justice and reintegration were discussed in chapter 3. This chapter focuses on the practical implementation of diversion in the context of specific programmatic responses developed in South Africa and elsewhere on the African continent.

DIVERSION

South Africa

In South Africa, the first attempt to incorporate diversion was through its inclusion in the official Interim Policy Recommendations of the Inter-Ministerial Committee on Young People at Risk.[108] This Committee was established in 1995 to deal with the situation of children in custody. It set itself the goal of developing proposals for the transformation of the entire child and youth care system for 'at risk' children.[109]

However, even before the publication of these recommendations, South Africa had begun offering diversion programmes. The process began in the early 1990s as a result of the establishment of the Youth Empowerment Scheme ('Yes' programme) by the National Institute for Crime Prevention and Reintegration of Offenders (NICRO). The practice was enhanced by the development of diversion guidelines by certain provincial directors of public prosecutions during the latter 1990s; again these did not enjoy binding status.[110]

Kenya

Historically, there are no formal diversion programmes in Kenya. However, in 2001, Save the Children Fund (UK) initiated a project whereby the various role players conducted a survey and embarked on consultations in order to establish a pilot diversion project. The project aims at separating child welfare cases from those destined for the criminal courts. The pilot is currently underway in three districts, and it is envisaged that it will be expanded to cover all districts after the initial pilot period of three years.

The project framework involves establishing a formalised structure, starting at police station level.[111] Police desks are established and manned by specially-trained police officers, and proper facilities are made available to handle children arrested for committing offences or 'in need of care and protection'. The police desks fall under the supervision of district 'core teams' of child justice role players, including officials from the Children's Department, the police, the Probation Department and selected NGOs. The team is the first point of reference for the officers at the police desks. A district coordinator (usually the district Children's Officer) is tasked with arranging regular meetings of the district core team.

The task of the core teams is – periodically and according to agreed operational procedures – to review cases where children have been apprehended and arrange, where appropriate, for (mainly for welfare cases) arrange for immediate reintegration back into their families. Where family reintegration is not immediately possible, the core team is required to identify and facilitate the child's placement and rehabilitation within the community, or in state or non-governmental homes. This illustrates the biggest constraint on the administration of juvenile justice in Kenya: namely, the fact that the majority of children who find themselves in conflict with the law are not offenders in the strict sense, but rather in need of care and protection. In most instances, Kenyan child offenders are found to have committed relatively petty offences. Studies have shown that the factors that contribute to children coming into conflict with the law include the poverty of parents, the impact of HIV/Aids, child neglect and abuse within families, displacement due to ethnic conflict and the absence of clear child protection policies.[112]

108IMC [1996] 40-47
109Sloth-Nielsen, J [2001]: 177 & 186
110Sloth-Nielsen, J [2001]: 262
111Pilot Diversion Project National Core Group [2001]
112Save the Children Fund UK [2001]

Diversion in action

Once the children arrive at the police station, they must be separated from adults. The registration process is done by police officers who divide the children into three categories: those in need of care and protection; those in need of protection but requiring discipline (as opposed to punishment); those who have committed offences.
Children falling into the first category, which consists generally of child welfare cases, are the main beneficiaries of the project, as they are immediately integrated back into families or alternative care. For the second category – ostensibly children who have committed minor offences – the project makes use of various options, including cautioning, restitution, mediation or release under the supervision of child officers or other role-players. The majority of Kenyan child offenders fall into this group, For those falling into the third category – the more serious child offenders – a criminal trial is envisaged. However, the court is expected to adopt one or more of a number of options when dealing with the child, including committal to rehabilitation schools, release under supervision or community service.
Once a police officer has determined that a child falls into a particular category, the district diversion coordinator must be informed. The district coordination team arranges for the core team to interview the child; the police transport the child to the core team's offices for this purpose. Diversion for each child is treated uniquely according to the circumstances, with the requirement that the diversion follow-up be completed within 48 hours.
Reintegration back into the family is given primary consideration, although children's homes and private institutions usually act as 'rescue centres': an interim measure where immediate reintegration is not possible. Follow-up reintegration must be done by members of the district core team, working through programmes in the community. Reports on each diverted child must be submitted with two weeks to the provincial Children's Department, which must coordinate the keeping of records and data.

Uganda

After Uganda's ratification of the Convention on the Rights of the Child, it embarked on a law reform process that culminated in the enactment of the Children's Statute of 1996.[113] The statute covers the issues of child care and protection on one hand, and child justice on the other, and tries to promote a balance between justice and welfare. However, the issue of diversion is not specifically legislated for, and diversion occurs within the very limited scope allowed by the Act. Diversion *does* occur mainly through the discretion afforded to various officials: namely, village courts, the police, and family and children's courts. Thus, despite the absence of a legislative framework for diversion, it can be said to be practised on three levels under the Statute.

The first level is under the auspices of the community or village court system, whereby the law provides for local councils with judicial power over a number of criminal offences. This system places an emphasis on the informal resolution of conflict at community level. The local courts have presiding officers who are elected by the electorate of the particular local council. The court may deal with the following criminal offences involving children: assault,

113Act 6 of 1996
114Section 93 and Schedule III

theft, criminal trespass and malicious injury to property.[114] Diversion occurs within this system due to the fact that the orders that the courts are empowered to hand down are steeped in the principles of restorative justice, and are devoid of the normal retributive element of criminal law. These orders include reconciliation, compensation, restitution, apology or caution.

Secondly, diversion can be said to occur at police station level through the use of police cautions for particular designated offences such as theft, assault (common and grievous bodily harm), criminal trespass and malicious damage to property. This facilitates the exclusion of the formal criminal process in certain types of matters.

Finally, diversion can occur under the Statute at the Family and Children's Court level. Here a magistrate can use her or his powers to involve the parties in alternative dispute resolution.

However, it is clear that work still needs to be done in the area of diversion, particularly around programmatic approaches to children coming into conflict with the law.

Namibia

Namibia, like South Africa, has embarked on a law reform process for children in conflict with the law; new legislation in this regard is still eagerly awaited. However, again, despite the absence of a legal framework for diversion, diversion practices have been introduced into Namibia, demonstrating that children in conflict with the law can be managed in the absence of laws. Having said this, it is still important that legal provisions be enacted in order to ensure consistency, accountability and clear rules for the management of young offenders.

In 1994, a Juvenile Justice Forum (JJF) was established, consisting of government line ministries, NGOs and individuals; by 1999, almost every Namibian region had its own JJF.[115] In 1995, a pre-trial diversion programme began, known as the Juvenile Justice Project (JJP). This is managed by the Legal Assistance Centre and was first available at the Windhoek Magistrate's Court.[116]

The Namibian model has similarities to the South African experience and is seen as an example of good practice. For example, Nigeria has recently been involved in a child law reform process and various stakeholders have visited a number of African countries on study tours. From the findings of the study tour to Namibia, the following was said:

> *....that good management and maintenance of the juvenile justice institutions visited affected the quality of services provided. The availability of trained and proficient personnel within the juvenile justice system results in a system that promotes and protects the rights of children in the administration of juvenile justice.*

DIVERTING CHILDREN LIVING ON THE STREET

The phenomenon of street children in Africa is problematic, as governments tend to ignore the issue rather than engaging with the causes and seeking solutions. Unfortunately, street children are often targeted in connection with crimes, and those that do commit crimes are the forgotten souls of the criminal justice system.

The Kamukunji District diversion pilot project, Kenya

Over a two month period, approximately 62 children were rounded up by officers from a police station in the Kamukunji District. Of these, 61 cases were 'diverted'. Significantly, none of these children were offenders, but were mainly lost or homeless children, children engaged in child labour in the city, victims of neglect or children living on the street. As a result of this project, 46 children were reunited with their parents; ten children were sent to government rehabilitation schools, and five children went

115Mukonda, R [1999]: 1
116Mukonda, R [1999]: 1
117Juvenile Justice Administration [2003]: 18

to Undugu Society, a child welfare NGO actively involved in the rehabilitation of children living on the street.

What is interesting about the pilot project is that diversion is being used mainly to support the child welfare system, rather than the criminal justice system. Particularly in Africa, many children who are seen as being in conflict with the law are, in fact, children in need of care. Thus a project that caters for the needs of children in need of care *as well as* the needs of child offenders is a positive step towards creating a holistic intervention for children. The emphasis that the project places on reintegration is also a laudable feature of the process, and is central to ensuring that children rejoin society in a constructive way.

Othandweni, Johannesburg, South Africa

Othandweni is a non-profit organisation that provides services to and addresses the needs of children living on the streets in the greater Johannesburg area. It has adopted a holistic approach towards children in order to equip them to become productive members of society. Othandweni started in 1994 and has developed four projects for children living on the street. Diversion services form part of the work done by Othandweni. However, in order to see the full benefit of diversion for street children, we will look at all four projects.

Basic care: this involves feeding, clothing and providing hygiene services to about 150 children every morning and evening. Diversion services fall under this project as it includes guardianship at court and family group conferences.

Training: this involves training in business theory, life skills, literacy training, health education, practical bakery and art training, as well as job placement and follow-up support.

Sports and recreation: this involves soccer and cricket development as well as adventure camps and life skills development.

Health care: this provides primary health care, screening of sexually transmitted diseases and TB, HIV testing, and home-based nursing at a clinic housed in a container and staffed by a permanent doctor and nurses. A hospice facility is also available.

The diversion component of Othandweni encompasses three aspects. Firstly, staff members act as guardians for street children who have been arrested and are to appear in court. They attend the assessment with the children and, if the case is diverted, assist them in complying with the diversion conditions. If the case proceeds to trial, staff members stand in as guardians to assist the child in court. Secondly, staff members visit sentenced children in prison. This allows the project to help plan for the child when s/he is released, and involves entrepreneurial training and family preservation services. Thirdly, Othandweni offers family group conferencing facilities –. it received training as one of five pilot projects identified for this work under the Inter-Ministerial Committee.

The diversion project initially had some problems in getting referrals; to overcome this hurdle, the project held workshops with probation officers. The aim of the workshops was to make probation officers aware of the services offered, and of the fact that the project has a good understanding of the challenges facing children living on the street and is well placed to offer family group conferences. By June 2003, the project had received four referrals; all of these had a successful outcome and three of the children were enrolled in entrepreneurial training.

The sports and recreation project also becomes involved with children in conflict with the law. It runs human rights camps (where children are informed about the dangers of crime) and takes children on weekend camps, a component of which is to inform them of their rights on arrest, sexual abuse and drug awareness.

118Information obtained from Othandweni Annual Report [2002] and interview with Kgomotso Msimango on 2 June 2003

This project shows that diversion services form only part of a proper intervention for street children. What children living on the street lack is a normal family life and the support that goes with it. Thus, what is needed is an all-round approach to help them manage their lives, become responsible citizens and make amends for any wrong that they may have committed.

DIVERSION FOR YOUNG SEX OFFENDERS

There is a clear need to focus on young sex offenders in order to begin to redress the power imbalance that, more often than not, results in violence against women. It is argued that interventions with young offenders have a good chance of success, as they occur at a time when the child's personality, attitudes and beliefs are still in their formative stages and can be altered where there are serious behavioural problems.

Who are young sex offenders? There is a range of types of children who display sexually deviant behaviour. Friedrich explains:

> *Some children who are called sexually aggressive may not even be intrusive with other children but are simply reacting to their own victimisation in a compulsive, self-stimulating manner. Other sexually aggressive children may engage in very extensive but largely mutual interaction with other children,typically other sexually abused children. Finally, there are sexually aggressive children who truly are intrusive and coercive, but they are quite different from children who are simply reactive to their sexual abuse.*[119]

It is important, therefore, to avoid generalising when speaking of young sex offenders, and to realise that there are varying degrees and classes of this kind of offending. Likewise, there are differing motives for sexual aggression in children. Araji explores these:[120]

Lack of self control: children who are impulsive or compulsive or both.

Emotions expressed: sexually aggressive children demonstrate deep feelings of anger, rage, shame and loneliness.

Abuse histories: sexually aggressive children may (but not necessarily) have been sexually abused. All have experienced some type of abuse – physical, sexual or emotional – usually multiple types.

Abuse-victim relationships: sexually aggressive children seek out others whom they perceive to be less powerful, unequal in status and who can be controlled.

Environments: the majority of sexually aggressive children live in dysfunctional-type homes or environments. These include families that lack boundaries, especially in the area of sexual activities.

Treatment outcomes: of all children demonstrating problematic sexual behaviours, children who are sexually aggressive are the most resistant to treatment

It is evident that good interventions are of paramount importance in the management of these types of offenders.

Childline, KwaZulu-Natal, South Africa[121]

Childline is an organisation that provides preventative, educative and rehabilitative services to the public. Its main focus is abused children or children affected by abuse, and the organisation works closely with siblings and parents. The organisation also provides counselling services and a helpline for children, adolescents and adults. The Childline rehabilitation programme is of particular importance. This targets sex offenders – both adult and child. It operates as a diversion programme, but is also available to sentenced sex offenders. Referrals to the programme are received from families, communities and sometimes the courts.

People referred to the programme undergo a thorough assessment procedure. The assessment is done over a period of between six and ten weeks, during which various people are interviewed and consulted. These include the offender, the offender's family, the victim and officials from the Child Protection Unit of the police. The aim of this process is to determine whether or not the offender acknowledges responsibility for the offence committed.

The programme runs for approximately two years and sessions are held either on a weekly basis or every two weeks, depending on the age grouping. For example, for children between the ages of nine and twelve years, sessions are held every week; while for children between the ages of thirteen and seventeen years, sessions are held every two weeks. Further age groupings include children under the age of nine years and persons between the ages of eighteen and 23 years. While these are usually group sessions, there may be one or more individual sessions if required.

The themes covered in the rehabilitation programme include: taking responsibility for the offence committed; self-concept issues; understanding feelings and other people; self-empathy; victim empathy; communication and improving family relationships; sexuality; socialisation issues, and relapse prevention. An evaluation runs throughout the course of the programme. The programme is an example of a very intensive, lengthy diversion programme for sex offenders and is particularly valuable when dealing with sex offenders who pose a serious risk of re-offending.

Teddy Bear Clinic, Gauteng, South Africa[122]

The Teddy Bear Clinic started as a medico/legal clinic in 1986. From 2000, it extended its services to offer therapeutic interventions, child witness court preparation programmes, forensic assessments and juvenile offender programmes.

The Teddy Bear Clinic juvenile offender programme – the Support Programme for Abuse Reactive Children – began with a request from the Protea court control prosecutor, because there were no services available for young sex offenders and NICRO was not equipped to deal with them. Almost simultaneously, referrals started coming through from the police's Child Protection Unit, which had been receiving requests for help from schools.

The Clinic had previously done individual work with offenders; they now consulted the relevant literature and developed a programme for the initial group. From there, they developed a manual which they use for training so that the programme can be run by service providers in areas where the Clinic does not operate.

The programme consists of a ten week course with sessions of one and a half hours duration. However, the sessions are flexible and the length of the programme might be extended to twelve weeks if necessary. In addition, if a child is identified as being at particular risk during the course of the programme, s/he will receive individual intervention. The intake criteria include parent information and the child's personal history. Because of the information required, the protection of the child's right to confidentiality is limited. Most referrals are court mandated. The programme is facilitated by two people – one male and one female – in order to ensure a high level of accountability; at least one facilitator is a professional psychologist or social worker.

The programme caters for children between the ages of six and eighteen years of age, modifying content

119 xxxxxxxxxx
120Araji, op cit, p. 43-44
121Information obtained from an interview with Linda Dhabicharan on 25 February 2003
122Information obtained from an interview with Shaheeda Omar on 2 June 2003

according to the age of the group. The content focuses on psychotherapy and cognitive behaviour modification. Themes include: sex education; empathy training; conflict resolution; social skills training; cognitive restructuring; acknowledging behaviour; acknowledging positives; impulse control, and relapse prevention. All the children who pass through the programme are followed up after three months and again after six months.

One of the innovations offered by the Teddy Bear Clinic is training on how to run a sex offender programme. In this way, the Clinic can ensure that services are available where the need exists, as there are very few services of this kind in South Africa. The criteria for training are that the individual or group receiving the training must have worked in the area of abuse, and have two to three years' experience working with children. Thus far, those who have received training are probation officers, NICRO social workers, NGOs and children's homes.

Saystop, Western Cape and Eastern Cape, South Africa

Saystop was formed in 1997 with the purpose of seeking innovative and effective interventions to treat and manage young sex offenders. The aim is to prevent a pattern of deviant behaviour emerging and to reduce the possibility of further offending.

Saystop began because a number of individuals in the Western Cape were concerned about the increase in cases involving children who commit sexual offences. Moreover, although charges were being laid, cases were not being prosecuted. The reason for this seemed to be that, in a number of cases, the offence was of an experimental nature (that is, the child had engaged in sexual activity for the first time). In other cases, the charges were withdrawn because of the youth of the child alleged to have committed the offence, or because of the relationship between the child and the victim. Failure to prosecute results in children not being held accountable for their actions and being returned to their communities without being referred to programmes that could assist them in understanding and changing their abusive behaviour.

The Saystop project developed a programme that can be used to divert children from the criminal justice system or used as an alternative sentence. The programme is particularly beneficial as it provides constructive alternatives to existing sentencing options. By diverting children, it holds them responsible and accountable, while attempting to address the reasons for the offending behaviour and potentially providing an opportunity for reintegration into the community.

The project partners with the state. The service providers (i.e. facilitators of the programme) are probation officers employed by the Western Cape Provincial Department of Social Services. They are trained by the Saystop project and, after training, continue to receive mentoring services and follow-up site visits to help them with facilitation. The Saystop programme also offers a telephonic advice service and a newsletter to keep facilitators updated on developments.

The facilitators run groups for children who have been referred to the programme throughout the Western Cape; it has recently been extended to the Eastern Cape as well. Numerous requests have been received to extend the programme to the provinces of Gauteng, Limpopo and the Northern Cape because of the lack of services and interventions available for young sex offenders and the obvious need for them.

Children who attend the programme are selected on a number of criteria: [123]

Age: the programme accepts children aged between twelve and eighteen years. However, most referrals are of children aged between twelve and sixteen years. It is thought that children younger than twelve have difficulty grasping the abstract concepts contained in the programme and also have a limited attention span.

123Ehlers, L and van der Sandt, T [2001]: 6

Offence: the programme deals with children who have committed a crime of a sexual nature. However, in deciding whether to accept a particular child, the nature of the offence is examined in order to determine if it was exploratory in nature. In addition, the programme will only accept children accused of crimes where there are minimal aggravating circumstances. In other words, children involved in a violent sexual assault or gang rape are not accepted. Furthermore, the child must accept responsibility for his or her actions.

Address: the child must have a fixed address.

Guardian: the child must have a parent, guardian or care-giver to take responsibility for ensuring the child's attendance at the sessions.

The programme consists of ten two-hour sessions, which normally run once a week. As mentioned, some groups have been adapted because of the difficulties associated with travelling daily to one place over a ten-week period.

Session 1 (Crime awareness) informs the child of the aims of the programme, the nature, causes and consequences of crime and so on. Session 2 (Self-esteem) broadens the participants' self knowledge, creates awareness of factors that influence their self concept and promotes a positive attitude towards themselves. Session 3 (Understanding my body) examines the changes that take place in boys' and girls' bodies as they enter puberty and normalises the feelings that go with these changes. Sessions 4 and 5 (Sexuality, socialisation and myths) create awareness of appropriate sexual behaviour towards others, and debunk myths about gender stereotypes. Sessions 6 and 7 (Victim empathy) identify the different feelings that people have; create understanding of feelings of powerlessness and how these relate to situations of abuse, and initiate the process of preventing relapse into offending by making participants aware of the possible feelings of their victims. Sessions 8 and 9 (Relapse prevention) explore anger triggers and responses, and look at ways of responding to anger and conflict situations. Session 10 (The way forward) encourages communication between caregivers and the children and makes caregivers a part of the children's future aspirations.

Bearing in mind that specialist services for child sex offenders in South Africa are extremely limited, Saystop can be used as a 'starting point' for the treatment of young sex offenders. It is recognised that some children will need to be referred to more intensive, longer-term intervention programmes after attending Saystop. In this respect, Saystop can clearly be used as a tool to determine that need and further aid the development of appropriate treatment.

CONCLUSION

Diversion programmes in Africa are still evolving. Legislation is either in place or is being put in place. Despite difficulties with legislation and the absence of it, it has become apparent that diversion services have been seen as beneficial and that there is a demand for them. The difficulty is that these services are often not as widely available and accessible as they should be. It is in this context that the above chapter has attempted to indicate how a criminal justice system can introduce, sustain and develop diversion and specific diversion initiatives – whether for a particular target group of children or with few available resources.

CHAPTER 7

REINTEGRATION

CHAPTER 7

REINTEGRATION

Lukas Muntingh

The concepts of diversion, restorative justice and reintegration were discussed in chapter 3. This chapter focuses on the practical implementation of reintegration in the context of specific programmatic responses developed in South Africa and elsewhere on the African continent.

As reflected upon earlier, the use of custodial sentencing options should be a measure of last resort. Hence, even where institutions are running proper programmes, the resort to institutions should be limited. It is more productive to invest in duplicating the results of effective programmes in communities, rather than sending children to institutions to participate in programmes. However, the reality is that there *are* children in prisons and institutions and, in some of these, good programmes are being run. The following section will reflect on two South African programmes, both being operated inside prisons.

Khulisa: Leadership by Youth

Khulisa is a South African non-profit organisation that works with juvenile offenders. The organisation has described its work as unique, because it was introduced and facilitated by former offenders and graduates of the youth programme. This approach has proved highly successful in promoting a positive influence on, and a point of identification with, young people in many forums.

Khulisa works with sentenced and unsentenced youth in prisons, and with disadvantaged communities, schools and secure care facilities. The organisation runs four core programmes, two of which are aimed at reintegration:

Make It Better: a preventative programme that develops youth leaders to run community-level projects offering group participation and income-generation.

New Directions: a non-custodial course for first time child offenders who have been diverted from the criminal justice system by the courts or other competent authorities.

Discovery: an in-prison rehabilitation programme, which teaches offenders to become accountable for their behaviour.

Destinations: the reintegration of ex-offenders into society by linking them to training, learnership and job opportunities.

Since Khulisa began, more than 400 young people have participated in reintegration programmes and, of its original group of forty volunteers, twenty-two have been released. From a selected sample of sixteen participants, only two have re-offended. Eleven now form a team of 'change catalysts'; seven of these have been on parole for more than a year.

According to Khulisa's documentation:

> *Each group member, after his or her release, has undergone in-depth therapy, as well as training in communication and public presentation skills, to ensure that his or her desire to make reparation is received attentively, not only in the corporate sector, but also by communities at all levels. In addition, each group member has received lessons on "ubuntu", the philosophy of the African people, which states, "a person is only a person through other people".*

The reintegration programme comprises two components. The first, *Usiko* (meaning heritage) combines storytelling with multifaceted life skill activities in an attempt to restore self-respect and a sense of responsibility among young people at risk and in conflict with the law. Traditional stories that focus on values and morals are the entry point to a variety of outcome-based life skill exercises. Visual arts, drama, dance and musical activities highlight the inspirational and educational messages in the stories. The second component, My Path, focuses on serious creative writing (journals and exercises) and often leads to self-discovery. The programme also allows for transformation and development through experiential learning and is based on three, three-month self-study modules with weekly facilitated group discussions.

A number of aspects identify the Khulisa programme as good practice. First, the programme uses as facilitators children and young people who are or have been in prison. This lends credibility to the programme content, and also presents a real-life positive role model within the prison context. It stands to reason that a programme facilitated by a prisoner or ex-prisoner will be more readily accepted by prisoners: not only do they have an intimate knowledge of what prison life is about, but, more importantly, what the challenges are upon release.

Second, Khulisa uses traditional storytelling as a means of inculcating values and norms by using a form of expression that is familiar to the participants. The use of other forms of artistic expression enable the participants to make 'new connections' and, by developing their creativity, understand life in a different way.

Nicro: Blazing the Trail

NICRO is widely regarded as the leader of diversion programmes in South Africa. Indeed, it is at present the *only* national non-governmental crime prevention service provider in South Africa, with approximately 240 staff members and almost 600 volunteers. [124] By 1993, it was offering three diversion programmes for children in conflict with the law and, at present, offers four options for children in conflict with the law: the 'Yes' programme, Pre-trial community service, the Journey programme and family group conferencing.

NICRO has made a substantial contribution to the introduction of diversion services in South Africa, resulting in widespread acceptance of the practice by the criminal justice system. It has also paved the way for the establishment of various other programmes aimed at intervening with children in trouble with the law. This means that, once the new child justice legislation is enacted in South Africa, there will be a good availability of programmes and service providers to aid implementation.

Tough Enough Programme

The Tough Enough Programme (TEP) is a response by NICRO to increase the effectiveness of offender reintegration by focusing on the quality of the intervention rather than on the number of people assisted. The development goal of the programme is to reduce crime by reducing recidivism. TEP is not run exclusively for children in prisons but, where feasible and possible, the programme involves them. The objectives of the programme are to assist pre- and post-release prisoners with skills development, building and improving relationships, developing potential and motivation for action.

This group-based programme starts approximately six to nine months prior to release and continues for approximately the same period thereafter. [125] Participation is voluntary. The programme runs in five phases over a number of months. It starts in prison, about three to six months prior to release and continues six to nine months after release. It encourages participants to take responsibility for the factors in their life that may cause them to re-offend (including factors that inhibit reintegration, which may be related). This is a participant-driven process, with facilitation by NICRO. There is a strong emphasis on community involvement and support. It includes, amongst other things, victim/offender mediation as a possible result. The five phases are:

Recruitment, assessment and selection: This is a one-to-one process during which the NICRO service delivery prepares the client for participation in the programme.

Identifying the challenges: this involves a five-day group experience (ten to fifteen per group), individual interviews and intensive group work, during which time the clients identify the issues they face and look at strategies to overcome them. This is followed by a period of a minimum of eight weeks, where participants focus on

124Information accessed from www.nicro.co.za/projects.asp
125Lomofsky and Smith [2003]

actualising the decisions made in phase two. This involves family members, victims and economic empowerment.

Overcoming the challenge: this runs over six to nine months post-release. It consists of the consolidation and implementation of previous decisions, and involves support groups and community structures.

Staying out: this is continuous for the participant, with minimal NICRO support. The client takes responsibility for his or her reintegration, and for making positive contributions to the community.

In 2002, NICRO commissioned an evaluation of the TEP. (See chapter 10, Monitoring and Evaluation). It found that the most significant factors that motivated a positive change in participants were their resolution not to return to prison, the influence of the TEP, the desire to rebuild a relationship with the family, employment and the influence of religion.

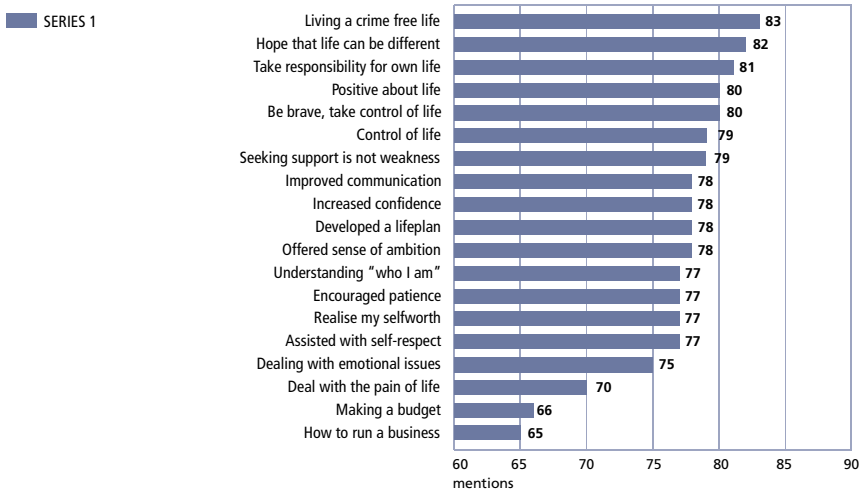
Upon their release from prison, clients experienced a high level of acceptance and support from their families. The TEP also played a role in helping clients to value the support received from their family: 39 percent said family support had increased greatly in importance and 51 percent of these attributed this to the TEP.

Participants also discontinued contact with friends who were a negative influence on their positive commitments. Gang involvement proved to be one of the least relevant risks; only one client was still involved in a gang. The community involvement of participants actually increased: the majority of clients maintained their support and participation in community activities. The majority rated the TEP as a 'good' or 'excellent' preparation for life outside of prison.

Another memorable aspect was the improvement in participants' areas of skills. Twenty-six percent said their conflict management skills had increased; 24 percent said their self awareness had improved; 17 percent reported a change in their problem-solving skills, and 14 percent said they coped better.

The greatest impact of the TEP was that it increased the personal empowerment of almost all participants, in the following areas: improved self awareness and self esteem; greater coping skills; improved anger management/ communication skills; increased problem solving skills; effective decision making and greater planning skills (clients gained the ability to develop a life plan).

TEP helped by... (multiple responses)



The TEP played a positive role in terms of increasing the economic empowerment of those respondents who prioritised this issue as a personal risk factor or 'gap' in their reintegration. Evidence for this statement was witnessed in the high number of respondents who said that the TEP had played a fundamental role in helping them get employment. In terms of its usefulness, participants favourably rated economic empowerment skills such as 'building a career' and 'running a business'.

A high percentage (58%) felt that being a part of the TEP helped them to overcome the problem of having a criminal record.

Almost everyone in the sample agreed that the TEP had great motivational and inspirational benefits, and the majority of respondents agreed that the programme had helped them significantly by motivating them to choose a life away from crime.

Citizen Social Care Centre, Kenya

In Kisimu Town in Kenya, an organisation known as Citizen Social Care Centre (CSCC) was established in 1992 to address the extreme poverty and raise the living standards of the community by improving the environment and the status of the Kenyan poor. [126] The state of poverty is responsible for a host of ills that plague Kisumu Town, such as: the high rate of maternal and infant mortality; malnutrition; low meaningful and profitable involvement in socioeconomic activities; poor sanitation; low education levels; marginalisation, and unplanned and large ill-fed families.

Two pilot programmes were started in April 1994, with the training of health volunteers who, in turn, targeted groups of women, children and youth. To date, women have set up income-generating activities and some street children have been rehabilitated and repatriated.

The objectives of the programme are to:

- Identify, train and rehabilitate children in especially difficult circumstances to become good citizens
- Promote and raise the status of women through programmes that focus on involving them in income generating activities up to the decision-making level
- Encourage community participation with a view to promoting self reliance, ensuring sustainability, mobilising local resources and effectively integrating programmes into various sectors in order to reduce crime by increasing job availability
- Maximise programme impact in terms of improving rights to housing, child feeding practices as part of growth, and the promotion of the importance of human settlements
- Promote basic primary health care to reach all the rural and urban poor so that they are able to manage the most common illnesses
- Provide information on safe motherhood, nutrition, and Aids awareness for women

In order to reduce poverty and its negative aspects – which tend to degrade humanity – the Citizen Social Care Centre or CSCC saw it as critical to address women's issues and made a concentrated effort to empower women through well-planned and properly coordinated income generating and farming activities. Large families weigh heavily on women's responsibilities, and the CSCC encourages women to voice their opinions on their reproductive rights as a means of reducing family size in the future.

The programme also targets children and youth. There are large numbers of school dropouts in Ksimu Town, young people who have run away from home to the streets and engage in crime, violence and drug abuse. These youth are now being involved in drama groups, which put on mobile theatre performances to sensitise the community on a variety of issues. Young people who live in slums are being formed into groups who collect waste

126Citizen Social Care Centre [2003]

paper for recycling to generate their own income.

The CSCC programme is interesting in that it does not focus directly on children who are in conflict with the law, but rather on a range of poverty-related issues, using the women in the community to drive the process. The programme has clearly identified the issues that result in the social exclusion of children and focuses on these. Addressing economic issues by looking at available resources (such as, cultural), the programme has succeeded in reintegrating a number of children who were living on the streets and were probably involved in (petty) crime. The evidence further suggests that, through economic development, families have become more functional and thus more able to serve as a resource for children and youth.

The Kisimu Town example offers an important learning tool as it demonstrates ways of dealing with children who are homeless and living on the street. The benefit of this model is that, within the framework of diversion, solutions are found for children who should actually fall under the welfare rather than the criminal justice system. The fact that there is now some intervention means that they no longer fall through the cracks and become lost to society.

PROTECTING CHILDREN AND YOUTH FROM ARMED CONFLICTS

African ex-combatants constitute a specially disadvantaged group. The typical veteran is semi-literate and unskilled, has few personal possessions, often has no housing or land and frequently has many dependants. Some veterans are also physically and psychologically handicapped by wartime experiences. Many find it difficult to take independent initiatives and cope with the ordinary demands of civilian life. Even when they possess a marketable skill, former combatants tend to have little or no experience in the labour market, having taken up arms at an early age. [127]

If the above description is true for adult ex-combatants, it is probably even more so for children and young people. Children and young people who emerge from armed conflicts face a risky future and stand a very good chance of becoming involved in crime should they not be successfully reintegrated into society. Over the past ten years, our televisions, radios and newspapers have reported on the horrific experiences of children in armed conflicts in Sierra Leone, Angola and Liberia, to name a few. We can, however, draw upon the work that has been done with these children and young people to develop some strategies to deal with this problem.

National Peace Accord Trust, Katorus, South Africa

Katorus is the collective name for three townships (Katlehong, Thokoza and Vosloorus) situated to the east of Johannesburg. During the period 1990 to 1994, this area was embroiled in a bitter and bloody political conflict between supporters of the African National Congress (ANC) and the Inkatha Freedom Party (IFP). Ethnic and political boundaries were at the heart of the conflict that was being waged by the youth of Katorus[128].

The National Peace Accord Trust (NPAT) became involved in the Katorus area in 1994 and recognised that, apart from the reconstruction process, there was a need to deal with the psycho-social impact of the violence of the preceding four years. A training programme was developed (based on needs identified by the community), focussing on trauma management, basic counselling, public and media communication, parenting, conflict resolution and project management.

The NPAT programme was followed by a wilderness therapy programme. This programme was set up in response to an initiative of a former leader of the armed conflict who had sought assistance in dealing with post-traumatic stress. The programme experienced a number of set-backs in what was still a volatile situation. However, the first wilderness trail set off in the Drakensberg mountains in 1996. Since then, NPAT has facilitated numerous trails and reports regularly on its findings and observations. The reporting provides a detailed account of experiences, achievements and lessons learned. The core themes of the wilderness transformation trails are described as follows:

Risk: learning most activities involves risk; if we are to gain something, we also run the risk of losing something.

Opportunities for creative expression: creativity and the making of new connections and expressions of self is, in a sense, the antidote to trauma.

Personal responsibility: accepting personal responsibility for healing rather than resigning oneself to a sense of being a powerless victim of circumstance.

Transforming trauma: addressing the core experiences of psychological trauma by addressing participants' ability to change and make new connections within their environment, selves and the community.

Empowerment: developing wilderness skills to increase self-esteem and self-sufficiency.

Connection: disconnection is experienced by traumatised youth in their relationships with the environment, self and others. By reconnecting the psyche to the primal matrix, these relationships can be redeveloped.

An external evaluator evaluated the project to give the findings credibility [129]. The programme had a transformative effect on participants; some described it as a turning point in their lives. Specifically, participants:

- developed new connections and new relationships
- were able to face danger in order to deal with the trauma in their lives in a different and more effective manner
- gained self-confidence, self-esteem and the ability to reflect on life goals
- developed coping and problem-solving strategies
- began to build relationships and demonstrated growing trust
- were helped to rediscover a common humanity and transcend stereotypes
- acquired skills and attitudes that had a positive affect on their families
- found being able to talk about traumatic experiences a cathartic experience
- learnt to forgive
- found a rejuvenated spiritual interest and re-connection with ancestors
- understood that this was the beginning of a long process

Figures available from the NPAT report also demonstrate substantial reductions in criminal involvement, drug and substance abuse and increased levels of employment and involvement in community activities.

Whilst the work of the NPAT focussed on the militarised youth of Katorus, it is evident that the issues of reintegration are very similar to those we observe when working with children and young people in prisons and institutions. Some of the challenges – such as trauma or volatile underlying political divisions – may be more pronounced or acute amongst militarised youth, but the issues faced in terms of 'returning' to a community and being able to lead stable, productive and law-abiding lives are broadly similar.

UNICEF, Angola

Restoring spiritual harmony through traditional healing is an essential step in helping child soldiers in Angola to demobilise and reintegrate into their home communities.[130] In many Bantu cultures, people believe that one who kills is haunted by the unavenged spirits of those who were killed. Spiritually contaminated, a former child soldier

127Shelton et al [2001]: 119
128The description on NPAT is based on the report by Seiler, J et al [2002]
129Schell-Foucon S [2001]
130 Wessells [1997]

who has killed puts an entire community at risk if he re-enters it without having been purified. The most immediate healing steps – which generally cannot be taken until after armed conflict ends – involve demobilising everyone under the age of eighteen years, reintegrating them with families and communities, and assisting them in making the transition into civilian life.

Wessells reports that, in one community, a traditional healer explained to him the ritual he ordinarily conducts to purify former child soldiers:

> *First, he lives with the child for a month, feeding him a special diet designed to cleanse. During the month, he also advises the child on proper behaviour and what the village expects from him. At the end of the month, the healer convenes the village for a ritual. As part of the ceremony, the healer buries frequently used weapons – a machete, perhaps, or an AK-47 – and announces that on this day the boy's life as a soldier has ended and his life as a civilian has begun.*

Anecdotal evidence suggests that this kind of purification ceremony helps decrease the stress and fear that gnaws at former child soldiers, and helps communities accept young people back. The preliminary evidence also suggests that, once young people have been accepted, the community often succeeds in teaching them non-violent modes of behaviour. [131] Wessells also reports on a programme in Angola that trains adults in local communities to deal with the emotional needs of war-affected children through a mixture of Western and traditional healing methods.

The use of traditional ceremonies and rituals only occasionally finds its way into reintegration programmes, but these offer powerful tools and opportunities in the appropriate cultural and ethnic settings. Reintegration programmes aimed specifically at young criminal offenders are poor in content when it comes to utilising traditional practices and ceremonies; there is much scope for their inclusion.

CONCLUSION

From the above, a number of issues has emerged that can be taken forward to improve reintegration services.

First, the definition used and the approach taken on reintegration services should be wider rather than narrower – in the sense that we need not wait until a child or young person is sentenced before we start thinking in reintegration terms. In most cases, the process of exclusion starts well before a child or young person is arrested.

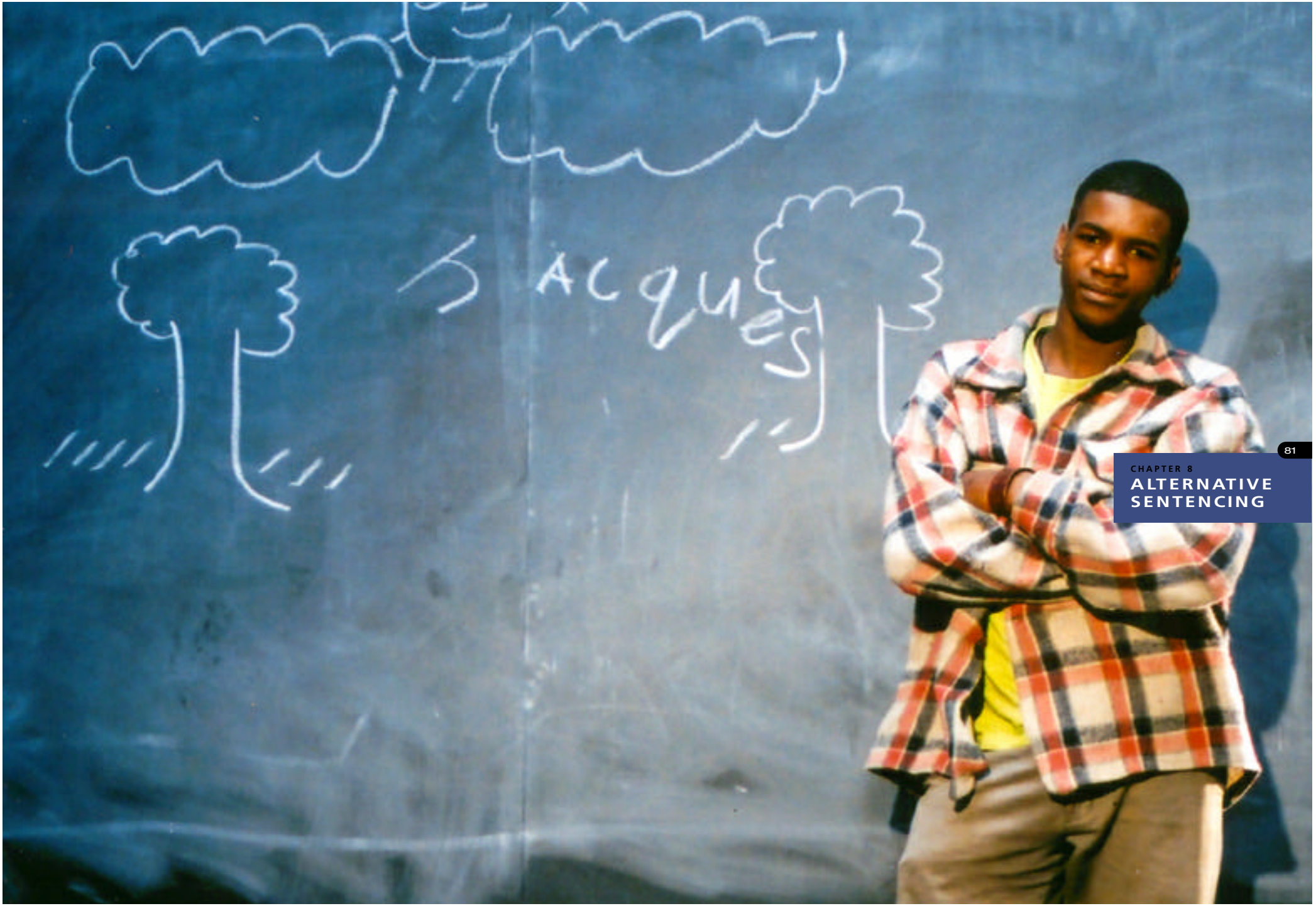
Second, reintegration means, in essence, rolling back or reversing the process of exclusion through the development of skills, social and economic bonds and support networks.

Third, policy and legislation can have an important impact, not only on promoting reintegration, but also on limiting exclusion. Many African countries are still stuck with legislation dating back to colonial times and based on the dominant paradigm of Europe at that time or even earlier. A number of countries, such as Ghana and Mozambique, are in the process of legislative reform. The opportunity now presents itself to enact legislation that limits exclusion and institutionalisation, and promotes reintegration through innovative and creative means that are suitable to the African context.

Fourth, we need to take an integrated perspective on reintegration and acknowledge that the wide range of development projects across Africa also have reintegrative impact and potential. Just because they are not called 'offender reintegration' does not mean they cannot serve this purpose or contribute to this goal.

Lastly, reporting on monitoring and evaluation of reintegration services needs to be strengthened through the development and implementation of user-friendly tools appropriate to the circumstances and the programmes being rendered. It may be the case that reports are available, but that they are not accessible.

131 Wessells [1997]: 7


Jacques

CHAPTER 8

ALTERNATIVE SENTENCING

Lukas Muntingh

INTRODUCTION

When we consider depriving a child of her or his liberty as punishment for committing a criminal offence, we need to examine closely how the child arrived at this juncture in his or her life. It is likely that we will find that the child has been continuously excluded from or deprived of the resources, benefits and support structures that we, as society, would like all children to enjoy. However, children do not have the political voice and power to advocate for and demand these resources, benefits and support structures and rely on others to do this on their behalf. Thus, when we send a child to prison, we need to ask critically whom we are punishing, for what and how this action will contribute to a safer society in which children can enjoy their full rights and benefits. In other words, we need sentencing options that are serious about the best interests of the child and true to the principle of using custody as a measure of *last* resort.

When discussing examples of alternative and non-custodial sentencing in terms of good practice, it is important to identify the principles or guidelines that can be used to identify good practice. The following principles are used in this chapter. First, the sentencing option needs to present a real alternative to custodial sentencing, in particular, imprisonment. The emphasis is, therefore, on providing an alternative for those offenders who would ordinarily have received a custodial sentence. Second, the sentencing option must be feasible within a developing country context and not resource intensive. Third, the sentencing option should be sustainable through intersectoral and civil society support, and fourth, the sentencing option should be simple, accessible and have community support.

Very few examples are likely to comply fully with all four guidelines, but there are certainly examples that comply with the majority of them. These will be highlighted below.

The UN Standard Minimum Rules for Non-custodial Measures list the following as non-custodial sanctions that may be used to dispose of cases:

- verbal sanctions such as admonition, reprimand and warning
- conditional discharge
- status penalties
- economic sanctions and monetary penalties, such as fines and day-fines
- confiscation or an expropriation order
- suspended or deferred sentence
- probation and judicial supervision
- community service order
- referral to an attendance centre
- house arrest
- any other mode of non-institutional treatment
- some combination of the measures listed above

These are the conventional options arising from a punishment paradigm that remains prison-centred. New types of crime (environmental crime, organised crime, corruption and money laundering) involve different criminal actors and new criminal procedures and sanctions. There is, therefore, a need to distinguish between conventional prison-inspired non-custodial sanctions and non-prison-inspired non-custodial sanctions, such as forfeiture, seizure, confiscation and banishment from certain activities. [132]

WHY ALTERNATIVE SENTENCING?

Alternative or non-custodial sentencing probably has its origin in the realisation that imprisonment is not suitable for all offenders, and that it can have a range of detrimental affects, often not anticipated when punishments are imposed. Further reasons forwarded for alternative sentencing are that: it offers greater potential for the successful reintegration of the offender; it will reduce the prison population, and the offender's family is not victimised by the imprisonment. The arguments in favour of alternative or non-custodial sentencing are succinctly summarised by Zvekic [133]:

The arguments for non-custodial sanctions are essentially the mirror image of the arguments against imprisonment. First, they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation', they promote integration back into the community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.

Appropriateness of alternative sentencing

If non-custodial sentencing is considered appropriate for some adult offenders – based on the particular circumstances and characteristics of that offender – these factors are amplified when we assess the situation of children in the criminal justice system. Youth, lack of experience and impressionability are all motivating factors for the use of non-custodial options rather than custodial sentences for children.

Across Africa, the age of criminal capacity ranges from as young as seven years (South Africa and The Gambia) to sixteen years (Mozambique and Guinea Bissau) [134]. This wide range demonstrates the uncertainty and lack of agreement on children's capacity to construct the intention to commit a crime and comprehend the consequences of their actions. With this in mind, we should not only be extra careful when imposing custodial sentences; we should go even further and restrict, through legislation, the imposition of custodial sentences on children. In the absence of clarity on children's ability to commit crimes, we should be guided by the best interests of the child. Clearly, non-custodial sentencing options hold far more potential to realise these interests than do custodial options.

The appropriateness of this type of sentencing relates both to the nature of the offence and to the personal

132Zvekic [1997]: 23Zvekic (1997:23)

133Zvekic [1997]: 23

134CRC Country reports (1992-1996); Juvenile Justice and Juvenile Delinquency in Central and Eastern Europe, 1995; United Nations, Implementation of UN mandates on Juvenile Justice in ESCAP, 1994; Geert Cappelaere, Children's Rights Centre, University of Gent, Belgium. www.right-to-education.org

135Muntingh [1997]16

characteristics of the offender. There is a range of petty offences for which a prison sentence would not be appropriate, as when the age and personal circumstances of the offender make a prison sentence unsuitable. A ten-year review of community-service orders in Cape Town reveals the following offence profile: [135]

Ten-year review of community service orders in Cape Town		
Offence category	Frequency	Percentage
Crimes against the person	215	14.9
Crimes against property	628	43.6
Victimless crimes	597	41.5

Of the total group, 56.1 percent were convicted of three types of offences: namely, driving under the influence (31%), shoplifting (4.1%) and theft (19.7%). The detailed offence profile also shows a wide range of offences: including environmental crime, bigamy, possession of counterfeit money and so on. Of the total, 49.3 percent were first offenders and a further 30.3 percent had one prior conviction. In the same sample, 45.5 percent of offenders were under the age of twenty-five years. Of the total, 84.9 percent were male and 15.1 percent were female.

The same study found the following characteristics amongst servers with the highest compliance rate: higher educational level; non-drug users; people convicted of victimless crimes; first offenders; married people; people older than twenty-two years, and people who are employed.

Recidivism

Although non-custodial measures obviate imprisonment and its negative impacts on the individual, there is unfortunately no clear evidence available on whether or not non-custodial measures curb recidivism more successfully than prison. Recidivism studies are fraught with methodological problems and pitfalls and, although the re-offending rate of select groups can be traced (such as the community servers in Cape Town referred to above), there are no baseline data with which their recidivism rate can be compared. The inherent differences between the offence and the individual profiles of prisoners and 'community servers' present major obstacles to the comparison. The 'success rate' of these non-custodial measures usually refers to the compliance rate, which indicates whether or not the offender complied with the conditions of the sentence. This can, however, create a false impression: an offender can be placed under a severe regime with very strict monitoring conditions, such as correctional supervision, which effectively assist him or her with complying with the conditions, but which do not pay attention to the risk factors in the individual's life after s/he has completed the sentence. The Cape Town study of community-service orders found that the 'survival time' of recidivists after completing their sentences is approximately thirty months. [136]

Reduced costs

The cost-reduction argument is probably the clearest in terms of advocating for the increased use of non-custodial measures, and one that is particularly favoured by prison administrations. According to the 1999/00 South African Department of Correctional Services Annual Report, the daily cost for a probationer/parolee was R9.54 in that year, compared to R80.82 per day for a prisoner. The added benefit is that the ratio of staff to probationer/parolee is 1:33, compared to 1:5 for prisoners. Minor reductions in the prison population through non-custodial sanctions will, however, make virtually no impact on the maintenance costs of prisons. For example, if each prison had 10 percent fewer prisoners, it would have very little, if any, effect on the number of personnel needed, on programme costs or on the daily management of the prison. [137]

136Muntingh [1997] :23
137Zvekic [1997] :36
138DCS [2002]

Reduction in prison population

The expectation that the availability of non-custodial sentencing options will result in a reduction of the prison population should be tempered with the realities of the situation and the acknowledgement that there are other factors that influence the size of a prison population. Their effect is often more quickly visible and also more difficult to counter. The following figures from South Africa illustrate this point. Currently, correctional supervision and parole are used extensively to decrease the number of people in prison: on 31 December 2000, 68 179 probationers and parolees were in the care of the Department of Correctional Services in South Africa. Despite these substantial numbers, the prison population has been steadily increasing, primarily as a result of the awaiting-trial population. However, recent figures have shown that the sentenced population has also increased: from 110 074 in January 2001 to 120 635 in January 2002. [138]

There is a definite shift towards longer prison terms, and fewer prisoners are being admitted for terms of less than six months.

In view of this trend towards longer prison sentences for serious offenders, it is somewhat unrealistic to expect non-custodial sentences to have any significant impact on prison numbers in the foreseeable future. Whereas short-term prisoners (six months or less) make up nearly half of annual admissions, they comprise roughly 5 percent of the daily population. Even if the Department of Correctional Services were to convert *all* of these sentences into correctional supervision, the result would be a reduction of roughly 5 percent in the prison population. As mentioned, overcrowding in South African prisons is, by and large, the result of the ever-burgeoning awaiting-trial population rather than the sentenced population, despite the significant increase in the sentenced population since January 2001.

To summarise, although the arguments in favour of non-custodial sentencing are very enticing on paper, one should anticipate results with *cautious optimism*. There are many other variables that impact on the use of non-custodial sentencing and its intended outcomes. The fairly stringent selection procedures for these sentencing options immediately exclude a large number of offenders, leaving prison as the only option. Furthermore, there is often very little in the way of guidelines to assist sentencing officers in imposing non-custodial sentences. Even where legislation and guidelines exist, the use of non-custodial sentencing options is undermined by suspicious attitudes from sentencing officers, limited resources and logistical problems.

ALTERNATIVE SENTENCING AND ADJUDICATION MECHANISMS

Whilst this chapter focuses on alternative sentencing, it is worth investigating the adjudication of children's cases in criminal matters. Restricting the investigation to criminal matters is intentional, so as to exclude those mechanisms that have been established in various jurisdictions to deal with child care issues – such as Children's Court inquiries in South Africa. The nature and ethos of a particular adjudication mechanism is important as it is established with a particular mandate, vision and set of intentions in mind. Based on this, such a mechanism will, one hopes, endeavour to live up to these.

Child Panels in Ghana[139]

Ghana's Children's Act (560 of 1998) makes provision for the establishment of Child Panels at district level. A Child Panel has non-judicial functions to mediate in civil and criminal matters concerning children, as described by the Act. A Child Panel consists of the following persons, appointed by the Minister of Social Welfare: the chairperson of the Social Services Sub-Committee of a District Assembly; a member of a women's organisation; a repre-

139The description of Child Panels in Ghana was sourced from Kassan D (2003)

sentative of the traditional council; the district social worker; a member of the Justice and Security Sub-Committee of the District Assembly, and two other citizens from the community. These latter should be of high moral character and proven integrity; one of the two should be an educationalist.

The child panel is intended to assist with victim-offender mediation in minor criminal matters involving a child, where the circumstances of the offence are not too serious. The Act further provides that a child panel should seek to bring about reconciliation between the child and any person offended by the action of the child. A child appearing before a child panel should be cautioned as to the implications of his or her actions and warned that such behaviour may, in the future, subject him or her to the juvenile justice system.

A child panel may decide to impose a community guidance order on a child or may, in the course of mediation, propose an apology, restitution to the offended person or service by the child to the offended person. A community guidance order means placing the child under the guidance and supervision of a person of good standing in the local community, for the purposes of reform, for a period not exceeding six months.

Regulation 13 of the Child Rights Regulations[140] refers specifically to complaints in criminal proceedings and states that, where a minor criminal complaint is lodged at a police station or at a juvenile court, the officer in charge should refer the matter to a Child Panel within the district.

The proceedings of the child panel are recorded by the secretary. This includes any proposals or settlement agreements reached between the parties. The deliberations before the panel are otherwise informal, and statements by the parties are not required to be under oath.

An initiative to assist District Assemblies set up pilot child panels (in the absence of the regulations) was undertaken by Save the Children in collaboration with other organisations.[141] Over a period of two years, approximately ten child panels were set up as pilot projects: some at district level and others at community level. The purpose of the community level pilots was because it was felt that child panels at district level might in certain circumstances be inaccessible to members of communities. Moreover, child panels at community level enhance harmony at the local level and empower communities to resolve disputes in the traditional way.

Community level panellists are elected by the community, and representation is gender-balanced. Meetings are informal and often held in a member's house or garden. A child protection core team of the District assemblies oversees their work and Save the Children staff acts as mentors to the child panels. There appears to be no evaluation of these panels as yet, but the opinion is that they are working and that communities are once again feeling empowered to resolve disputes in their midst.

In the absence of evaluation data, it is not possible to assess the impact of child panels. However, at a theoretical level, one can identify some interesting and promising features. Firstly, the child panels make provision for an alternative to the usual criminal justice processes by being mandated to deal with petty criminal offences. Secondly, the legislation and regulations stipulate that the referral process should happen at police station level, thereby limiting the child's exposure to the criminal justice system. Thirdly, the child panel is made up of a balanced mix of individual representatives from government and civil society, and specifically community representatives. Fourthly, and probably most significantly, is the fact that the panels' method of adjudication is underpinned by a restorative justice philosophy and the harshest sanction it can impose is a community guidance order. Fifthly, the child panel also has the potential to act as an early warning system to identify children who are exhibiting risk behaviour.

140It is important to note that, while the Children's Act was promulgated in 1998, the regulations to the Act were only passed towards the end of 2002 and hence child panels were not yet established as provided for in the Act.

141These other organisations were UNICEF, Department of Social Welfare and the Children's Commission. In terms of the Children's Act 560 of 1998, it is the duty of the District Assemblies to set up child panels in their districts.

142See further Chapter 14

143Kakama [999]

144Odongo [2003b]: 5

In essence, the child panel acts as a buffer between children at risk and the criminal justice system by providing a mechanism through which conflicts and crimes can be dealt with in a manner that is more restorative and child-centred than conventional methods.

Children's courts and village courts on Uganda [142]

Since 1996, a number of reforms have been implemented on Uganda.[143] These are amply described in the chapter on above. Recent research [144] indicates that these family and children's courts continue to face numerous challenges, but that there have also been some strong gains. These relate primarily to the:

> *diversion of some cases, thus relieving pressure on the limited detention facilities, improved working relationships between key actors, sensitisation of children who have passed through the system on their rights and giving priority to the prompt handling of cases involving children.* [145]

COMMUNITY SERVICE ORDERS

Another project that draws on the strength of communities is the community service order (CSO). CSOs are increasingly used and are a popular sentencing option in Africa. They have proved their feasibility as an alternative sentencing option in a number of countries. Although not exclusively used for children, the CSO offers an alternative and more constructive sentencing option for children in conflict with the law.

In a number of countries, Penal Reform International (PRI) has been the initiator and driving force behind the establishment of the CSO as a sentencing option. The PRI claims to be assisting or has assisted with the setting up of CSOs in Zimbabwe, Kenya, Malawi, Uganda, Zambia, Burkina Faso, Congo Brazzaville, the Central African Republic and Mozambique. PRI describes its method of work as follows: [146]

> *In these countries, the Community Service programmes started with national seminars on Community Service. Gathering the judiciary, relevant governmental bodies and representatives of the civil society, these seminars allowed participants to deepen their reflection and knowledge on alternatives to custody and to agree on a programme for the implementation of Community Service in their respective countries. Following the seminars, National Committees on Community Service were set up, composed of the main professional and institutional bodies concerned,of relevant NGOs and community leaders. These committees have worked towards the elaboration of a legal framework allowing for the introduction of Community Service and launched programmes of sensitisation of the public and of training of various stakeholders. They also issued guidelines for professional bodies concerned with the implementation of Community Service. To support them, PRI developed tools and reference documents, largely inspired from the Zimbabwean experience,and in particular a handbook on "Community Service in Practice".*

PRI's work on CSOs in Africa can be classified as good practice for a number of reasons. In Zimbabwe, for example: [147]

> *Legislative provision for CSO was made in 1992 and more comprehensive legislation was passed in 1997. A National Committee on Community Service was estab-*

145Odongo [2003b]: 6

146Sourced from the Penal Reform International website at Sourced from the Penal Reform website at http://www.penalreform.org/english/cs_programmes.htm)

147Sourced from the Penal Reform International website at (PRI: http://www.penalreform.org/english/cs_zimbabwe.htm)

lished in 1992. This consisted of: high court judges; representatives from the Ministry of Justice; the Magistracy; the Police, the Zimbabwe Prison Services; the Department of Social Welfare; representatives from the Attorney General's Office, and members of non-governmental organisations

It was the task of the National Committee to supervise the Magistrate Courts' approach to sentencing offenders to community service. The Committee, realising the odds it was up against, embarked on a campaign of countrywide workshops to promote the idea of CSO and conducted workshops with magistrates, prosecutors, police officials and prison staff as well as for heads of institutions to which offenders are sent for their community service work. It further developed and issued guidelines for use by magistrates, prosecutors and heads of Institutions.

In addition to the National Committee, a smaller executive committee was established and a National Coordinator appointed. In order to manage CSO on a day-to-day basis, 22 Community Service Officers were appointed at magistrate's court level.

Their functions are three-fold:

- To provide the National Committee with information and statistics on community service orders
- To provide the court with pre-sentence reports and information regarding potential cases
- To develop and maintain placements or institutions where offenders can perform community service.

In order to facilitate community participation and accountability, district committees were set up with representatives of the police, prison service, social welfare, the magistracy, prosecution District community service officers, charitable organisations, churches, councils, hospitals, non-governmental organisations. The Committee meets monthly and its main objective is to identify placement institutions within its district that can be used to place community servers

During the period 1992 to 1998 the number of community servers grew rapidly from 882 in the first year to 7337 by 1998.

It has been said that the introduction of the CSO as a sentencing option has resulted in a decrease in the prison population from 22 000 to 18 000. However, there are conflicting reports on this and recent political events in Zimbabwe may have reversed these achievements. [148]

Based on the above guidelines on what is good practice in alternative sentencing, we can conclude, firstly, that CSOs in Zimbabwe presented a real and workable alternative to imprisonment. Secondly, despite limited resources, Zimbabwe was able to implement CSOs by building political, judicial and community support for this sentencing option. From the more detailed descriptions of PRI's documentation, it is evident that volunteers contribute significantly to making community service orders work in Zimbabwe. Thirdly, the structure and representation on the National Council, Executive Committee, provincial and district committees clearly indicate the acknowledgement given to and the cooperation sought from all stakeholders. This meets the third requirement of intersectoral cooperation. Lastly, the workshop campaign conducted provided the public and stakeholder education that established the basis for making this sentencing option easily understandable and accessible.

148See, for example, reference made to Zimbabwe by the Ugandan Chief Justice (http://restorative justice.org/rj3/Full-text/Uganda/cjpaper.pdf) and ANB-BIA Supplement Issue nr 409 (http://peacelink.it/anb-bia/nr49/e02.html). Accessed 4/10/2003.

Correctional supervision in South Africa

Correctional supervision was introduced in the early 1990s through an amendment to the Criminal Procedure Act, partly in an effort to address the overcrowded conditions in South African prisons. Again this sentencing option is not exclusively available to children.

Correctional supervision has a dual function: it can be used as an alternative to imprisonment or it can be used as a method of facilitating the earlier release of people who have been imprisoned. In essence, correctional supervision is a more structured and strictly controlled community-based sentence than the community service orders. The sentence may include the following: house arrest; the performance of community service for a certain number of hours in a community project; participation in treatment programmes, for example, treatment for drugs or alcohol abuse or in a training programme which will help him/her find work; the payment of victim compensation.[149]

All persons placed under correctional supervision are monitored by officials of the Department of Correctional Services or by contracted volunteers, through visits or telephone calls to the person's home or place of work, and visits by the offender to the local community corrections office.

This sentencing option may not be suitable to all environments – for example, in rural areas – but it works reasonably well in urban areas where the basic infrastructure is in place and a person can be traced and visited with relative ease.

From figures released by the Department of Correctional Services, it is evident that a substantial number of children is receiving correctional supervision, either directly as a sentence or where their sentences have been converted to cor rectional supervision. This is shown in the table below.[150]

Children under correctional supervision – December 2001

Province	<14 years	14 - 16 years	16 - <18 years	Total
KZ-Natal	5	42	287	334
E-Cape	4	31	204	239
Free State	1	30	166	197
Limpopo	4	31	118	153
N-West	2	27	117	146
W-Cape	2	11	124	137
Mpumalanga	0	18	92	110
N-Cape	2	6	59	67
Gauteng	4	17	77	98
Total	24	213	1 244	1 481

149 Dissel and Mnyani [1995]

150DCS [2002]

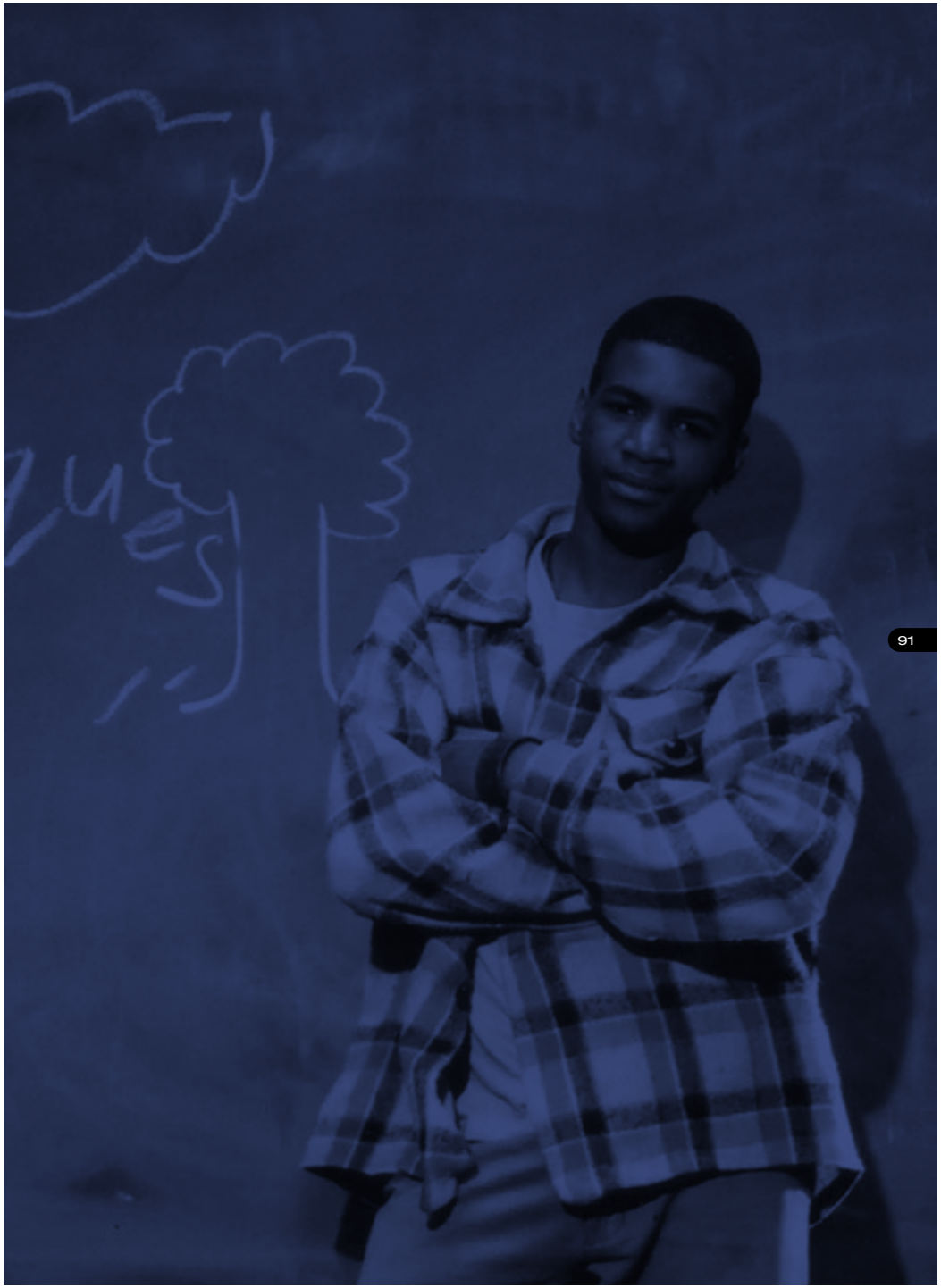
151On 31/3/2001, there were in excess of 68 000 persons (all ages) placed under correctional supervision DCS [2002]

Correctional supervision as a sentencing option has a number of strengths. But it also some shortcomings if assessed in terms of the four principles described in the introduction to this chapter. Correctional supervision presents a real alternative to imprisonment. This is reflected by the large number of prisoners in South Africa whose sentences are converted from imprisonment to correctional supervision or offenders who are sentenced to correctional supervision[151]. The strict control exercised over offenders by the community corrections officials of the Department of Correctional Services makes correctional supervision an attractive alternative to imprisonment for many magistrates.

Whilst correctional supervision is substantially cheaper than imprisonment, it is still fairly resource-intensive in terms of personnel, infrastructure, administrative systems and so forth. This sentencing option also runs into problems in rural areas where roads are not accessible or telephones unavailable.

The style in which the South African Department of Correctional Services provides correctional supervision is not distinguished by intersectoral cooperation or community involvement, although examples of this can be identified on a limited scale. There is, however, nothing to prevent the Department from establishing structures that would facilitate such cooperation and involvement.

The legislative provisions for correctional supervision in the Criminal Procedure Act are not simple, and the range of ways through which an offender can be placed under correctional supervision does not make for accessible material. Whilst the principles underlying this sentencing option are fairly simple, the administrative process appears to be somewhat complex.



CHAPTER 9

CRIME PREVENTION FOR CHILDREN AND YOUNG PEOPLE

CHAPTER 9

CRIME PREVENTION FOR CHILDREN AND YOUNG PEOPLE

Cheryl D. Frank

. . .strong parental attachments to consistently disciplined children in watchful and supportive communities are the best vaccine against street crime and violence .

Sherman,1997

INTRODUCTION

The idea of crime prevention seems almost too good to be true. The notion that one can intervene to prevent a crime before it happens, thereby negating the creation of both an offender and a victim and the need for the criminal justice system, could be classed as utopian in its vision. The reality is that it is too good to be true. Like all social sciences, crime prevention is an inexact science, and in most of the developing world it is a fledgling and nascent endeavour.

Its confounding nature relates directly to the confounding nature of crime itself. Crime is a convenient, overarching term for a range of different behaviours that are inconsistent over place and time, and that have different and varying causes and consequences. Almost in response, the field of 'crime prevention' is a vast and nebulous landscape of theories, strategies and programmes, rendered even more complex by the fact that many activities that may have a crime prevention outcome may not set out with that intention. The essence of the crime prevention enterprise is to find ways of disaggregating this broad category into intellectual bite-size pieces, and this is what this chapter sets out to do. In order to avert any confusion, the term crime prevention will be used to will refer to strategies intended both to prevent and reduce crime.

Childhood and adolescence are recognised as ages where vulnerability to the factors that may result in offending and victimisation are most palpable.[152] In exploring the range of strategies that may be considered 'good practice' in Africa, this chapter takes the view that many of the approaches that need to be adopted are as much about the prevention of offending as about the prevention of victimisation and the overall promotion of safety and well being. This is, therefore, a broad terrain and reference will be made to programmes that apply on both a micro-social level and to the broader macro-social and economic issues that need to be addressed.

It should be noted at the outset that the emerging nature of the crime prevention enterprise in the developing world makes it very difficult to find appropriate examples for discussion. While there may be many exciting and innovative approaches being implemented, relatively few of these are documented and even fewer have been subjected to rigorous evaluation. The term 'good practice' is, therefore, used quite broadly here, and applies to innovative approaches that seek to give effect to important crime prevention principles.

WHAT IS CRIME PREVENTION

There are many ways to think about the crime prevention enterprise. Some strategies for doing this are presented below as a way of providing some of the most popularly used conceptual tools. One of the most popular approaches is the description of crime prevention approaches in terms of the following three categories of activities, and emerges from the medical model:

Primary prevention: Strategies directed broadly at the general public, that seek to educate and inform as a means of reducing the possibilities of offending or victimisation.

Secondary prevention: Strategies intended to intervene with those believed to be at risk of involvement in crime or victimisation, with a view to intervening early and reducing the possibilities of further offending or victimisation.

Tertiary prevention: Strategies directed at those who are already involved in crime; that seek to prevent further involvement in crime.

A second way of thinking about crime prevention relates to the kinds of strategies that may be applied. The following distinctions are made:

Law enforcement: This refers to traditional strategies such as patrols, visible policing, etc. that may have the effect of deterring offenders.

Situational crime prevention: This refers to the range of measures applied to the physical environment to reduce opportunities for crime.

Social crime prevention: This is a broad term that refers to all strategies that seek to intervene in the individual and social conditions that promote or result in crime.

Much of the international discourse on crime prevention relates to what can be termed 'risk-focused crime prevention' [153], and emerges from the public health approach to prevention. This approach postulates that there are number of individual, social, environmental, economic and political factors that individually or in concert result in individuals or groups being at higher risk than others of becoming offenders or victims. Risk factors identified in international studies include: family disruption, violence, poor parenting, poverty, inadequate housing and health conditions, poor schooling, truancy, school drop-out or exclusion, peer group activities and pressures, discrimination and lack of training and work opportunities.[154] This approach holds that there may equally be factors that promote 'resilience' among individuals in high-risk situations, and these are referred to as 'protective factors'. Using this approach, crime prevention may be thought of as the successful reduction of risk factors, and the increase or strengthening of protective factors. [155]

Often crime prevention initiatives that work are best identified, not by the original intentions of the programme, but by the results of the initiative. For the purposes of this chapter, the strategies that are discussed may span the range of categories that are described above, but can best be described as 'social crime prevention'.

SOME KEY CONSIDERATIONS RELATING TO CHILDREN, YOUNG PEOPLE AND CRIME PREVENTION

This section identifies and briefly discusses significant issues that must be taken into account in any discussion of the prevention of crime.

1 History and context

Children and young people in Africa are subject to a range of events and processes that mould their daily experience and actively direct their every choice. Macro-social realities such poverty, armed conflict, the impact of HIV/Aids and rapid social change are critical to any analysis of risk and resilience. A view that is respectful of the influence of history is also vital: pasts that were violent and authoritarian and turbulent processes of social change actively fashion contemporary conditions; and dynamically influence the strategies employed by individuals on a daily basis.

2 Human rights, democracy and the rule of law

It is a complex proposition that a culture of democracy, human rights and the rule of law will promote the prevention or reduction of crime. Many governments may be able to demonstrate that impinging on the human

152Shaw [2001]

153Lehman and Hawkins [1994]
154Shaw [2001]
155Sherman [1997]

rights of some may protect others. However, there are a number of ways in which the erosion or absence of these political and social realities exacerbate rather than ameliorate those factors that promote offending and victimisation. In response to the pressure of high crime environments, many policy makers may be tempted to focus on the short term, applying tougher law enforcement strategies and promoting harsher punishments. Yet internationally, the value of 'investing in and supporting young people and their families through preventive approaches, rather than excluding, punishing or incarcerating them' [156] is being recognised.

Studies of crime prevention in schools point to the importance of a democratic school culture [157] and the consistent application of a fair, rules-based regime. Lessons on good programme delivery emphasise the value of participation by children and their families and peers in the development of programme theory and intervention strategies. Overall, the promotion of the principles of democracy, human rights and a rules-based society are good for crime prevention.

3 Crime prevention and development

The need continually to explore and interrogate the complex relationship between crime and development has to be central to all crime prevention considerations in Africa. Whether crime is an impediment to development, how development may create factors that will result in greater crime, and how different kinds of crime categories relate to the development debate all need to be considered. While poverty creates many consequences for children and families, among the most critical is the development and perpetuation of vulnerability in every sphere of life. Pertinent to the crime prevention discussion is the fact that many of the risk factors associated with offending and victimisation are very strongly influenced, if not dictated, by the economic conditions of the household. [158]

While there may be valuable examples of poverty alleviation and income generation projects that have improved the lives of African people, it is clear that civil society activists can no longer afford to ignore the macro social, economic and political forces that converge to create the high levels of risk that permeate daily life in Africa. This more global view is essential to understanding current realities and foreseeing future adversity.

4 Gender and ethnicity

Opportunities, quality of life and ultimately issues of safety and security in Africa are inextricably linked to issues of gender and ethnicity. Gender, in particular, warrants far greater examination. The status of women and girls in society often dictates the levels of control they are able to exercise over their daily lives; limitations on this control lead to great risk of victimisation. On the other hand, young males are very often at high risk of offending and victimisation, especially in relation to violent crime. Overall, the issue of gender is far more complex than can be glibly explained away by references to patriarchy. Each programme that seeks to intervene in the social environment must engage in realistic ways with this concern; and this should begin with an analysis of how gender identity is constructed by programme users themselves.

In societies that are deeply divided in terms of race and ethnicity, and where particular ethnic groups are in control of the state and commerce (and their range of benefits), the consequences for individuals can range from economic disadvantage to genocide. Overall, the importance of understanding the stratification of society, and how this influences life choices and livelihoods, and how individuals may react to barriers to their aspirations should be central to the crime prevention endeavour. Most important, however, is how the perpetuation of such social stratification may relate the persistence of risk factors for offending and victimisation.

156Shaw [2001]: iii
157Gottfredson [1997]
158Shaw [2001]

5 The role of civil society and faith-based organisations

The role of civil society organisations (CSOs) and faith-based organisations (FBOs) in crime prevention also bears some examination. Many organisations working in Africa are engaged in the provision of services, often filling service-delivery gaps left by a state that is unable to provide these services. This is often a critical role and serves the purpose of ameliorating potentially disastrous social conditions. However, this service role is often assumed at the expense of the equally important activist role that such organisations need to play. The establishment and mobilisation of social movements to promote the wellbeing and security of children are vital to building accountability amongst both government and civil society.

Within the realm of service-delivery, CSOs can often be the forerunners of new programme approaches that may announce great change. Innovative programmes run by CSOs may be implemented on a small scale, but have the potential to gain interest and support over time. One useful illustration of this is NICRO's introduction of diversion programmes in South Africa in the early 1990s. Taking advantage of the fact that prosecutors have the discretion as to whether or not to prosecute, NICRO was able to implement diversion progressively across the country over a period of ten years, and is now offering these services to some 16 000 children a year.[159] NICRO can also be credited with the introduction of the idea of restorative justice into South Africa and the implementation of South Africa's first restorative programme.

159Muntingh [2003]; Muntingh and Shapiro [1997]

GENERAL GOOD PRACTICE IN CRIME PREVENTION

National policy and legislation

The recognition by the state of the importance of the safety and wellbeing of children, and the importance of crime prevention, provides a good foundation for any crime prevention approach, but is neither necessary nor sufficient. Two different sets of national policy and legislation apply in terms of good practice. The first set relates to the implementation of a national crime prevention policy that seeks to define, coordinate and implement initiatives at all levels of government. Côte d'Ivoire and South Africa are examples of countries that have developed such crime prevention policies. South Africa has failed to implement its National Crime Prevention Strategy (1996); however, elements of this strategy have emerged in new processes, such as the national Urban Renewal Strategy.[160]

160Rauch [2002]

Many countries in Africa have developed legislation that seeks to promote the safety and protection of children, both in relation to offending and victimisation, and this is the second set of policies that has relevance in this discussion. Such legislation can be considered to be 'good practice' only if these laws seek to give effect to international instruments such as the United Nations Convention on the Rights of the Child, as well as more regional instruments such as the African Charter on the Rights and Welfare of the Child. A further aspect of 'good practice' relating to such legislation is its full implementation with a view to ensuring that children are adequately and equally served. Little evidence of either type of 'good practice' mentioned above is observable in the African context.

CRIME PREVENTION STRATEGIES

Crime prevention strategies in families and communities

Children's status as victims or offenders is inextricably tied to their status as learners, family members, labourers and so on, and it is within these other roles that the risk factors for victimisation and offending are created and reinforced. In one of the most comprehensive studies relating to crime prevention, Sherman states,

> *... there is widespread agreement about a basic conclusion:strong parental attachments to consistently disciplined children in watchful and supportive communities are the best vaccine against street crime and violence.*

This points to the multi-dimensional nature of the crime prevention enterprise and the complex interaction between the home, school and community.

Sherman's notion of 'watchful' communities is one that may find strong resonance with traditional African approaches to the caretaking of children. However, what is true is that rampant social change has resulted in homes and neighbourhoods that can be extremely unsafe for children. Building strength and resilience through the environment offered in homes and neighbourhoods is an important aspect of any crime prevention approach.

Supporting caregivers to strengthen families

Many different strategies are available to build and strengthen families. These include family preservation services, family support programmes and so on. Home visiting interventions often form the basis of programmes that give intensive support to families and children who are believed to be at risk. The different forms are quite comprehensively reviewed by Bender *et al.* [161]

Central to all of these interventions is a dynamic understanding of what a family is, and which individual's resources may be called upon to serve the needs of that family group. In studies of care-taking in sub-Saharan Africa and elsewhere, girls were often as likely to provide nurture and care to other children as were mothers.[162] In the African context, an increasingly common scenario is when children are caretakers of other children in households that are suffering the impact of HIV/Aids and other social processes. Often, children are prevented from attending school because of this. Creating support for these kinds of families may require that practitioners adopt far more creative strategies than those traditionally applied.

Strengthening and reunifying families

Often, families that wish to be together are pulled apart by circumstance. Most often, these circumstances involve armed conflict or economic necessity. The example discussed below indicates how a 'good practice', such as family tracing and reunification, can be made even better by establishing processes to obtain feedback from users of the service.

Family tracing and reunification, Save the Children, Liberia

Save the Children (UK) manages family-tracing and reunification programmes in Liberia, Côte d'Ivoire and Sierra Leone and, through its sub-regional Separated Children's Programme, provides capacity-building support to agencies and ministries.

Internal and cross-border displacement in Côte d'Ivoire, Guinea, Liberia and Sierra Leone has resulted in an estimated 15 000 separated children, many of whom may have experienced forced military recruitment, physical and mental abuse and other forms of exploitation. The long-term effects of such traumas can adversely affect the reintegration process: families may find that their children have become virtual strangers during their absence; while children may find that they have exchanged one bad situation for another and leave their families to return to their country of asylum.

Save the Children held a workshop in preparation for the cross-border reunification of 51 Liberian and Sierra Leonean refugee children whose families were traced through a sub-regional Family Tracing Network. The workshop was intended to discover whether enough was being done to ensure that children and families were adequately informed about each other's situations before agreeing to reunification, and whether the current process for preparing both parties was contributing to sustainable family reunification. Workshop delegates included separated and reunified children aged nine to eighteen years, parents, representatives of the United Nations High Commission for Refugees (UNHCR), the International Children's Rights Committee, the governments of Sierra Leone and Liberia and family-tracing agencies from those two countries.

Children participating in the workshop said existing family-tracing practice did not allow them meaningful input and that, in order to make informed decisions about reunification, they needed to be given more facts. They wanted specific information, negative and positive, about their families' situation, the security situation in their areas of origin and protection measures in place upon their return. They also wanted to be consulted about the type of information concerning their experiences during separation to be given by social workers to their families. Family poverty would not deter them from returning home, but they expressed concern over lack of educational opportunities, particularly if they had been attending school in their asylum countries. The workshop concluded that there should be increased involvement of families, communities and particularly children in planning and preparing for family reunification. Participants also concluded that collaboration and coordination between agencies that carry out cross-border family tracing activities needed to be improved.

The provision of early childhood development/education

Early childhood education or development (ECD) can be defined as 'the provision of physical, emotional, social, spiritual and moral development for children aged between zero and nine years'.[163] The national audit of ECD provisioning conducted in South Africa in 2001 appropriately identified that ECD has the potential to promote and strengthen society in a range of areas: such as the promotion of democracy and equality, the protection of children's rights and the promotion of community development.[164] Such programmes are also internationally recognised as offering great potential for the reduction of risk factors relating to crime and violence.[165]

The opportunities for crime prevention presented by ECD relate to the following factors:

- The accessibility of children
- Opportunities for monitoring of overall wellbeing of children
- Opportunities to take immediate remedial action and intervene early when problems are discovered.
- Opportunities to engage parents in planning for remedial action, due to the fact that ECD facilities are often located where children live

161Bender et al [2002]
162 Weisner [1994].
163 Williams et al [2001]: 5
164 Williams et al [2001]
165Sherman et al [1998]

[Open box]
Early Childhood Education/Development Provisioning, South Africa
A national audit of ECD provisioning was conducted in 2000 and indicated that there were 23 482 ECD sites, and that 1 030 473 children were being served by 54 503 educators. Data suggested that about one-sixth of the children in the 0 to seven age group were in some kind of ECD provisioning. A little less than half of the five to six year age group was accommodated (413 000 out of an estimated 960 000 children of this age group). However, only 10 percent of trainers are deemed by the Department of Education to be adequately qualified.

After-school care

Like ECD, after-school care programmes offer opportunities for community vigilance and supervision of children when they leave school for the day; as well as further opportunities for nurturing and development. Like ECD programmes, such services can be run at a low cost and managed with great success at community level.

PASCAP (Partners with After-Schools Care Projects), South Africa
The core of PASCAP's model is to provide nationally accredited learning programmes, mostly to unemployed members of poor communities, with a view to enabling them to establish after-school care projects in these communities. PASCAP offers training and support thereafter, and maintains a strong focus on quality control over the services offered by their trainees. Apart from the 'learning programmes' and support offered, PASCAP also undertakes a range of other programmes that complement their training work.
The key learning programmes offered are:
Introduction to neighbourhood child and youth protection: This is a basic learning programme aimed at enabling an understanding of neighbourhood safety and the development components and functions of programmes for children and youth in communities affected by high levels of poverty.
Neighbourhood child and youth protection: This learning programme comprises the development of basic and intermediary practical skills in child and youth programme facilitation. It incorporates a range of creative and contextual elements, building capability for implementing neighbourhood safety centres in resource-scarce communities.
Project management / Business Skills I & II : The project management learning programmes focus on the development of generic management skills (which are similar to that used in business management). In order to facilitate sustainable community projects, there is an emphasis on managing child and youth protection projects in a manner that is effective, efficient and complies with relevant legislation and quality standards.
After school development practitioner learning programme: This programme is a core component for effective poverty-focused after school practice. The programme enables participants to acquire an understanding of poverty-centred, context appropriate intervention and develop a range of practical skills for effective work with different age groups of children and youth. Theory and practice is integrated with an emphasis on implementation. At the end of this programme, qualifying participants receive a project starter kit comprising a range of development and administrative materials with which to initiate an after school project in their communities.
Community protection for children at risk: Given the high rates of child abuse and neglect, this learning programme provides participants with basic skills in child development specifically aimed at engaging with children at risk.
Implementation support / Mentorship: This is an important program to provide new after-school practitioners with one-to-one coaching and field assistance. Participants who have completed the After School Practitioner Training Course are eligible for enrolment.
Youth development programming: This learning programme specifically aims to develop skills in working with youth in a holistic and creative way. At the end of the learning programme participants should be able to implement and evaluate a youth development programme within their communities, based on identified community needs.
These learning programmes are supported by the organisation through a range of other projects that include: Urban regeneration; Parent empowerment; Children's Art for Children's Rights; Youth Focus Groups; Regional Network Development; Active Learning Libraries and Financial Management Support [166]

Gangs, organised crime and drugs

The impact of gangs and organised crime on communities already under siege by poverty can be profound. Organised crime offers opportunities for a range of illicit activities to enter into and become entrenched in communities, often involving young people from an early age. Gangs and organised crime offer opportunities to young people that are difficult to replicate within the legitimate environment; they also create day-to-day circumstances of great risk to those who are engaged in this milieu, as well as innocent bystanders who may be caught in the crossfire of gang contestation. Notwithstanding these impacts, it is true that gangs frequently enjoy the support of many members of the communities within which they operate, and often come to be seen as local philanthropists.[167] While many African countries suffer from the range of impacts of organised criminal gangs, solutions to these problems outside the law enforcement framework have been limited. From a social crime prevention perspective, one possibility is that suggested by Standing (2003a), who advocates an analytical approach that engages ecologically with the issue, and aims to understand the broader 'criminal economy' within which gangs and organised crime operate. It is also true that some diversion and reintegration programmes may offer individual gang members pathways out of this lifestyle.

Schools and crime prevention

Schools are interesting and complex environments. While, on the one hand, they can be seen simply as places where education is provided for children, they can also be viewed as places where the holistic health, wellbeing and development of each child can be promoted and realised. In both these scenarios, the school environment can create great risks to the wellbeing of children, as well as offering many opportunities to promote resilience.

There are two ways of thinking about crime prevention in schools. The narrower approach is to focus on the school itself and how it can be made safer in order to ensure that learning is possible. These approaches are often discussed under the rubric of 'school safety' and will be explored in more detail later in this chapter. The wider approach is to look at how schools may serve as environments to promote the prevention of crime and violence more broadly. These strategies typically focus on factors both within and outside the school setting, and involve a wide range of people from within and outside the school. Both ways of approaching the problem are legitimate (with one being a subset of the other), and there is a wealth of information available with regard to strategies that work in the context of both approaches. The

166www.pascap.org.za
167Standing [2003a]; Standing [2003b]

discussion that follows explores how schools may contribute more broadly to the crime prevention agenda.

It should be noted that many of the principles and practices that apply in relation to schools could also apply to other institutional settings that serve children, but that all strategies should be viewed with the necessary caution as to relevance and value.

Making education accessible

The role of education provision in promoting development has been well demonstrated, and the impact on households of ensuring that education is made accessible to all children, especially girl children, is clear.

The issue of school enrolment has both supply and demand dimensions. On the supply side, the government has to be able to provide education services, at least in terms of primary schooling, to all children. This is often not the case elsewhere, notwithstanding the fact that many countries subscribe to the United Nations goal of universal primary school enrolment by 2015. The second dimension of this problem is for households to demand education services and to want to place their children in schooling. This is also not necessarily the case. Bennell (2002) demonstrates that the demand for schooling at primary level has declined over the past ten years and that it will continue to decline unless economic conditions change. He argues that, while some governments in sub-Saharan Africa may be succeeding in creating greater facilities and supply, the demand for primary education may be declining as caretakers of children become less and less convinced of the overall benefits of investing in education given the trend of fewer formal sectors jobs in the economy. An additional variable to keep in mind is the extent to which children drop out of school in the early grades. This is discussed later.

In 1999, a UNICEF report indicated that, while there had been some improvements in enrolments, only 60 percent of children in Africa were enrolled in school: implying that some 40 million children were not attending school.[168] It is clear that deaths from HIV/Aids are a strong factor in relation to the declining demand for education. It is reported that, in Mozambique, 68 percent of children with both parents alive attend school, compared with 24 percent who do not have parents.[169] HIV/Aids also threatens the ability of countries to supply education, as has been seen in Zambia where the teaching skills base has been eroded by deaths, and the education management infrastructure is similarly compromised.[170]

This discussion is a brief but telling reflection of the complexity of education service delivery, notwithstanding its centrality to the success of any development efforts on the continent. It is also an admonition as to the need for ongoing efforts in this area.

Promoting school safety

As with all organisational environments, how the environment affects its users is defined less by the policies and legislation that govern an organisation, and more by the culture that has developed within it.

Much of the good practice has emerged in this area indicates that approaches such as security measures to protect children in school may be necessary but are never sufficient in promoting safety.[171] All indications are that holistic approaches that intervene with the entire school community (inclusive of parents and caretakers of children) operate best.[172]

The first set of tasks in relation to the promotion of school safety is to eliminate the risks internal to schools. There are a number of threats to the safety and wellbeing of children inside of schools, and these actively perpetuate the circumstances that make schools unsafe and unhealthy environments for children to be in. These include sexual abuse by educators, corporal punishment, bullying and other kinds of victimisation by peers. Strategies that have been adopted on this level relate to changing school culture, and are discussed in more detail below. Other strategies that have worked in relation to abusive educators relate to more efficient law enforcement in terms of suspending, investigating, convicting and removing educators who are dangerous to children. It should be noted that the risks discussed above are often associated with high levels of school dysfunctionality. This is most often due to poor school management, which is discussed further later in this chapter.

The next set of strategies concerns ways to ensure that children complete their schooling. These are interventions that monitor truancy and drop-out rates, and seek to engage these children in programmes that promote their participation in formal schooling. Many countries remain quite unsophisticated about surveillance systems to monitor and respond to these issues. What is clear in the African context is that there are a number of social conditions – such as poverty, orphan hood and child labour – that militate against children going to school, even where education services are provided. Strategies adopted to deal with this problem cannot focus only on the micro social environment of the individual and family; they need also to include programmes to 'reintegrate' and mainstream children who may have behaviour problems and who are considered by the school to be difficult. In the long term, this approach is far more conducive to prevention than the removal of these children from the school.

A third set of strategies relates to a focus on the culture of the school and the ways in which school activities are managed. There is much evidence to indicate that strategies for school management can have a great impact on the safety of the school; and this is often a useful starting point. Building democratic school management practices have been shown to improve investment in the school by both educators and children. How discipline is handled at the school is also an important factor. Here, children need to be aware of the range of behaviours that are considered unacceptable within the school context; it is most effective to engage them in a process of developing school rules and codes of conduct. These rules need to be present within the culture of the school and made clear to all new children and parents. The application of these rules is also important. Rules need to be seen to be applied both consistently and fairly; and to apply to all in the school, inclusive of educators and school managers.

CONCLUSION

This chapter has sought to provide a broad overview of crime prevention relating to children and young people, with some examples to reflect the levels of innovation and good practice that have emerged on the continent. This has by no means been a comprehensive overview of crime prevention and should perhaps be thought of as a set of fundamental considerations in the crime prevention enterprise.

168 Women's International Network News [1999]
169The Economist [2002]
170Kelly [1999]
171Gottfredson [1997]
172Griggs [2002]; Shaw [2001]

CHAPTER 10

MONITORING AND EVALUATION: PROMOTING THE DOCUMENTATION AND EVALUATION OF PROGRAMMES

CHAPTER 10

MONITORING AND EVALUATION: PROMOTING THE DOCUMENTATION AND EVALUATION OF PROGRAMMES

Lukas Muntingh

Documented research on reintegration services in Africa is not widely available or accessible and, when it is, often offers fairly superficial reporting on programmes and their results. Monitoring and evaluation is as important a part of the programme as the programme itself. Without reflecting on programme implementation and assessing its impact, we cannot know whether we are doing the right thing and, if not, what improvements to make.

Documentation and evaluation are central challenges for crime prevention internationally. Researchers are clear that the impact of crime prevention interventions is strongly tied to the context within which these operate.[173] Yet, in Africa, little is known about what strategies work for which target groups across the range of different social, cultural and environmental conditions on the continent.

PLANNING WITH A VIEW TO EVALUATION

It is thus essential that programme planning be undertaken with a view to evaluation. The methods used need not be expensive or skills intensive. A range of tools is available on the Internet and through various resource centres that offer a guide through this process. If we are to learn anything about crime prevention, it is of paramount importance that a level of scientific rigour is injected into all initiatives.

A further issue relating to evaluation is the need for government and civil society organisations to recognise the value of making decisions that are based on the evidence from local research. Often policy decisions in respect of programme strategies are taken in the absence of good research – usually on the basis of some 'gut' sense of the value of the proposed intervention. Policy-making that relates to the quality of life of children and their families should be taken far more seriously than that.

It is also true that, in their haste to provide programmes, many implementers have little interest in documentation or evaluation, often based on the rationale that they are not researchers. This is a self-defeating approach, given that one can only learn about the impact of programmes in a systematic way and improve their functioning if there is some focus on evaluation. While it is accepted that evaluation can sometimes be a costly business, it is also true that there are a range of strategies that service providers can put in place in order to ensure that programme approaches and impacts are reviewed, or at the very least documented.

PROTECTING CHILDREN'S RIGHTS

It is also critical that diversion programmes operate according to a set of clear guidelines, and that government takes the lead in setting standards and evaluation processes to avoid abuses of the rights of children and others who may be diverted by the courts.

An example of guidelines governing the referral of children to diversion programmes is contained in a circular entitled 'Juvenile Offenders: Diversion Programmes', distributed by the Director of Public Prosecutions (Eastern Cape).[174] These include the following:

- The juvenile must admit to his part in the crime for which s/he is indicted and must be prepared to undergo the programme
- The parent or guardian must agree to the implementation of the programme and be prepared to co-operate
- The juvenile should preferably be a first offender. However, juvenile offenders with previous convictions may be considered for referral if the previous convictions are not of such a nature as to result in the conversion of the proceedings to a children's court enquiry
- The crime should be of a less serious nature

Risks to be avoided

The risks in respect of diversion programmes for children can be amply illustrated by the recent concerns about the Noupoort Christian Care Centre in the Northern Cape (NCCC). The centre, which is operating under a temporary licence, has been used by some courts to divert young people who have committed offences related to drug and substance abuse.

There have been three deaths and other complaints of physical abuse at Noupoort since it opened in 1991. In June 2004, the Minister of Social Development appointed a committee to conduct an urgent investigation into 'allegations of gross violations of human rights' at the centre. The Pretoria High Court ordered the Department of Social Development to decide on the NCCC's application for permanent registration, and that the Centre provide the Department with unrestricted access. The Minister ordered an immediate investigation. The terms of reference were, amongst other things:

> *To do an assessment of the management structures of the NCCC, other administrative issues and human resource and structural composition. It will also assess the treatment programmes and the environment within which adults and children are treated; whether the environment and programmes are suitable for children and are in compliance with the Child Care Act, the Minimum Standards for Residential Care, the Constitution and any other legal prescripts relating to the removal of children from their homes and long term treatment for drug-programmes.* [176]

The 74-page report released by the investigating team reported unhygienic conditions, bad management, only one professional staff member, the forced imposition of religious doctrine, a military regime and gross violations of human rights. It was also found that children were deprived of access to their parents:

The task team recommended that the Minister close the facility.[177] The Centre management was given 21 days to justify its continued existence, failing which it will be closed down in July 2004.[178]

CONTINUOUS MONITORING AND EVALUATION

Recently, several authors have argued that sound programme evaluation practices should be viewed as tools to improve practices and strengthen programmes as they mature[179]. In fact, Lipsey[180] and Louw[181] have argued that programme evaluation should not be considered the final stage or signify the 'end' of a programme, but should rather be an integral part of the intervention. For this reason, they suggest that evaluators should be involved from the initial stages of programme development[182].

Monitoring and evaluation are essential elements of the problem-solving process; once an intervention has been developed and implemented, it must be monitored and evaluated to ensure that it is been successfully implemented; that it is properly targeted on the problem; that it is having the expected impact upon the problem, and that unforeseen impacts are not having a counterpro-

173Pawson & Tilley [1998]; Sherman et al [1997]
174Sloth-Nielsen, J [2001]: 263
175Not to be confused with the Noupoort diversion project
176Ministry of Social Development, press release 16 June 2004
177Independent on Line, 7 July 2004
178SABC news, 22 June 2004
179See: Louw, J [2000]; Lipsey MW & Cordray D S [2000]
180Lipsey [2000]
181Louw [2000]
182From Van Niekerk A & Dawes A [2004]
183Gray, Fox and Schuller [2001]: 2

ductive effect on the problem.[183]

Monitoring and evaluation results have further applications, as outlined by NACRO.[184] They are important in acquiring continued or additional funding. They build community interest in the work of the organisation or partnership. They boost the morale of staff working on the project or intervention. They raise the profile of the organisation or partnership and demonstrate that it is effective. They allow the organisation or partnership to contribute to the national debate on the effectiveness of programmes.

EXAMPLES OF GOOD PRACTICE

In chapter 7 of this volume, two examples of good practice were reported on: that of the National Peace Accord Trust (NPAT) and that of NICRO/ TEP. These two programmes demonstrate some good practices in terms of monitoring and evaluation. The lessons that can be learned from NPAT as follows:

First, the NPAT documentation reveals that there was a rigorous process of reporting in detail on what happened during each of the wilderness trails. Organisations are often daunted by the research process and the perceived complex processes that it may involve. Accurate reporting and monitoring by the staff of a programme is, however, much easier and allows trained researchers to work with detailed data and conduct a proper analysis at a later stage. This means that we must document what we do; without monitoring information, such analysis will not be possible.

Second, when the time was ripe and the opportunity presented itself, NPAT brought in an independent evaluator to conduct a thorough and in-depth analysis. Impact evaluations need not be done on a continuous basis; but should ideally be done at regular intervals, as determined by the particular profile of the client group or other factors, such as programme design.

The evaluation NICRO conducted of its TEP programme was of a more sophisticated nature, and involved professional researchers who conducted a formative evaluation, followed up by an impact evaluation approximately twelve months later. The TEP impact evaluation design displays a number of interesting features. The impact evaluation framework began by defining reintegration and identifying the risk factors that the programme aims to address. Based on this, a set of indicators was developed to provide information in this regard. In order to gather information on the performance and impact of the TEP, four methods of data collection were used:

Document review: this included an analysis of available programme documents such as progress reports.

Workshop on reintegration: this was facilitated by the researchers and attended by a wide variety of stakeholders, including people from civil society and government agencies. Its purpose was to determine indicators for reintegration and recidivism.

Qualitative in-depth interviews: these were conducted with the released participants of the programme. Qualitative interviews were also conducted with NICRO service delivery staff.

Qualitative/ quantitative interviews: a survey over four provinces was conducted with NICRO/ TEP clients and their family members.[185]

The combination of data collection methods and the framework for analysis provided results of a fairly high degree of reliability and validity; these are being used to inform improvements in the design and delivery of the programme.

TOWARDS THE DEVELOPMENT OF STANDARDS AND GUIDELINES

The UNDP Child Justice Project recently completed a national audit of diversion services. Despite some commendable programmes, the results indicate that diversion and alternative sentencing options for young sex offenders are almost non-existent in South Africa. Once the Child Justice Bill becomes law, there will be increased pressure on existing projects and services.

However, it is important that this roll-out does not take place merely because there are no alternatives, but rather because the available programmes have been shown to provide effective intervention for this particular client group.

A NICRO-led project has been commissioned by the Department of Social Development to develop minimum standards for diversion in South Africa. As amply demonstrated by the Noupoort Christian Care Centre example above, there are a number of potential risks inherent in the development and implementation of diversion programmes, namely:

- Infringing on the rights of children.
- Maladministration
- Inappropriate content
- Poor monitoring and evaluation
- Inappropriate matching of children to programmes
- Poor programme content – badly structured and presented
- Lack of capacity
- Lack of service providers' skill

It is, therefore, both desirable and necessary to set certain standards in order to mitigate the risks outlined above. However, given the current variance in skills, resources and capacity across provinces, one would need to ensure that the development of these standards does not result in the exclusion of under-resourced service providers.

The goal, therefore, is to develop standards for diversion programmes that are appropriate to their context, achievable, developmental and empowering, whilst not compromising on the rights of children and the quality of services rendered to them. Objectives in developing the minimum standards for diversion programmes would include infra-structural, administrative and managerial requirements, knowledge and skills requirements, operational management, monitoring, evaluation and minimum requirements.

Moreover, there are many programmes that have not yet been evaluated. Evaluation is extremely important if one wishes to develop good practice. However, practitioners are often reluctant to fill in long, time-consuming forms and there is a need to develop simple and effective evaluation methods.

In addition to the development of minimum standards, there is a need to look at the outcomes of various types of programmes, including (but not limited to) existing South African diversion options. This is likely to be a lengthy process, as intensive research into best practices both nationally and internationally is currently being undertaken.

184NACRO is an independent voluntary organisation working to prevent crime in the United Kingdom. Gray, Fox and Schuller [2001]: 8
185 Lomofsky and Smith [2003]: 7

PART THREE

SPECIFIC ROLEPLAYERS AND GOOD PRACTICE

CHAPTER 11

POLICE AS ROLEPLAYERS

CHAPTER 11

POLICE AS ROLEPLAYERS

Jacqui Gallinetti

It is the general duty of the police to create a safe and secure environment for all. This it must achieve by reducing crime, preventing action that may threaten the safety of communities, investigating crimes and bringing perpetrators to justice. [186] In fulfilling these functions, the police deal with children as both victims and offenders.

Children who come into conflict with the law will inevitably at some stage, generally at the outset of the matter, come into contact with the police. Thus police practice must be regarded as an integral part of any child justice system. Often contact with the police is the child's first encounter with the criminal justice system and shapes his or her impression of, and interaction with, the process that follows.

In addition to the Convention on the Rights of the Child (see chapter one), other international human rights instruments inform the performance of police functions and duties in relation to children in trouble with the law. Two of the most relevant are the United Nations Minimum Rules for the Administration of Juvenile Justice[187] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[188] These documents lay down principles that nations and, in this context, their national police services must adhere to.

International rules guiding police practice

Beijing rules

- Rule 6 deals with scope of discretion. This rule allows for an appropriate scope of discretion to be exercised at the different levels of juvenile justice administration, including police investigation. However, there needs to be sufficient accountability in the exercise of this discretion and it needs to be exercised by persons who are specially qualified or trained to do so.
- Rule 10 deals with initial contact. This rule requires that, when a juvenile is apprehended, his or her parents must be notified immediately or within the shortest possible period of time. In addition, law enforcement agencies must respect the legal status of the juvenile and promote his or her wellbeing and avoid any harm.
- Rule 11 deals with diversion. It empowers police to divert juvenile cases away from formal criminal hearings.
- Rule 12 deals with police specialisation. This rule requires that police who deal regularly or exclusively with children in conflict with the law receive specialised training and instruction. In particular, the rule calls for special units to be established in large cities.
- Rule 13 deals with detention pending trial. This rule deals with principles such as detention as a measure of last resort and for the shortest possible period of time; the requirement that juveniles be kept separate from adults, and that they receive all the necessary care and assistance they require.

United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

- Rule 17 requires that the investigation of a case relating to a juvenile deprived of his or her liberty and awaiting trial must be expedited and given the highest priority so as to shorten the period of detention.
- Rule 12 requires that the deprivation of a juvenile's liberty must be in accordance with a respect for his or her liberty.
- Rule 18 includes the requirement that juveniles have the right to apply for legal aid and to have private and confidential access to their legal representative.
- Rule 50 involves the right of every juvenile, upon admission to a detention facility including a police cell, to be examined by a physician in order to record evidence of prior ill-treatment or establish whether there is a need for further medical care.
- Rule 56 deals with the notification to the family or guardian of a juvenile of his or her death, illness or injury in a detention facility, including a police cell.
- Rule 64 prohibits the use of instruments of restraint except in exceptional cases, when authorised, and where all other control methods have been tried and failed.
- Rule 67 prohibits all forms of disciplinary measures constituting cruel, inhuman or degrading treatment, including corporal punishment.

POLICE PRACTICE IN SOUTH AFRICA

The South African Police Services (SAPS) has a past record of numerous incidents of alleged abuse and violations of human rights. The Child Justice Bill, currently before the South African Parliament, will provide a clear role and responsibilities for the police in order to ensure the protection of children who are alleged to have committed offences. In the meanwhile, steps have been taken to ensure that children arrested by the police receive proper treatment.

One-stop child justice centres

A premier South African example of the implementation of practices designed to improve the overall ill-treatment of children in conflict with the law is found in 'one-stop child justice centres'. The intention of the one-stop child justice centre is to bring together police, social workers (or probation workers) and a dedicated court to deal with juvenile cases under one roof. The benefits are improved access to diversion; shorter detention and awaiting trial periods for children; better quality services aimed at respecting the rights of children, and enhanced coordination between the various departmental officials who play a role in processing cases involving children in trouble with the law.

There were, at the time of writing, three one-stop child justice centres in South Africa, the first of which was established as a pilot project at Stepping Stones in Port Elizabeth.[189] At each of the three centres, a partnership has been entered into between the departments of Social Development, Justice and SAPS in order to provide for the expedient and effective management of juveniles. The centres adopt a holistic approach: arrested children are charged, assessed and appear in court at the same locality in order to ensure a coordination of services.

The police component includes a dedicated charge office, dedicated staff and awaiting trial cells within the centre. This means that the first port of call for many children is a facility dedicated to juveniles where they will have no contact with adult offenders.

The enthusiasm, creativity and resourcefulness of the staff at the [Port Nolloth] Centre ensures that the young people from the rural Richtersveld also experience an effective, streamlined child justice service

186 South African Police Service Code of Conduct available at www.saps.gov.za.
187 The Beijing Rules [1985]
188 General Assembly Resolution 45/113 of 14 December 1990.
189 The other two centres are at Mangaung in the Free State and Port Nolloth in the Northern Cape.
190 Article 40 Volume 5(2) July 2003: 3.
191 Senekal, A. 'Mangaung – the most recent One-stop Child Justice Centre', Article 40, Vol. 4 No.4, December 2002: 2
192 Inspector Tumelo Mofokeng, 'The police at the One-stop Child Justice Centre', Article 40, Vol. 4 No.4, December 2002: 5

that is empowering and in their best interests.

At the Mangaung one-stop centre in the Free State, the SAPS office has six holding facilities equipped with beds, bed linen, toilets and basins; there is under-floor heating for the winter. Each holding facility has a bell so that the children can call for assistance when necessary.[191]

Nine police officials and nine guards work at Mangaung on a 24-hour shift basis. Their general tasks include:[192] receiving children after arrest and making immediate contact with a probation officer; making efforts to release children into the care of their parents and detaining them only as a last resort; providing food for the children in the holding facilities; taking children to the doctor if the need arises, and transporting children to their homes if they cannot pay for transport.

> *An average of 50 percent of all cases [at the Mangaung One-Stop Child justice Centre] are diverted or developmental interventions...90 percent successfully competed diversion programmes and as a result their cases were withdrawn.* [193]

The police officials stationed at the centre have undergone training and motivational sessions conducted by the centre manager.

Intersectoral training and police involvement in facilitating community based alternatives

During the period October 2001 until May 2002, intersectoral training on child justice was undertaken on behalf of the Department of Social Services, Arts and Culture in the North-West Province.[194] The training involved key role-players in the criminal justice system – such as probation officers, prosecutors and the police. The training activities included instruction on the theory and practice of family group conferencing and restorative justice; diversion and the law; arrest, reception and referral, and intersectoral collaboration.

> *The training on restorative justice and family group conferencing included a practical component;trainees were expected to apply their knowledge in a real life situation. The police officers who participated in the course took this to heart and subsequently ran a number of interventions. In Rustenburg, for example, SAPS Inspector Mooki ran two family group conferences – the first relating to a charge of culpable homicide and the second to a charge of attempted murder. Both matters were resolved successfully.*

One of the probation officers involved in the training solicited the assistance of the local police in a very innovative way.[195] Faced with a situation involving four children thought to be living on the street, who had been charged with housebreaking and theft and were not being diverted, she arranged house arrest pending the trial in order to try to unite the children with their parents, making compulsory school attendance a condition. The monitoring of the children was done by the parents, the probation officer and the investigating officer. On successful completion of the programme, the probation officer had the following to say about the involvement of the investigating officer:

> *What was particularly encouraging was the willingness of the investigating officer to participate in the programme. He monitored the children every day by visiting their homes, even though he did not live in their area!*

This then is an excellent example of intersectoral collaboration and participation in child justice processes, and shows that an individual can make a difference and also influence others to follow their good example.

Some positive outcomes from the training as far as the police are concerned are that it has improved team spirit among stakeholders responsible for child justice, and the number of children awaiting trial in prison and police cells has been substantially reduced.[196]

SAPS standing orders

SAPS in South Africa have drafted a number of instructions to inform police officers about the manner in which they should execute their duties. A number of standing orders are relevant to juveniles deprived of their liberty. These are:

∑ Standing Order (G) 341 – Arrest and the treatment of an arrested person until such person is handed over to the community service centre commander.
∑ Standing Order (G) 349 – Medical treatment and hospitalisation of a person in custody.
∑ Standing Order (G) 350 – Use of restraining measures.
∑ Standing Order (G) 361 – Treatment of persons in the custody of the Service from arrival at the police station.

A sample of some of the relevant provisions includes the following:

Arrest and treatment of an arrested person until s/he is handed over to the community service centre commander: This Standing Order notes that the object of arrest is to secure attendance at a trial and should not punish, scare or harass.[197] The requirements for a lawful arrest are as follows: the arrest must be properly authorised; the member carrying out the arrest must exercise physical control over the arrested person; the person arrested must be informed of the reason for the arrest and his or her rights as an arrested person, and brought to the appropriate place as soon as possible. Searching is allowed but this must be done in a decent manner which displays respect for the inherent dignity of the arrested person. A person may be searched only by a person of the same gender.

Medical treatment and hospitalisation of a person in custody: Once arrested, a SAPS member has a legal duty to take care of the arrested person: should the arrested person show signs of serious illness or injury, the member must exercise discretion and decide whether to take the person for urgent medical treatment. If so, the member must decide whether the person is fit to be transported by police vehicle or requires an ambulance. If 1the member is in doubt, s/he should take steps to arrange for such treatment.

Treatment of persons in the custody of the service from arrival at the police station: Certain definitions need to be noted in relation to this standing order. 'Appropriate adult' in the case of a juvenile means his or her parent or guardian or the person in whose care the parent or guardian has placed the juvenile; alternatively, this may be a probation officer or social worker or correctional service officer, the station commissioner or a responsible member of the public older than 18 years.[198] In the case of juveniles, the member effecting the arrest or another responsible member must ascertain the identity of an appropriate adult and must as soon as practicable inform her or him of the arrest, the reasons why and the place where the juvenile is detained

Safe custody of arrested persons: In certain circumstances, persons arrested on the same charge or for the same case must be held separately. Males and females must be held separately. If circumstances permit, sentenced and unsentenced persons should be separated. Juveniles should be detained only as a last resort and held separately from adults. Persons alleged to have committed violent crimes should, wherever reasonably possible, be

193See the theme issue on the Mangaung One-Stop Child Justice Centre in Article 40 Volume 4(4) 2002.
194Julia Sloth-Nielsen, 'Training in the North-West Province leads the way', Article 40, Vol. 4 No.2, July 2002: 1-2
195Ellen Modiboa, 'Phone Ellen', Article 40, Volume. 4(2), July 2002: 5
196Miche Sepeng, 'North-West Province Department of Social Services, Art, Culture and Sport: Training of responsible for Reception, Assessment and Referral Centres', Article 40, Volume. 4(2) July 2002: 2
197page 2
198page 1

kept separately from persons charged with less serious crimes.

These orders are quite comprehensive, given that detention by the police is not really institutional care. In addition, certain constitutional guarantees are emphasised – such as, presumption of innocence, prohibition of cruel inhuman and degrading punishment and detention of juveniles as a last resort. These give practical substance to constitutional provisions and requirements set by international instruments.

Human rights and policing

SAPS has also developed a human rights and policing training programme for all SAPS trainers, legal advisors and police stations.[199] The foundation on which the training was based is the South African Constitution (Act 108 of 1996), the Criminal Procedure Act (Act 51 of 1977), the Universal Declaration of Human Rights and other international instruments. The training package consists of a resource manual and presentation guide for trainers, an information workbook on human rights and policing; training videos and posters, a copy of the South African Constitution and a copy of the International Human Rights Standards for Law Enforcement.

It is considered that this programme will go a long way towards instilling a human rights basis for the work and responsibilities of members of SAPS.

POLICE PRACTICE IN KENYA

Implementation of a new approach to dealing with children in trouble with the law

One of the biggest challenges facing the administration of juvenile justice in Kenya is the fact that most children who find themselves in trouble with the law are not offenders in the strict sense of the word, but rather in need of care and protection.[200]

A collaborative effort to try to combat this problem was the establishment of a strategic alliance spearheaded by the Department of Children's Services.[201] This comprises relevant government departments and includes the police, the probation department and the judiciary as well as international and national NGOs.

Following on this, a diversion pilot project was developed by Save the Children UK in 2001. The pilot was run in three urban districts: namely, Nairobi, Nakuru and Kisumu. Its aim is to divert children who have not committed criminal offences away from the juvenile justice system and into community based alternatives.[202] The police play an integral role in this project as they represent the entry level for children into the diversion programme.

Police desks have been established at police stations, manned by specially trained police officers with proper facilities to manage children arrested for committing offences or in need of care and protection. These desks fall under the supervision of a 'core team' of juvenile justice role-players, including the Children's Department, Probation Department, the police and selected NGOs.[203] To enable the day-to-day functioning of the diversion project, a district core team made up of representatives of each of the above role-players is the first point of reference for the police officers involved.

The functions and responsibilities of the police are set out in the standard manual for diversion procedure.[204] They must separate children from adults once they arrive at the police station; registering them and determine which of three categories the children fall into – those in need of care and protection, those in need of protection but requiring discipline, and those who have committed offences. Once a child is classified, they must inform the district diversion coordinator and transport the child to the district diversion office for interviewing.

This project provides a very good example of the pivotal role the police can play in diverting children away from the criminal justice system. As the first port of call, they can ensure that children proceed no deeper into the system than is necessary.

POLICE PRACTICE IN GHANA

Ghana was the first country in the world to ratify the UN Convention on the Rights of the Child in 1990. This move towards ensuring legislative reform of child law was preceded by the establishment of the Ghana National Commission on Children in 1979. In 1995, the Commission established a multi-sectoral Child Law Reform Advisory Committee to investigate, review and make recommendations to government for appropriate changes in the law. One of the role-players on the Committee is the police.[205]

This law reform process has had three main results:

- The Criminal Code (Amendment) Act 1998, which increased the minimum age of criminal responsibility from 7 to 12 years of age.
- The Children's Act (Act 560 of 1998), which deals with the development and social wellbeing of children.
- The Juvenile Justice Bill (2003), which deals with the prevention of delinquency, constructive and humane sanctions for juvenile offenders and general provisions for juvenile justice.[206]

Women and Juvenile Unit

During the law reform process, an innovative practice was introduced through the establishment of a division unit within the Ghana Police Service known as the Women and Juvenile Unit (WAJU). The unit was set up on 26 October 1998 as a result of the increase in domestic violence cases, and reports that some police stations were referring to domestic violence matters as 'family and private problems'.[207]

While WAJU was established in response to the increasing number of cases involving abuse and violence against women and children – and primarily to support victims – its crucial functions also include handling juvenile offences and child delinquency.[208] For example, when a crime is reported and the alleged perpetrator is a child, an officer from WAJU will go to the alleged perpetrator's house in plain clothing to inform the parents of the charge against the child. The purpose of the use of plain clothes is to avoid intimidating the child. A statement is taken from the child in the presence of his or her parent(s) or guardian and, when the circumstances require that the child be detained in a police cell, s/he is held separately from adults until the first appearance in court. Holding a child may occur if the parents cannot be located or the child lives on the street.

199 Available at www.saps.gov.za.
200Save the Children UK [2001]: 12
201Save the Children UK [2001]: 12
202See the chapter on Diversion for more detail on this project.
203Draft Guidelines for the Implementation of the Diversion Strategy for Protection and Care Cases in the Juvenile Justice System, p. 2.
204An annexure to the Draft Guidelines for the Implementation of the Diversion Strategy for Protection and Care Cases in the Juvenile Justice System.

205
206
207Anin-Botwe, Gifty [2001] November.
208Anin-Botwe,Gifty [2001] November. Other functions include investigating all female and child related offences, handling cases involving domestic violence, handling cases of child abuse, prosecuting these cases where necessary and other functions as may be directed by the Inspector General of Police.

WAJU is also involved in crime prevention initiatives. The unit visits schools to educate children on issues relating to sexual abuse, child abuse and neglect and also holds discussions on how to avoid getting involved in criminal activity and ways in which crime can be reported to the police. In addition, WAJU holds talks at church and community gatherings to raise awareness among parents on how to protect their children from abuse and how to prevent their children from getting involved in crime or becoming victims of crime.

The establishment of specialised units within national police forces to deal with children in conflict with the law is in line with Rule 12 of the Beijing Rules. This recognition of the special status and vulnerability of child offenders is a practice that all police forces should aspire to.

POLICE PRACTICE IN NAMIBIA

Namibia's new juvenile justice legislation is in the process of being drafted and finalised. Nevertheless, a current initiative to manage young child offenders has been established by the Legal Assistance Centre in Windhoek: the Juvenile Justice Programme.

Juvenile justice programme, Windhoek

One of the central features of the programme is the involvement of the police. The roles and responsibilities of the police in the running of the project include the following:[209]

- Partnering with schools, parents, social workers in order to prevent crime
- Participating in a Juvenile Justice Forum in each town and region together with local magistrates, social workers, prosecutors and youth officers to monitor and ensure the implementation of juvenile justice
- Designating a police officer to every child that is arrested, to manage the case from the time of arrest until the matter is referred to court
- Informing parents of an arrested child of his or her arrest and investigating the possible release of the child into the parents' care in non-serious matters

The specific functions of the police in relation to crime prevention strategies are to create awareness and sensitivity on the responsibilities of children in schools;[210] and to create awareness in communities, particularly where there is a high prevalence of crime. Outreach programmes to reach children and youth are held in schools, churches, youth centres and communities. The emphasis is on community policing.

This example illustrates the good cooperation that can be achieved between the police and NGOs in order to facilitate the management of child offenders in the absence of formal legislation.

Windhoek police station

Another good example of Namibian police practice can be found at the Windhoek police station.[211] Many police stations are not equipped to handle children, as their main focus is on adult offenders. However, the police station in Windhoek has a juvenile section with adequate staff, specifically mandated to deal with children in conflict with the law. The children are kept in separate cells and segregated according to their gender. The station has a television room and a hall for indoor games. The cells have adequate toilet facilities and the children are provided with blankets and light mattresses.

This may be seen as an attempt at ensuring some measure of compliance with the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and that children's rights to be kept separate from adults and recreation and leisure and hygiene are being attended to.

209Ehindero, S [2003]: 4-6
210Oti Anukpe Ovrawah [2003]: 1
211Juvenile Justice Administration Report on International Field Visits in Juvenile Justice Administration to Malawi, Namibia, South Africa and the United Kingdom, Abuja, Nigeria, June 2003, p. 11

POLICE PRACTICE IN ZAMBIA

A training manual has been drafted for all juvenile justice role-players in Zambia, including the police. The intention is to introduce them to the administration of juvenile justice and inform them of the rights of children who come into conflict with the law. As far as the police are concerned, the manual can be used for the basic training of new recruits as well as advanced training for commanding officers and detectives. The manual will be used for the training of all new police recruits in police college, where a dedicated module on juvenile justice is to be introduced. This is an important innovation towards ensuring that there is standard sensitisation and information on juvenile justice at the outset of a police officer's career.

Child friendly police practice

Three dedicated pilot sites have been established in selected Lusaka police stations. Each has a juvenile justice desk office, staffed by police officers sensitive to child rights. These officers maintain a vigilant watch over any children in police detention, ensuring they are protected and held separately. In addition, they ensure that the children are provided with basic care such as adequate food. This is an exceptional practice in Zambia, considering that all persons in police detention are not provided with food at state expense and have to rely on their families for this purpose.

The initiative has benefited from the maintenance of a separate record concerning all children detained in police custody. An examination of these records shows that the specialised juvenile police officers have made innovative use of concepts such as police cautioning and the release of children on bond to minimise the deprivation of their liberty in police custody. The positive attitude of the juvenile police officers and their commanding officers lies at the heart of the child-friendly court project.

POLICE PRACTICE IN UGANDA

The Ugandan Children Statute of 1996[212] lays down a number of rules that govern police handling of child offenders. Section 90 of the Statute stipulates the following:

- The police must inform the parent or guardian of the child or Secretary for Children's Affairs on the arrest of the child
- An arrested child must only be interviewed in the presence of his or her parents or guardian and a probation officer must be present during the interview
- The child must be detained separately from adults
- The child must be released or taken to court within 24 hours
- A female child must be under the care of a police woman during interrogation and custody

These provisions have been elucidated further in the police guidelines drawn up by a special task group; these now enjoy official status within the Ugandan Police Force.[213] The guidelines contain some important provisions[214]. For example, where possible, all cases involving children in conflict with the law must be handled by the Child and Family Protection Unit. Although originally established to deal with issues of violence against women and children, the Unit has extended its reach to juvenile offenders.[215] Where the circumstances of the offence are not serious, where the child shows remorse and is a first offender, the police must caution the child and have him or her released. Where the police are of the opinion that a child in conflict with the law is not a danger to the community and the safety of the child is not at stake, the police must

212Act 6 of 1996
213'Implementation of the Children's Statute 1996 -- Police Guidelines' published with the support of Save the Children Fund (UK)
214Partnership for Global Good Practice [2002]: February
215Kasingye, Asan [2003]: 3

release the child on police bond. A police officer investigating a case where a child has appeared before a Family and Children Court and a plea of not guilty has been entered must ensure that investigations are completed in a period of less than one month and, where, owing to the seriousness of the case, the matter is before the High Court, the maximum period of investigation must not exceed three months. The police may not release any information that is likely to affect the welfare of the child in conflict with the law, nor disclose the identity of the child except where it is absolutely necessary for the purpose of carrying out the relevant investigations.

As far as good and innovative practice is concerned, the police have, in some cases, drawn in willing members of the public as 'fit persons' where the parents or guardians of the child cannot be traced. Such persons attend the police interview and the subsequent process after release. The positive effect of this practice is evident from the following account by a child:

> *Milly [member of a community based organisation] stood by me at police. After being released she visited me regularly and provided counselling and guidance that has helped me to stop stealing. I am a total orphan dependant on my uncle who does not provide for me. But despite my hardships, I no longer steal because my 'mother' [Milly] regularly guides me.*[216]

The Childcare and Family Protection Unit is involved in a number of activities.[217] One of these involves conducting crime prevention programmes with Community Liaison Officers throughout the country: at schools, local councils, religious institutions and tertiary education institutions. Workshops are also conducted for district police leadership, officers-in-charge, district political leadership, administrative officers, religious leaders and judicial officers. They cover various crime prevention issues as well as the prevention of juvenile crime.

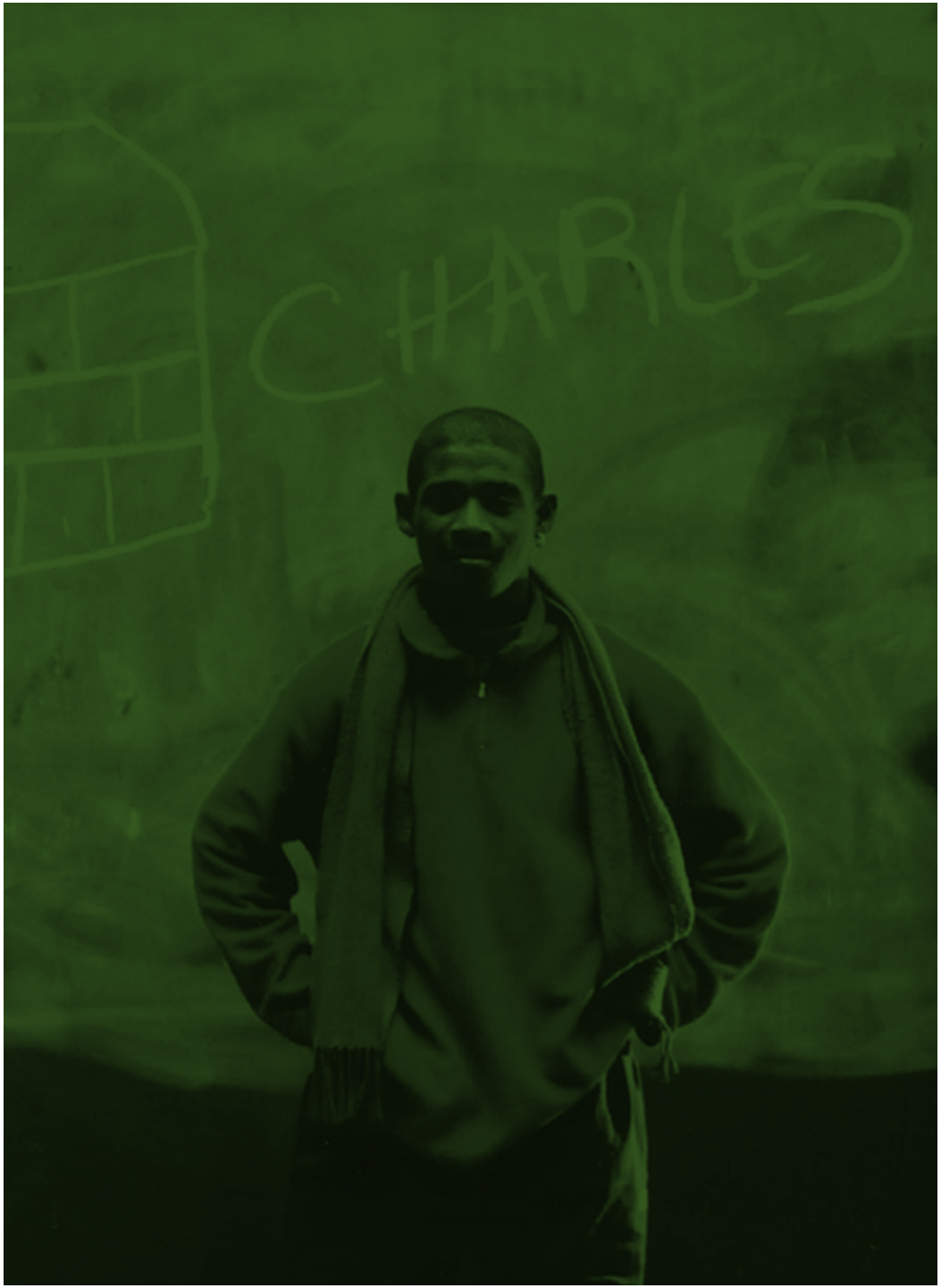
The Unit also arranges counselling for juveniles and their parents or guardians; this involves making use of family group conferences. It also refers cases involving children to other agencies and organisations which can try to find a mediated solution to the matter. These include local government courts which impose non-punitive measures and divert cases.

The Ugandan model presents an exceptional example of how legislation and practice can complement one another, especially in the arena of police practice. The fact that the police are so closely involved in juvenile justice lends credibility, in the eyes of the public, to necessary solutions and interventions in child justice.

CONCLUSION

This chapter has illustrated a number of good police practices that can be found in Africa at present. Each is different and has its own intrinsic value in the respective countries. Yet they are similar in focus and simple enough to be replicated in countries that have not yet introduced such practices.

216Kakama [2002]: 6
217Kasinye, Asan [2003]: 4 – 6.



CHAPTER 12

PROBATION OFFICERS AS ROLEPLAYERS

CHAPTER 12

PROBATION OFFICERS AS ROLEPLAYERS

Daksha Kassan

INTRODUCTION

Probation services are integral to the management of children in conflict with the law. Not only are these services of importance once the child enters the criminal justice system; they are also critical to prevention. It is the probation services that devise the most appropriate recommendations before the matter of an alleged child offender goes to trial, and then assist the child offender to become a rehabilitated and responsible citizen.

PROBATION AND PROBATION PRACTICE

Probation is a method of dealing with specifically selected offenders. It is a feature of the criminal justice system and often (though not exclusively) entails the offender being placed under personal supervision or provided with treatment or other assistance. The aim is to rehabilitate the offender and allow for his or her social reintegration.

As the practice of probation has developed in the modern context, it is also characterised by crime prevention, early intervention and aftercare services. Some definitions of probation include:

> *Probation is a method of punishment with a socio-pedagogic basis, characterised by a combination of supervision and assistance. It is applied under the free system to offenders selected according to their criminological personality and their receptiveness, in relation to a system whose aim is to give the subject the chance of modifying his approach to life in society and to take his place in the social environment of his choice without the risk of violating a penal norm again.*[218]

> *probation is a method of dealing with specifically selected offenders and . . .consists of the conditional suspension of punishment while the offender is placed under personal supervision and is given individual guidance or 'treatment'.*[219]

> *probation is a social function delivered to offenders and their families within a criminal justice system.(Quote from an interview)*[220]

SOUTH AFRICA

The Probation Services Act (116 of 1991) details the powers, functions and duties of probation officers in South Africa, and provides for the establishment and implementation of programmes aimed at combating crime, and the rendering of assistance to and treatment of certain persons involved in crime and related matters.[221] Probation officers are generally social workers appointed specifically to render probation services prescribed by this Act or any other law.

The powers and duties of probation officers include:

- investigating the circumstances of the accused;
- helping a probationer comply with his or her probation conditions in order to improve social functioning;
- immediately reporting to the courts where a probationer fails to comply with his or her conditions;
- reporting to the court on the progress and supervision of, and the compliance with, probation conditions by a probationer;
- conducting information classes, and
- planning and implementing programmes.[222]

218Definition provided by Cartledge et al as quoted by Robert Harris [1995]: 3

219Definition of United Nations 1951:4 as quoted by Robert Harris [1995]: 4

220 Telephone interview held with Dr Stan De Smidt, Head of Probation Services, Department of Social Services and Poverty Alleviation, Western Cape Provincial Administration on 19 August 2003.

221Preamble of the Probation Services Act 116 of 1991.

222Section 4 of the Probation Services Act 116 of 1991.

It is clear that, in fulfilling their duties, probation officers take on various roles: as investigators, supervisors, crime 'preventers' and planners and implementers of programmes. Moreover, with the notion of restorative justice becoming a common feature of the criminal justice system (and especially considering the provisions of the Child Justice Bill[223], which provide for family group conferences and victim offender mediations), probation officers are also becoming conveners and mediators in restorative justice initiatives. Furthermore, their emerging involvement in pre-trial procedures (where they perform assessments of children immediately after they have been arrested or charged with a crime) adds a new dimension to their profile, as they can also be seen as early intervention pre-trial or assessment officers.

ASSISTANT PROBATION OFFICERS

As has been seen, the probation officers carry a phenomenal load. It had been found that, owing to a huge workload and lack of capacity, probation officers were not able to render supervision services to probationers, nor were they able to deliver crime prevention and crime awareness programmes to communities and the public at large. This was the thinking behind the introduction of a new category of employees within the Department of Social Development in South Africa: assistant probation officers. Assistant probation officers are appointed primarily to assist probation officers in carrying out the probation services and functions required by the Probation Services Act.

Prior to the 2002 amendment to the Probation Services Act, assistant probation officers were appointed to pilot projects in various provinces; the first group was appointed in the Western Cape in 1998. Feedback from probation officers during the 2001 field research[224] was very positive. They said that they were better able to manage their workloads and could concentrate on their other duties. For example, probation officers had more time to visit police cells, perform speedy assessments and prepare pre-sentence reports. They were kept informed about children who had been arrested or were in custody due to regular visits to police cells by assistant probation officers. Communities and schools were also informed of the probation services offered in their area and many more schools were visited by assistant probation officers, who delivered crime prevention and crime awareness talks and informed children about issues relating to drug and alcohol abuse.

Following on the success of the pilots, an advisory group consisting of members of the Department of Social Development and other key role-players saw the need to appoint assistant probation officers, whose main focus was to render probation services to children who came into conflict with the law.[225]

The new assistant probation officers did not require a formal qualification in social work. The formal qualifications they held ranged from senior certificates to diplomas in teaching, human resource management, information technology, marketing and tourism.[226] However, within a month of their appointments, they received formal and informal training on developmental assessment, criminal justice legislation and legislation relating to children, understanding the criminal justice system and government structure, interviewing skills and diversion.

The introduction of assistant probation officers has meant that probation services can be offered when a child enters the criminal justice system or when the child offends; it has also made possible the provision of preventative services such as crime prevention and crime awareness campaigns, which were not previously

223B49 -2002

224D Kassan, 'Assistant Probation Officers -- A Desperate and Definite Need Article 40, Volume 3 (4), November 2001. See also D Kassan [2002] August

225D Kassan, 'Assistant Probation Officers -- A Desperate and Definite Need Article 40, Volume 3 (4), November 2001; D Kassan [2002] August

226This information was gathered during a study undertaken by D Kassan in 2001; it should be noted that this study was limited to only two provinces, namely the Western Cape and Mpumalanga. See D Kassan [2002] August

delivered because of the other statutory functions with which probation officers are occupied. Assistant probation officers also assist probation officers with gathering the information needed for pre-sentence reports; they assist with supervision and monitoring services, freeing up the probation officer to perform other statutory functions, and they make probation services visible within the communities....with the appointment of assistant probation officers, probation services were given new meaning and were made visible within the communities. (Quote from a supervisor)

THE ROLES PROBATION OFFICERS PLAY IN DELIVERING SERVICES

PO as family finder

Once a child is arrested, it is of utmost importance that the child's parents are informed. This duty is often placed on the arresting officer. However, since the probation officer also needs to be informed of the arrest of the child and must make an assessment of the child, the probation officer also takes on the task of tracing the parents or family.

Since this can take a great deal of time, and because probation officers are often under pressure to complete various other reports and tasks, volunteers are appointed to perform this duty in some cases. Known as 'family finders', their task is to trace the parents or family of the child. Where 'family finders' are not appointed, the assistant probation officer carries out the task.[227]

PO as supervisor/monitoring children awaiting trial

In South Africa, a very innovative programme, initially known as the 'house arrest' programme (now called 'home-based supervision')[228], was initiated in the Western Cape[229] in 1998. This programme generally entails the supervision or monitoring of children awaiting trial and allows for them to remain in their family settings while awaiting trial. This programme was devised because, due to the overcrowding in places of safety and a shortage of such facilities, children awaiting trial could no longer be held in custody where the circumstances warranted it.

The programme allows for the alleged child offender to remain in his or her family setting and to continue with schooling. 'House arrest' as an option is often recommended where the alleged child offender lives at a fixed address and has a stable background.[230] An assistant probation officer will visit the child at least three times a week, at any time and on any day of the week, to ensure that s/he is complying with the conditions (if any) stipulated by court, and also to ensure that the child is staying out of trouble or not committing further crime. The assistant probation officer will also consult with the family members about whether they are experiencing any problems with the child. The assistant probation officer also becomes a role model, confidant and mentor, establishing a relationship with the child that sometimes results in a positive change in attitude and behaviour of the alleged child offender. Where the child is not attending formal school, the assistant probation officer will assist the child to find employment, thereby enabling an environment in which the child can learn to be responsible.

While this programme was initially aimed at children awaiting trial, it is currently being developed to serve as a sentencing option and a diversion option.[231]

227Assistant probation officers were appointed to assist probation officers in carrying out their tasks and functions as listed in the Probation Services Act. Assistant probation officers generally carry out activities relating to crime prevention, supervision and monitoring and tracing parents of the child offender. See D Kassan [2002] August

228 Telephone interview held with Head of Probation Services on 1 October 2003.

229The Western Cape is one of the nine provinces in South Africa

230 Telephone interview with Head of Probation Services on 1 October 2003

231 Telephone interview held with Head of Probation Services on 1 October 2003

PO as sentence recommendation officer

In South Africa, probation officers are called upon to fulfil a very prominent role following conviction. This entails providing the court with a pre-sentence report just before the court passes sentence. The aim is again to provide the court with a full history of the child's background and family or home circumstances, and to recommend the most appropriate sentence in the circumstances. The report will also take into account the seriousness of the offence and the interest of the community.

The process also entails an investigation which comprises interviews or consultation with the child offender, the child's family, school teachers, any previous social workers who had interacted with the child or any agency which had rendered a rehabilitation service to the child.[232] In some instances, assistant probation officers assist with the gathering of the information to enable the probation officer to compile the pre-sentence report.[233]

It should be noted that, while there is no legal provision currently requiring that a pre-sentence report must be provided to the courts, the South African courts have in recent judgments emphasised the importance of a pre-sentence report before imposing sentence on child offenders. For example, in a number of cases, sentences were set aside by a higher court because the lower courts had not obtained a probation officer's pre-sentence report before passing sentence.[234] In one case, the court concluded that:

> *...it is difficult to see how the magistrate could properly have determined an individualised punishment suitable for the needs of this offender without the benefit of a pre-sentence report.*[235]

However, law reform proposals have resulted in pre-sentence reports becoming mandatory in respect of offenders under the age of 18 years. In this respect, the Child Justice Bill provides that, unless the offender is charged with a schedule one offence[236], or requiring a pre-sentence report would cause undue delay, a court imposing a sentence on a child offender must request a pre-sentence report.[237] The Bill further provides that a pre-sentence report may not be dispensed with if the court imposes a sentence with a residential requirement.[238]

Similarly, in Ghana, the practice has developed where the court requests a social enquiry report before imposing a sentence on a child offender. This report also includes particulars on the background of the child, the circumstances under which the offence was committed and a recommendation regarding the most appropriate sentence to be imposed.[239] Section 24 of the Ghanaian Juvenile Justice Bill[240] makes the furnishing of a social enquiry report before sentencing compulsory.

In Uganda, too, after a charge is admitted or later proved, a written social background report prepared by the probation and social welfare officer is a pre-requisite to both detention and probation orders and any other orders that the court may render.[241]

In Kenya, probation officers present confidential social inquiry reports to the court, with the purpose of recommending how best a child offender who is found guilty can be rehabilitated.[242]

The above clearly indicates that a pre-sentence report or social inquiry report is an important requisite before a court imposes a sentence on a child offender.

232 Telephone interview with probation officer on 1 October 2003.

233D Kassan [2002] August

234Sloth-Nielsen, J [2001] footnote 169 where reference is made to S v Kwalase 2000 (2) SACR 135 (C); S v Nkosi (case 1311/99 TPD unreported); S v D 1999 (1) SACR 122 (NC).

235Article 40 Volume 4(3), October 2002: 11

236These are generally the less serious offences such as theft of goods under a certain value, etc.

237Section 62(1) and 62(4)(a) of Bill B49-2002

238Section 62(4)(a)

239Kassan [2003] July Report on the Ghanaian Juvenile Justice System in Light of Best Practices and New Developments, Unpublished report, Children's Rights Project, Community Law Centre, July 2003

240January 2003 version

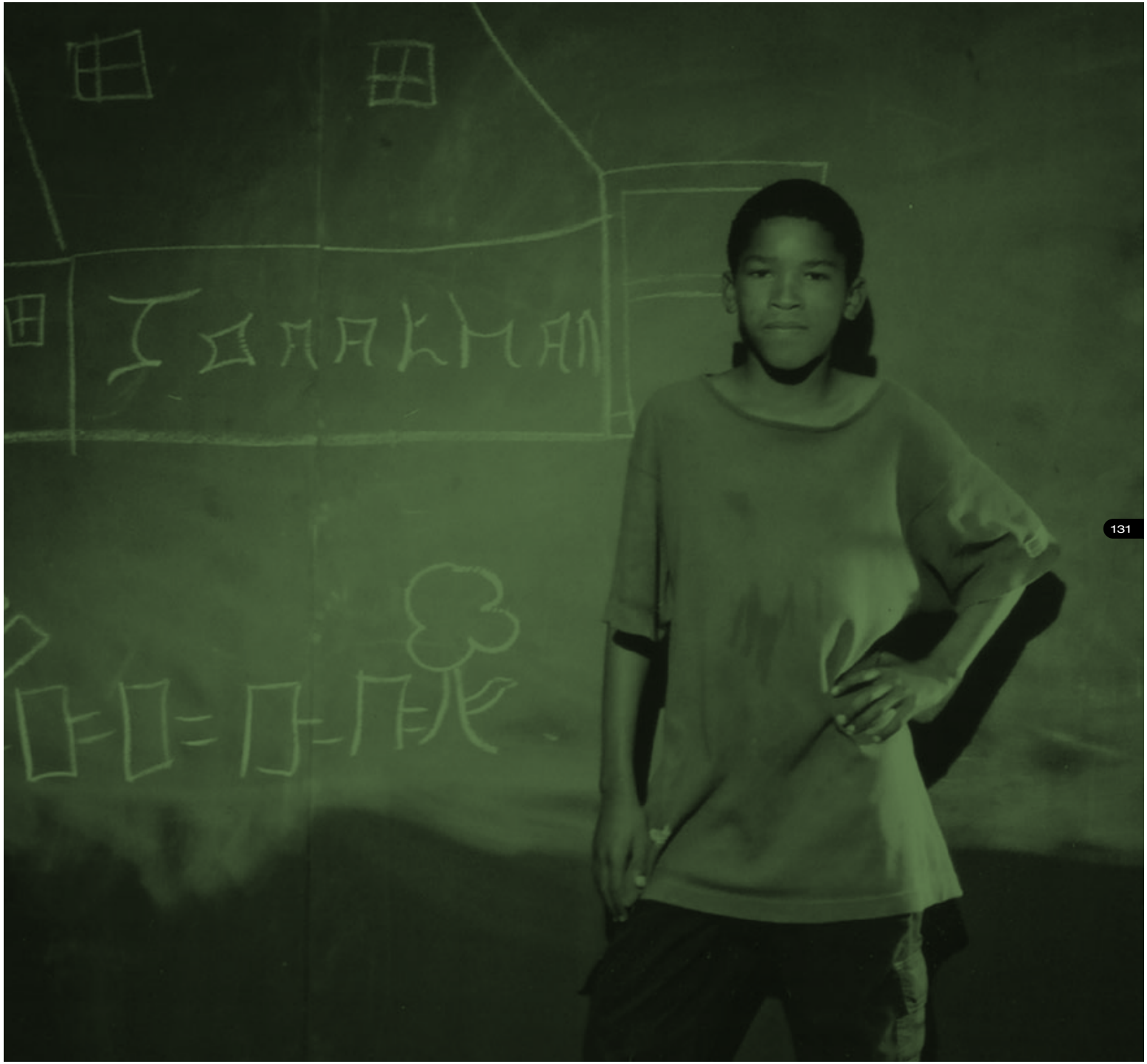
241Odongo G O [2003b]

PO's other duties towards convicted children

In Kenya, even when the child offender is sentenced to serve a period of detention in an institution (known as borstals), probation officers continue to play a role with social assessments and are tasked with preparing two reports.[243] An initial report is a brief to the manager of the institution about the child offender, the family and home background and recommendations on what measures can be taken towards the rehabilitation of the offender. The second report, known as a 'final home report', reflects the attitude of persons at home or in the community, with a view to assessing the potential success or constraints in attempting the eventual reintegration of the offender back into the community or family.

In addition, the probation officers also run 'aftercare services' for the *Borstals*, with a view to the child's successful reintegration. This may entail resource-assistance for those who undergo successful vocational training to enable them to apply their skills in the wider community once they are released.

242Odongo, GO [2003a]
243Odongo, GO [2003a]: 25



CHAPTER 13

JUSTICE OFFICIALS AS ROLEPLAYERS

CHAPTER 13

JUSTICE OFFICIALS AS ROLEPLAYERS

Julia Sloth-Nielsen

Diversion programmes in Africa are still evolving. Despite difficulties with legislation or its absence, it is clear that diversion services are seen as beneficial and that there is a demand for them. The problem is that these services are often not as widely available and accessible as they should be. It is in this context that this chapter attempts to describe how society may introduce, sustain and develop diversion and specific diversion initiatives – whether for a particular target group of children or with few available resources. At the end of the day, success depends on a willingness to succeed and respond to an identified need, together with the insight and knowledge to draw up a plan.

It is important to learn from good diversion practices as these will lead the way when diversion is formalised in the various pieces of legislation. There is also a clear need for programmes that children can be referred to.

It may be useful to examine programmes that have been established by justice officials to cater for the different needs of children, both in order to learn from their experiences and, with luck, to obtain insight into the challenges they faced and overcame in order to run successful programmes.

The following project offers an excellent example of how one enthusiastic and committed justice official was able to establish a project in a small town in South Africa, bringing together all the role-players that make this project a success.

Diversion by presiding officers

Although presiding officers are technically not supposed to be involved in diversion arrangements, field research[244] undertaken in juvenile courts in the Cape Town area has revealed that magistrates are, in fact, playing a hitherto unacknowledged yet important role in screening children out of the criminal justice system:

> Regarding prosecution of children aged under fourteen years…there was evidence of a presumption by the magistrates that, unless it is a very serious offence, the matter would already have been diverted. This presumption operates very powerfully [as illustrated by one respondent saying] 'if a matter appears in front of me which warrants either diversion or referral to the Children's Court, I would be furious with the prosecutor and would consider it a very serious matter, and consider disciplinary steps against the prosecutor.'[245]

Magistrates reported that they had often recommended referrals to the welfare-oriented children's court (where an inquiry into the care needs of the child can be held), despite negative attitudes from prosecutors keen on pressing criminal charges.[246] The overall findings of the research indicated that magistrates played a proactive and interventionist role where they deemed diversion or withdrawal of charges appropriate.

The level of this influence varied from direct involvement – 'I have introduced practice in my court of automatically withdrawing charges for under 14 year olds if the offence is not serious' – to less overt strategies – 'if a matter is brought before me which I consider should have been diverted, I'll make suggestions from the bench. If the prosecutor doesn't take my lead, I might adjourn and discuss the matter with him in my office'.[247]

Judicial officers can also use their creativity and local knowledge to develop imaginative alternative outcomes, even where these are not expressly provided for by legislation. They can usually be tailored within the confines of broader provisions permitting suspension or postponement of the passing of sentence on conditions. By setting innovative conditions, judicial officers can often achieve the aims of making children accountable for the harm caused far better, whilst at the same time fostering their reintegration into society.

244 Sloth-Nielsen J & V Mayer [2003]
245 Sloth-Nielsen J & V Mayer [2003]: 95
246 Sloth-Nielsen J & V Mayer [2003]: 95
247 Sloth-Nielsen J & V Mayer [2003]: 91

A large urban court in South Africa some years ago used the children's familiarity with, and love of, the icons of soccer. A roof to ceiling poster of a national hero – a boy who had risen from a situation of adversity to triumph as a member of the national team – was prominently displayed, taking up virtually an entire wall of the court room. Frequently the case would culminate in the magistrate handing the child a yellow card – the final warning on the soccer field. A lecture about keeping on the straight and narrow like the hero in the poster followed, with a warning that the next time the child appeared, a red card would have to be issued. The children understood the metaphor for 'time out' quite adequately.

The question of who mobilises the community to develop a diversion response is critical to the success of the intervention. The value of leadership provided by a court official cannot be over-emphasised; after all, the court (prosecutor) has the final say on whether or not diversion is recommended. If the facilitator or leadership comes from other quarters – for instance the probation officer or community leader – the court official should be brought in as a partner to help develop the model. This process is very important because it marks the formalisation of community partnerships for diversion; in other words, it is the stage at which commitments from the courts and community members are sealed, and a common purpose and co-ownership is created.

Noupoort is a rural area located in the Northern Cape. It was an area that thrived economically and socially when the rail business operated by Spoornet was at its peak. In those times, Noupoort had an estimated 80 percent employment rate. When Spoornet pulled out of Noupoort, the life of the community changed, resulting in almost 90 percent unemployment. As a young population, Noupoort suffered under the strain of a poor economy and almost invisible social life; children and young people were caught up in a life of crime, mostly petty theft and housebreaking. Since Noupoort is far removed from big cities where most social facilities are located, the courts battled to deal with children who had committed petty offences, with no choice but to keep them in police cells. There were no viable diversion options in the area. The leadership for the development of a diversion model came from a magistrate who has authority in the field of child justice. He began a process of mobilising all sectors of the community – local government, women's organisations, youth clubs, organisations for older persons and so on..

The community decided on a model that teaches children life skills and the opportunity to be mentored by their peers. It was agreed that young people have a better chance of reaching out to other young people and influencing their behaviour positively. With the guidance of the magistrate, the diversion facilitators were linked with external organisations such as NICRO, which provided training and capacity development support. The model was also linked with potential donors and introduced to the provincial Department of Social Development for official recognition and future funding. The model that has been developed has not only achieved diversion outcomes in Noupoort, but has been successfully used as a prevention model in schools and in the community generally.

Prosecutors

The chief discretionary role is, however, played by prosecutors, at least in the South African legal system. Constitutionally accorded the position of gate-keepers as regards the withdrawal of charges is concerned, prosecutors have contributed enormously to the development of diversionary practice in South Africa. As was pointed out after an audit of prosecutorial decisions to divert,

> *…it is imperative for prosecutors not only to know and understand diversion, but also to appreciate the need for diversion in our legal system.*[248]

The audit revealed inconsistent and selective

knowledge of diversion on the part of the prosecutors polled, underlining the need not only for continuous training on diversion procedures and programmes, but also for guidelines or directives from the National Prosecuting Authority to assist prosecutors in the exercise of their discretion where young offenders are concerned. At the same time, subsidiary or secondary sources of authority (such as directives of policy) are frequently couched broadly and permit a wide margin of discretion.

In a busy court in a rural area of Limpopo province, a young prosecutor, fresh out of law school, has initiated a community service programme based in the court building itself. One of the clerks supervises the young men, who perform cleaning duties and contribute to maintaining the neatness of public ablution facilities. This is not an isolated example – a senior prosecutor in an urban court in Gauteng also organises cleaning, tidying and filing for young offenders as an alternative to prosecution and conviction, especially because the closest formal diversion programme is out of reach for many youngsters due to the transport costs involved.

Prosecutors have also played an important role in spearheading diversion development in various regions of South Africa. The South African Young Sex Offenders' Programme, Saystop, which now operates in three of the country's provinces, got off the ground after prosecutors called an interdisciplinary meeting to highlight the need for specialised programmes for children charged with sexual offences, due (amongst other things) to the many difficulties involved in successfully concluding trials in sexual offences cases.

The examples described have shown how, with very few resources to start out with, individuals can make a real difference. In addition, it can be said that the success of these initiatives is due partly to the fact that the leaders of these projects were officials from within the justice system and therefore commanded some level of respect from the community. These efforts demonstrate that diversion can occur outside of a formal organisation and with the commitment, insight and expertise of people dedicated to working in child justice.

Art class diversion in Brits[249]

In Brits in the North-West province of South Africa, it was a prosecutor who provided the initiative.

During 2001-2002, the North-West provincial Department of Social Services decided to provide training for its officials on the Child Justice Bill. The Department invited other state officials working on child justice. The training included sections on diversion, assessment and restorative justice.

One of the trainees was a prosecutor from Brits who, after the group discussion on diversion, decided to formulate a plan to support the children in her town.

She began by doing a quick assessment of the children appearing in her court and determined that the majority of offences were for housebreaking and theft. From community members, she found out that these crimes were committed mainly because of poverty and the absence of proper care at home. As a result, she decided to provide skills to children in trouble with the law in order to help them support themselves. She attached her initiative to the local NICRO 'Yes' programme (see Annexure A) and launched art classes for the participants. She taught them basic art skills, including drawing and mixing colours.

The significance of this programme lies in the fact that the prosecutor herself is running the programme over and above her normal duties as a prosecutor. This has not been easy as financing depends on the goodwill of the community. What is most heartening is the enormous difference that one inspired individual can make in harnessing the energy of other officials and providing much needed diversion for children in trouble with the law.

In preparation for the promulgation of the Child Justice Bill the end of this year, the North West Province Department of Social Services, Arts, Culture and Sport commissioned training for 55 people on policies and legislation governing child justice.
The course involved on-the-job training for six months. The delegates came from ten service points where Reception Assessment Referral Centres have been established.
It is the Department's opinion that the training was very successful in that it has prepared the province for the forthcoming changes to the child justice system. It is generally felt that the following positive results have been achieved as a result of the training programme:

- **The training has improved team spirit amongst stakeholders responsible for child justice.**
- **Departmental roles have been clarified.**
- **People are knowledgeable on legislation governing child justice and the proposed changes to the present system. It has promoted the principle of restorative justice.**
- **Cases are dealt with more timeously.**
- **The number of children awaiting trial in prison and police cells has been tremendously reduced.**
- **Officials from the Department of Justice are more willing to divert children.**
- **There is an eagerness amongst stakeholders to share resources in the ten RAR centres.[250]**

Intersectoral cooperation

The intersectoral co-operation required to push through change at a practical level has been evident in the establishment of the Mangaung one-stop child justice centre, which was launched in 2002 in the city of Bloemfontein in South Africa. However, meetings between stakeholders keen to drive the process had began some years earlier; it was through the commitment and dedication of the local magistrate together with the social worker who currently serves as centre manager that the project came to fruition. Now situated in a pleasantly renovated building, the centre consists of a small but child-friendly court room, offices for staff from the Department of Justice and the National Prosecuting Authority, offices for social workers and child care workers, a desk for police officials, and temporary detention facilities for children who have come into conflict with the law. The process leading up to the launch included the development of detailed protocols describing how the centre would function and who would bear responsibility for which tasks. Workshops with stakeholders who were going to be part of the staff aimed to iron out the nitty-gritty of working relationships, and to ensure that all role players shared a common understanding and vision for the centre.

Part of the success of the Mangaung endeavour can be seen in the increased use of diversion for young offenders: within three months of opening, nearly 50 percent of incoming cases were being referred to programmes, and the number of unfinalised and pending cases on the court roll had virtually halved.[251]

CONCLUSION

This chapter has highlighted innovations and initiatives by various government officials, after identifying a need in their communities or areas of jurisdiction. It reflects their commitment to 'going the extra mile' to ensure that systems are thorough and effective.

248Adv H Mukwevho "The role of prosecutors in enabling diversion" Article 40 Volume 3 (3): 1-3.
249 Taken from Breitenbach, B. 'Diversion in Brits'. Article 40, Volume 4(2) July 2002: 8

250Miche Sepeng, North West Province Department of Social Services, Arts, Culture and Sport
251A full issue was devoted to the activities at the Mangaung one-stop child justice centre in Article 40 Volume4(4) 2002.

CHAPTER 14

COMMUNITIES AS ROLEPLAYERS

CHAPTER14

COMMUNITIES AS ROLEPLAYERS

Buyi Mbambo

Injobo ithungelwa ebandla is a Zulu proverb that means: when something is wrong in society, bring it out into the open so that there can be community discussions and involvement in coming up with solutions.

South Africa's Child Justice Bill proposes that, as often as possible, children should be diverted from the criminal justice into appropriate community-based programmes. The role of the community in dealing with children accused of crimes cannot, therefore, be ignored. This is reflected in traditional African child rearing practices where the value and practice of *ubuntu*[252] characterises interpersonal relations amongst community members, and especially how children were treated in communities. In traditional African communities, the spirit of *ubuntu* translated into the community taking collective responsibility for the care, well being, protection, development and guidance of children. The old African adage: 'it takes a village to raise a child' emanates from these traditional beliefs and practices.

The establishment of community-based responses to dealing with troubled children stems from the need to move away from institutional approaches, whose solution is to remove troubled children from their families and communities. Community-based approaches recognise the interplay of environmental factors in influencing the behaviour of the individual child. The responsibility for addressing the needs of a child becomes a responsibility that is shared by the family, the community and professionals, instead of simply passively expecting the formal system to address issues relating to children. Community-based responses are accessible and also affordable, since they rely a great deal on existing capacities in the community. They are owned by the community, hence their sustainability in the long term. Further, they promote the integration of children into their communities instead of isolating and stigmatising them.

Being community-based, therefore, implies community involvement in the development, design, delivery and sustainability of diversion programmes. The community has a role to play in assisting with ideas when developing a diversion model. Moreover, the community has a range of assets, including the voluntary capacity to implement and monitor the effective use of diversion options. In order to be able to play this role in respect of children accused of crimes, it is important that communities are made aware of the child justice system and diversion, and supported in their attempts to assist children.

National and international instruments

Community-based diversion programmes are located firmly within the framework of international law. The Convention on the Rights of the Child gives credence to the use of alternative measures for dealing with children accused of crimes without resorting to judicial proceedings. The African Charter on the Rights and Welfare of the Child states that, in matters concerning children, a child's rights to language, culture and religion must be upheld. This provision provides a foundation for the recognition of local cultural beliefs, values and practices in so far as they promote the healthy development of children. In practical terms, this involves close collaboration with local traditional leaders such as *amakhosi*, *izinduna*, and other persons with cultural insight into children's issues, such as community elders and traditional healers.

The United Nations Guidelines for the Prevention of Juvenile Delinquency (also referred to as the Riyadh Guidelines) promote a proactive approach to prevention which resonates with the philosophy, ethos and practice of diversion. Article 6 states that:

> *Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilised as a measure of last resort.*

The role of the community is also clearly articulated in Article 32 of the Guidelines, which states:

> *Community-based services and programmes which respond to the special needs, problems, interests and concerns of young persons, and which offer appropriate counselling and guidance to young persons and their families, should be developed, or strengthened where they exist. The Guidelines also give communities a role by providing a wide range of community-based measures or supports to respond to the special problems of children at social risk;this includes children accused of crimes.*

RURAL COMMUNITIES

Rural communities are commonly defined as sparsely populated areas in which people depend on natural resources for their survival. They include villages, small towns and farming areas. In South Africa, rural areas include vast settlements in the areas originally created as 'homelands' during the apartheid era. Rural communities are often characterised by high levels of unemployment and economic depression, with limited resources for social and economic development. It is estimated that approximately 50 percent of children below eighteen years of age live in rural areas[253]. Due to unemployment, poor infrastructure and lack of appropriate developmental opportunities, crime is also a characteristic feature of rural life: children are caught up in a wave of crime, both as offenders and victims.

The use of diversion is also very limited in rural areas. This is due to the fact that most diversion responses are initiated in urban areas where the infrastructure is different. Urban-based responses respond to the unique features of urban areas, making them inapplicable to rural communities. Rural communities have their own unique features, characteristics and strengths; this calls for specific responses especially designed to address the issues children face in these areas.

Rural communities and traditional conflict resolution systems

In most rural communities, victims of crime often use alternative avenues to report crimes committed against them. Traditional authorities are the most common and accessible forums, and are therefore readily used by most victims. African traditional conflict resolution mechanisms are characterised by a focus on community reconciliation and restoring relationships between offenders, victims, their families and the community at large. This process works through a communal system variously called *imbizo*, *izigcawu*, *izinkundla* or *makgotlas*.

In many rural areas, these systems are still in operation today. An imbizo takes the form of a mass community meeting held at the chief's kraal; this is an open meeting and is attended by many people affected by the issue at hand. Inputs from all are welcomed and encouraged. These gatherings are presided over by the chief or the chief's appointed representative. The value of these traditional dispute resolution mechanisms in rural areas cannot be underestimated, as they have significant implications for diversion and crime prevention responses aimed at young people. Due to the nature of these gatherings and the developmental approach adopted, traditional systems have the added value of strengthening community ties, rebuilding positive social values and contributing to the strengthening of the moral fibre of the community.

A study conducted in the rural community of

252Ubuntu is an African concept that underpins societal harmony in African traditional communities. In the spirit of ubuntu, a person is an integral part of society. As a result an individual can only exist cooperatively with other fellow human beings. It is a sense of 'I am because you are' . The Nguni cultural group has an expression 'umuntu ngumuntu ngabantu' – a person is a person because of others. That is an embodiment of the spirit of ubuntu.

253Statistics South Africa is currently desegregating rural and urban population data and working on definitions of rural and urban areas.

254Bolobedu is a rural area located in the East of Polokwane which is characterised by extreme levels of poverty, crime and systemic underdevelopment. See Percy Mathabathe & Themba Shabangu [2001]

Bolobedu[254] in Limpopo found that 35 percent of respondents reported crimes to traditional authorities, 31 percent to the police and 11 percent to other community structures such as civic and government agencies. It was also found that traditional authorities do not deal with all matters referred to them, and generally refer serious cases to the police. This was confirmed in interviews with police and traditional authorities in KwaMhlanga, Mpumalanga.

Petty theft is one of the common crimes committed by children and young people in rural areas. Young people reportedly steal from their families, relatives and neighbours. Most often, when charges are laid for such crimes, they are withdrawn later. One reason advanced for this is that families find a way of solving the problem, or traditional conflict resolution methods are used.

Informal (non-judicial) or traditional systems of conflict resolution are increasingly being recognised and considered as diversion possibilities. Many rural communities in South Africa have traditional leadership structures that are used to resolve disputes involving children. These systems make use of the wisdom of community elders to repair the damage done to the individual, group or community through the offending behaviour of the child.

However, research conducted on the use of traditional conflict resolution methods in diversion found that courts and probation officers are often reluctant to use these structures. Reasons advanced were that traditional courts sometimes use methods that are in conflict with human rights, such as coercing children and subjecting them to further victimisation and stigmatisation. There were, however, no objections to using traditional courts, provided that their office bearers are trained to uphold human rights and are given a basic understanding of the law. Traditional leaders are now being recognised as important partners in child justice forums established through a number of pilot programmes. This creates an opportunity to use these structures in a proactive and constructive way.

The role and strength of traditional leaders in dealing with children alleged to have committed crimes before the judicial system intervenes was described by an Elder from Nzuza-Fene Tribal Authority in KwaMhlanga, Mpumalanga:

> *The Tribal Council meets two times a week, on Wednesdays and Fridays. Wednesdays are dedicated to issues of children and young people and Saturdays are reserved for adult matters. Usually when young people in the community come into conflict, both families are involved, that is the families of both the offending child and that of the victim. Families try to resolve the matter between them, failing which they turn to the Traditional Court. When the matter has been reported to the authorities, the police of the tribal authority issue summons to the families, including children concerned, to appear in court on a Wednesday. Elders talk to the children first. The traditional court has the discretion as to whether the sessions will be open to the public. Usually the 'Children's Court' is open to the community, to build a sense of responsibility in the offending young person. However, in specific cases where a child has been victimised and needs protection, the court conducts a closed session attended only by family members and a few selected elders. Open sessions create an opportunity for the community elders to offer counsel and give advice in a "safe and integrative space". They teach young people positive values such as respect and instil a sense of community responsibility. It is common for the court to recommend community service as a way of healing relationships that have been harmed through crime. Traditional courts look at the needs of both the offender and the victim. The court creates mechanisms for compensation, restitution and healing: called* ***isinxephezelo*** *or* ***ukungxengxeza****. If such healing is not achieved, then the community gets divided.*

Traditional leadership structures often believe that they have a great influence on parents and accordingly conduct parenting education, teaching them to take responsibility for the upbringing of their children. They also bring in members of the extended family system. They remind parents and family members of the value of *amasiko*: that is, cultural rituals that influence the behaviour and conduct of their children, and encourage families to perform appropriate rituals to curb negative behaviour in their children.

Role of local government in rural diversion

Although local government has no jurisdiction over diversion and the criminal justice system, it is important to acknowledge that local authorities exist alongside traditional leadership structures in many rural areas.

A project that provides some valuable lessons for rural diversion is the Circles of Care Project[255], which was piloted in Qwaqwa and in the Eastern Cape. The fundamental concept is that local government in partnership with communities, 'form an invisible Circle of Care around the most vulnerable citizens', particularly children and youth: children's rights will be respected and promoted by integrating them into every facet of local government and community life. The Circle of Care project is a vision of how children and young people may experience care, protection and development within their families, communities and in the context of local government. The model builds on existing traditional African values, beliefs, practices and supports at a local municipality level. Its thrust is on creating networks of support for children through a community participation process, and building local capacity amongst families, community leaders and children so that they can respond to needs of children.

Perhaps the most important lesson of this programme is that it is founded from the start on a strong partnership between government and traditional affairs. These bodies have the authority, responsibility and means of communication within the community. The model has put children's issues firmly on the agenda of local government. The community assessment process aimed at identifying vulnerable children makes possible the early identification of children at risk. This awareness enables the community, through a process of analysis and reflection, to design and implement responses to identified issues. These include parenting programmes for parents of children with challenging behaviours, recreational programmes, raising awareness about the rights of children and the enrolment of children in schools, community gardens and so forth. The whole village grows through this process. More awareness of the rights and plight of children has resulted in a renewed sense of *ubuntu* and unconditional care for all children in the villages concerned, breathing life into the notion that 'it takes a village to raise a child'. Lessons from this model are relevant to the child justice system and diversion.

Lessons from best practice rural community-based diversion mechanisms

This section highlights best practice processes, mechanisms and models that have been piloted and implemented for diversion in rural areas in South Africa. Although some of these processes have not been formally evaluated, the research phase and interviews have produced anecdotal evidence of their effectiveness. The model consists of a number of stages:

Getting started

The Kangala Rural Diversion Project is a unique response to the absence of diversion opportunities in rural communities. Factors influencing the decision to develop this model were the absence of diversion-related services in the area and the fact that no NGOs or CBOs were rendering diversion services. There was also a willingness to implement diversion because the National Department of Public Prosecutions (NDPP) had conducted training for prosecutors in the area – the NDPP had previously conducted an audit on the use of diversion by prosecutors and found that diversion was not being applied in Kangala.

Intervention teams were made up of different role players, including government departments such as Safety

255Phillip Cook and Lesley du Toit [2003]

and Security, Social Services and Justice, Traditional Affairs and NGOs where they existed. The teams were trained in aspects such as an introduction to restorative justice, understanding the provisions of the Child Justice Bill and the new child justice system, the role of the community, and understanding and dealing with the needs and emotions of victims.

Community analysis and audit

The community analysis takes two forms. First is the situation analysis of the problem: collecting accurate figures and trends to motivate for the development of the diversion programme. In Noupoort, (see project description in Chapter 13) the court had figures for children who were entering the criminal justice system, and this helped in the design of the model. The objective of the second type of audit is to identify available community services, strengths and assets. In rural communities, the tendency is to assume and conclude that there are no resources in the community. Here it is important to redefine community resources beyond infrastructure, formal services and professional personnel. Rural communities have unique strengths and assets derived from people, cultural practices and even natural resources.

The Noupoort model demonstrates the role that can be played by CBOs and other informal community groups. The audit moved beyond organisational resources and looked at the individual resources of the members around the table. For instance, a profile of young people selected to deliver the programme demonstrated a wide range of skills and assets – computer skills, teaching skills and organisational and management skills. Retired volunteers in the community offered to run an after-school youth programme, to keep young people away from the streets and created an informal therapeutic environment.

Another visible strength of rural communities that has been successfully tapped is young people themselves. In traditional African communities, young people play an important role in helping their peers with transitional challenges into adulthood. Peer mentoring and support structures can be put in place as part of the rites of passage into adulthood. Young people can be grouped according to age, under the mentorship of an older young person, who has proved himself or herself to be a positive role model in the community. Although this system of mentoring does not exist in rural communities in its traditional form, the principles of mentoring have been kept and adapted. The Noupoort model is a case in point. Another model that has successfully used young people as mentors is Koppies (see box).

Koppies is a small rural community surrounded by farms on the outskirts of the Free State. Poverty and unemployment are characteristic features of community life. Children and young people are caught up in a wide range of criminal activities, including petty theft, housebreaking and stock theft. The catalyst for diversion at Koppies was a young person, aged 21 years, unemployed, full of ideas and interested in youth development issues. Upon hearing about diversion, s/he and other young people set up a Youth Desk at the police station. The purpose of the Youth Desk was to help locate the parents of children who had been arrested, in line with the provisions for police duties upon the arrest of a child. Initially, although the desk was been established with the permission of the police, it received hardly any referrals. The local court did not recognise or make use of diversion.

In order to promote the idea, a survey was conducted in police cells, a prosecutor was interviewed and information was obtained from Kroonstad Secure Care Facility. This information was used to promote diversion in the court, and with the Department of Social Development and the United Nations Child Justice Project. The community facilitator worked hard to obtain commitment from the prosecutor, the magistrate and the social worker, who came to Koppies a few times a month but, because of a heavy workload, did not have time to attend to child justice matters. In addition, other local youth development CBOs were roped in to support the diversion initiative.

Thus, young people began the process of supporting other young people in conflict with the law, talking to them as 'big brothers' and mentors. Subsequently, a rural diversion model with a life skills component was developed. This received official recognition by the courts and referrals started flowing in. In addition to the life skills component, family group conferencing was added as a way of working with families and bringing healing and harmony between the families of offenders and the families of victims. The strength of young people as leaders, both as advocates for changing the system and as mentors, is clearly demonstrated by the Koppies model.

Preparing for implementation

Once the decision to implement diversion has been taken and commitment to support the process has been obtained from all partners, the time is ripe to plan for implementation. First, the model to be implemented must be consolidated. The Kangala Rural Diversion model in Mpumalanga is an example of a model that was developed specifically to promote a unique diversion response in the light of constraints facing rural communities. Although the model has not worked as well as anticipated, it offers some useful lessons for rural diversion. One of its features of the model was the establishment of what is referred to as an 'intervention team'. Intervention teams are made up of probation officers, assistant probation officers, a prosecutor, a police official, a representative from traditional affairs and a representative from community-based organisations where these were available. The broad expectation is that the team will assist in the implementation of the project. In order to perform this task, the team received training from the facilitating organisation,[256] which covered aspects such as an overview of the child justice system, an introduction to restorative justice and its applications, and understanding diversion.

256See Evaluation report on Restorative Justice Centre: Rural Diversion Pilot Project, June 2003, Prepared by The Centre for the Study of Violence and Reconciliation. Website: www.wits.ac.za/csvr.

One of the lessons learned from rural models is that training is critical and should be an on-going feature of the implementation process.

Resource mobilisation for sustainability

Planning for implementation requires a careful and sensible allocation of resources. Issues of training and capacity development and transport, as well as the retention of volunteers and young people, have budgetary implications. Good practice models need to be sustained in the long-term; without financial back-up, models collapse. By way of example, the Koppies model has been recognised by the Department of Social Development and is now considered in the Department's funding cycle.

Clear working protocols and guidelines

One of the criticisms of the Kangala diversion model in Mpumalanga is that, although multi-sectoral intervention teams were established and the desired model was designed to link children to different diversion service providers, including traditional leaders, it was difficult to make this work in practice. The reason was that there were no clear guidelines and protocols to channel referrals between different sectors. In the absence of protocols, it was difficult for the courts and probation officers to refer cases to community-based organisations, youth organisations and traditional courts, as this would entail some transfer of authority and responsibility.

Implementation

The implementation stage is critical and requires support. The intervention teams in Kangala were designed to support the implementation process. Other rural programmes have instituted reference teams made up of different role players, including external organisations to assist with ideas for implementation.

Monitoring and evaluation

Monitoring is an integral part of the process. Ideally, monitoring should not be seen as a process that stands alone, done only after a lengthy period of implementation. Monitoring and evaluation should be conducted on a regular basis. Noupoort (see Chapter 13) formed a steering committee that met regularly to check on progress achieved and whether the model was yielding the desired outcomes. The monitoring team was intersectoral in nature. These were not groups of people that met to receive reports passively; they also enriched the implementation process with innovative ideas, trouble shooting when systems were blocked and making recommendations about the future direction of the programme. In other words, they were an advisory board as well.

Bokamoso Life Centre, Winterveldt, South Africa: an example of a holistic diversion model.

Bokamoso is a Northern Sotho concept that means 'the future'. The Bokomoso diversion model that was initiated in a rural community of Winterveldt, west of Pretoria. The model was developed to respond to the problem of crime amongst children and young people between fifteen and 21 years of age. Due to limited opportunities and resources in the community, children and young people were dropping out of school and engaging in high-risk behaviour, including crime. There were no NGOs in the area to respond to the crisis.

It was in this environment that Tumelong Mission developed the Bokamoso Life Centre, the aim of which was to deliver, through early intervention and support, a holistic developmental programme for young people in conflict with the law

The model is a holistic three-month life skills programme that begins immediately after a court referral. The life skills intervention is tailor-made to meet the specific needs of the child, based on an assessment of the unique circumstances and needs of the child concerned. In addition to focusing on the child, family outreach teams engage families and offer them intensive support services.

Young people are exposed to the Adolescent Development Programme (ADP), which is made up of a number of components. These include:

- Self development
- Health and safety, with a focus on personal hygiene, sexually transmitted infections, HIV and AIDS
- Environmental history, which helps young people understand the rich history of the area and thus their heritage, helping restore their pride and sense of connectedness to their natural environment. Community elders are used to teach this module and also transmit values through African story telling
- Economic empowerment teaches young people viable alternatives to crime. This component has been strengthened to include private partnerships with the corporate sector with a view to identifying and creating business opportunities for young people who have completed the programme
- Therapeutic intervention is provided, since many young people on the programme have suffered various types of trauma in their personal and family lives. Creative therapeutic modalities are used, such as play therapy, story telling and arts. Nature is also used as a therapeutic medium
- Literacy teaching aims to improve reading and writing and numeracy skills through coaching and mentoring
- Sports is an integral part of the programme

This model has successfully tapped the resources of government departments. For instance, in developing the economic development model, a strong partnership was formed with the Department of Defence, which has a fully equipped technical skills training plant. This is where young people learn to manufacture items such as the bank bags that are supplied to banks on a tender basis.

Monitoring, evaluation and documentation have been an integral part of the programme since its inception. This helps to build awareness of new challenges and ways of addressing them. The success of the model also lies in the availability of funding from both donors and government. The team has worked hard to strengthen its support base with government. The programme has evolved considerably since its inception; it has moved from being a purely life skills and individual development diversion programme and is now a solid holistic model that offers prevention, diversion, a community referral system and an economic development site, as well as a reintegration programme for children and young people who have gone through the criminal justice system. A strong restorative justice component has been added, and strong partnerships have been formed with youth serving organisations in the area, particularly NICRO. Clear working protocols have been developed to minimise service duplication and provide a holistic and integrated service for all young people. This is an example of a best practice rural model where most principles of rural community based diversion find meaning and expression.

SUMMARY OF PRINCIPLES OF RURAL COMMUNITY-BASED DIVERSION

From examples cited in this chapter, it is possible to highlight key principles for rural diversion. These principles can be used as a checklist when developing, monitoring and evaluating rural diversion initiatives. They are:

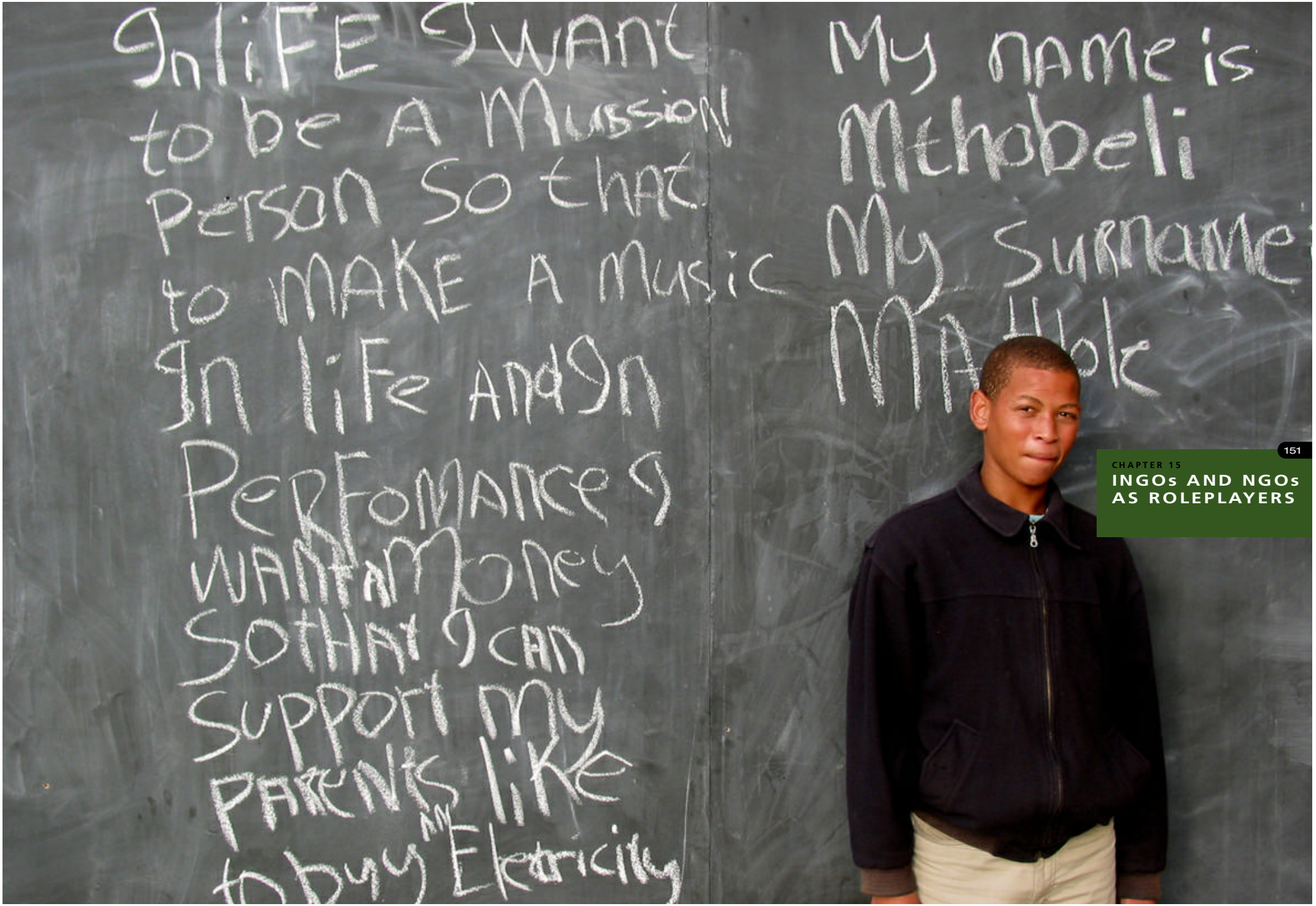
1. Due to the complex nature of the child justice system and the complex community contexts in which children exist, sound planning is a prerogative in rural diversion. Relevant role players and partners should be involved in planning, design, implementation and the review of the model. The model must be clear, with straightforward objectives, processes and expected outcomes.
2. There must be clear guidelines and protocols, as well as available criteria for community-based diversion. This will make referral systems work effectively and will enhance monitoring.
3. There must be protection of children's rights in all systems, including traditional conflict resolution systems: children must be allowed to participate, be informed and not forced to take part against their will.
4. Training and capacity development is the key. Best practice rural diversion should ensure that all those expected to deliver various components of the programme are trained. Training should also include the philosophical foundations of diversion, different diversion options, human rights, and also give a clear description of the tasks and functions of each role player. Part of the training should be on-site visits to other rural programmes.
5. Availability of resources to support programmes on an ongoing basis is ideal. When a model is conceptualised, there should be guaranteed funding for at least three years, subject to review and developmental quality assurance.
6. There should be system coordination to maximise impact and make effective use of all available resources.
7. There needs to be programme flexibility: can the model be used at different points of the system – for prevention, diversion, community-based sentencing, reintegration and (where possible) economic development?
8. A supportive and enabling environment: legislative environment is important, as is consensus amongst community stakeholders, clear communications, and the ability to build on the strengths of community.
9. There should be participation by children and young people in shaping interventions, implementation and monitoring. Young people are resources who can be used to direct the lives of their peers towards a more positive path.
10. Results-based monitoring and periodic review is critical.
11. The model should be given time to evolve: that is, to create and recreate itself in response to the evolving needs of rural communities and those of children.

CONCLUSION

Community-based rural diversion depends on getting recognition from partners in the child justice system. This chapter has sought to demonstrate the range of processes, mechanisms and models that are being developed in the rural areas of South Africa and elsewhere in Africa. Although there are still gaps and omissions in many models, many valuable lessons can be drawn from community-based rural diversion programmes.

One of the challenges to implementing rural diversion is the varying level of knowledge among different partners in diversion. When non-formal organisations and traditional structures are brought in, knowledge gaps are intensified. The goal should, therefore, be to create an atmosphere that encourages information sharing, education, indigenous knowledge building and safe discussion of the different roles of each partner. Another challenge is the attitude of parents, caregivers and communities at large towards children with challenging behaviours. Whilst communities have a clear and desirable role in promoting diversion, it needs to be said that rural communities are increasingly becoming intolerant towards alleged offenders. Many children in rural areas have been victims of community anger when members have taken the law into their own hands[257] and punished child offenders. This makes it clear that the promotion of rural community-based diversion should be coupled with a media or other public campaign aimed at educating and training communities in restorative justice theory, philosophy and practices. In this way, community healing, restoration of harmony and the spread of *ubuntu* for the sake of nation building and moral regeneration will be achieved.

257During the year 2000, many children suffered at the hands of the community when communities took the law into their own hands. Many of these incidents occurred in rural communities. The Restorative Justice Centre conducted research on this topic and the report is available on www.rjc.co.za


In life I want
to be A Mussion
Person So that
to MAKE A Music
In life and In
PerFomance I
WANT Money
SoTHAT I can
support my
PARENTS like
to Buy ME Electricity
My name is
Mthobeli
My Surname
MA Hlolo

CHAPTER 15

INGOs AND NGOs AS ROLEPLAYERS

Ann Skelton

INTRODUCTION

In most countries, services to children in conflict with the law are shared across a number of government departments (such as Justice, Police, Social Welfare, Education and Prisons). It is therefore necessary that there should be strong partnerships between these departments. Moreover, a number of initiatives in Africa and elsewhere in the world have shown that good juvenile justice systems thrive where there are strong partnerships between the government and the non-governmental sector. Thus, juvenile justice is a truly intersectoral field.

This chapter looks at the approach taken by UNICEF as the lead agency for the implementation of obligations under the Convention on the Rights of the Child (CRC). The CRC considers international co-operation a necessary means to ensuring the realisation of the rights it contains, as can be seen from specific reference to international co-operation in the final paragraph of the preamble[258]. UNICEF is the key UN agency involved, although UNICRI and UNDP have also been involved in important projects in Africa. The African Charter on the Rights and Welfare and the role of the committee related thereto is also discussed. In addition, the chapter contains information about the Kampala Declaration on Prison Conditions in Africa, the Ouagadougou Declaration and Action Plan on Accelerating Prison and Penal Reform in Africa, and a description of the role of the African Commission's special rapporteur on prisons.

International non-governmental organisations (INGOs), as well as non-governmental organisations (NGOs) at national and local level all have a very important role to play. This chapter focuses on the role of INGOs and NGOs and draws out useful examples of work that has been undertaken. The chapter also looks at coordinated efforts between government, INGOs and NGOs that have had very good results in a number of African countries.

THE UNITED NATIONS

The Committee on the Rights of the Child

Juvenile justice has been described by Bruce Abrahamson as the 'unwanted child[259] of States when it comes to living up to their obligations on the rights of the child. Many States have been asked by the Committee to undertake comprehensive reform of their juvenile justice systems. In his article, Abrahamson ponders some of the reasons why so many States are failing to deliver on their CRC commitments in this regard. First, he identifies the fact that juvenile justice is not a very popular cause.

> *Young people in the juvenile justice system are generally viewed only in a narrow perspective as law breakers, as a threat to the public. The fuller picture is not seen, the picture of boys and girls who are in need of understanding and assistance, who are often themselves victims of violence and social injustice, and who, when given help, can go on to live constructive lives.*

Second, he points out that juvenile justice is not a system but an overlapping of systems, and that this makes work in the area more difficult.

The Committee on the Rights of the Child recognises that States sometimes need help, and has suggested to several countries that they should seek technical assistance in the area of juvenile justice. In 1997, the United Nations Economic and Social Council passed the following resolution[260]:

> *The Economic and Social Council, recognising the need to further strengthen international co-operation and technical assistance in the field of juvenile justice, encourages Member States to make use of the technical assistance offered through the United Nations programmes, in order to strengthen national capacities and infrastructures in the field of juvenile justice, with a view to implementing the provisions of the Convention on the Rights of the Child relating to juvenile justice, as well as making effective use and application of the United Nations standards and norms in juvenile justice.*

Web-site addresses of United Nations Programmes relevant to Juvenile Justice

United Nations Children's Fund (UNICEF) http://www.unicef.org

United Nations Development Programme (UNDP) http://www.undp.org

United Nations High Commissioner for Human Rights (UNHCHR) http://www.unhchr.ch

United Nations Office on Drugs and Crime (UNODC) http://www.undcp.org

United Nations Inter-regional Crime and Justice Research Institute (UNICRI) http://www.unicri.it

United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI) http://wwwunafri.or.ug

The Child Justice Project: A UN technical assistance project of the government of South Africa

Motivating factors for establishing the Project

In June 1995, South Africa ratified the United Nations Convention on the Rights of the Child and in 1996, the Constitution of South Africa Act was passed. The Constitution contains a Bill of Rights with specific clauses relevant to the treatment of children accused of crimes. These created the international and constitutional law framework for the development of a new juvenile justice system in South Africa. In December 1996, the Minister of Justice appointed a project committee under the auspices of the South African Law Reform Commission (a law reform body) to draft a comprehensive new statute detailing procedures for children accused of crimes. The Minister also requested technical assistance from the United Nations for capacity building in the area of juvenile justice. The motivation for this was that, although South Africa was well poised to develop policies and laws in this area, implementation would need to be well-supported. The new democracy lacked experience in the implementation of its reform initiatives. The field of juvenile justice is also dependent on an integrated, intersectoral approach between a number of key government departments and non-governmental organisations providing services in this area.

Setting up and managing the project

The project plan was developed and agreement was signed in 1999, with the Department of Justice and Constitutional Development as the government co-operating agency. The United Nations agencies which were parties to the agreement were UNDP, UNODC and the UN Office for Project Services (UNOPS). The Child Justice Project was established as a three year project with a total budget of US$ 704 947.00. The Swiss Development Co-operation was the major donor and UNDP also made a financial contribution. The project was executed by UNOPS and the administration carried out by UNDP in Pretoria. The project was located in the National Department of Justice and Constitutional Development, in the Directorate of Children and Youth Affairs. The project had three staff members who were all South Africans.

Project objectives

The objective was to assist the Government and the NGO sector in the development of adequate responses to young offenders. This included: (1) enhancing the capacity and use of programmes for diversion and appropriate sentencing; (2) increasing the protection of young people in detention; (3) strengthening the implementation of child justice legislation; (4) raising awareness about the transformation of child justice among professionals in the criminal justice system and the general public, and (5) establishing a monitoring process for child justice.

258Cantwell [1997]: 72. Cantwell also points out the need for care to be taken, particularly in post conflict situations, about the dynamics of relationships between governments, UN agencies and non-governmental organisations.

259Abrahamson [2000]

260Resolution 1999/30.

Methods used to achieve project objectives

The following methods were used:

• Getting government departments to work together in an intersectoral way through a peer accountability approach. The key vehicle in this work was the Intersectoral Committee for Child Justice. This was established at the beginning of the Project's life and continues after the closure of the project.

• Identifying and building the capacity of key people in government at the national level to drive the child justice process in their own departments

• Addressing the previous lack of funding in this sector by planning properly with both line function and finance personnel from all departments (including provincial departments dealing with social development and education). This resulted in an integrated budget and implementation strategy for the Child Justice Bill, which was linked to government's Medium Term Expenditure Framework and used by departments to inform their bids to Treasury. The strategy was also handed to the Justice Portfolio Committee at Parliament. Indeed, the Child Justice Bill was the first South African Bill to include such a detailed intersectoral plan and budget at the time of submission to Parliament[261].

Partnerships

The Child Justice Project was based in the Department of Justice. An intersectoral steering committee was established at the outset, consisting of representatives of the following national departments and agencies: Department of Justice and Constitutional Development; National Director of Public Prosecutions; South African Law Reform Commission; Department of Social Development; Department of Correctional Services; Department of Safety and Security; Department of Education, and the Office of the President. Each of these has some role in the child justice system, and an effective and efficient system depends on their working well together.

The various departments and agencies had a strong sense of ownership of the project and its work. This sense of ownership and leadership by government was vital. Projects are often considered to fall 'outside' of government and fail to have a sustainable effect on government's work.

Project innovation

The key innovation that the project brought about was to get government departments and agencies to comply jointly with the requirements of the Public Finance Management Act, which requires that Bills should be accompanied by plans and budgets. The secret to the success of the process was working closely with the departments, assisting them in working out the norms and standards on which the costs of the new system could be based. The figures were generated by the departments concerned, not by the project. The project provided the frameworks and technical support to assist government, but always ensured that government officials came up with the answers themselves. Overcoming a lack of resources for children in the system was achieved by doing a professional job of convincing Treasury that money could be spent effectively. Most of the money requested has been allocated, and further follow up work for the next MTEF cycle is being done by the departments that did not get all the funding they requested. Thus, through the budget and implementation planning process, the project managed to get government to commit to spending an additional R 469 086 million over the first three years of implementation.

Project effectiveness

The project closed at the end of November 2003. An independent evaluation has found that the project achieved most of its objectives. The Child Justice Bill has not yet been passed, but is currently before Parliament and likely to be passed in 2004. A weakness of the project lay in its original design, whereby some of the project objectives were dependent on the passing of the Bill. However, the objectives were successfully adapted around this difficulty.

The project was rated very highly by the evaluators, and at their suggestion was nominated for an *Impumulelo* award, a South African award for excellence in government and partnership innovations. The project won the award.

261The Child Justice Bill: Budget and Implementation Strategy, as well as other documents produced by the Child Justice Project, including project reports and evaluations, are to be found at www.childjustice.gov.za

UNICRI PROJECTS ON JUVENILE JUSTICE

Juvenile justice and child protection in Angola

The overall objectives of this programme, which was financed by the Italian government, are to strengthen the Angolan institutions responsible for safeguarding children's rights and to enhance the country's institutional capacities in accordance with Angola's international commitments (including the Convention on the Rights of the Child).

The project strategy is to support the Angolan Ministry of Justice in establishing a child-oriented juvenile justice system, offering a range of alternative and educational measures at the pre-trial, trial and post-trial stages on one hand, and establishing a sound child protection system on the other. A child-oriented juvenile justice system will promote social rehabilitation of the child, provide mechanisms to ensure prompt and thorough investigation and adopt a comprehensive approach requiring communication between and with police, prosecutors, judges and local authorities.

Mozambique – strengthening juvenile justice

The project includes an assessment of the current institutional framework and practices, the updating of the national legislation according to the international instruments and standards, and the resulting reform of juvenile courts and reintegration institutions as well as training activities targeting juvenile justice personnel.

UNICEF'S CHILD PROTECTION APPROACH IN THE SPHERE OF JUVENILE JUSTICE[261]

UNICEF has not so far developed a formal strategic policy for action relating to children in conflict with the law. However, because the issue is considered by the Committee on the Rights of the Child to be so important for the compliance of States to the CRC, and because UNICEF has a broad field presence, the organisation has a unique and vital role to play in juvenile justice.

UNICEF's approach is focused mainly around Articles 37 and 40 of the CRC, the Beijing Rules on the Administration of Juvenile Justice and the UN Rules for the Protection of Juveniles Deprived of their liberty. UNICEF has decided to 'tackle the worst first', and has thus focused to a large extent on the over-use of detention – as a pre-trial measure, a sentence and an 'education' or 'welfare' measure.

The following rights issues have been identified as those UNICEF defends as a priority:

- Prohibition of death penalty and life imprisonment without parole for children
- Prohibition of torture
- Prohibition of arbitrary or unlawful detention
- Separate detention for children
- Humane conditions of detention
- Due process

262Information in the section has been taken from a document called "UNICEF's Child Protection Approach in the sphere of Juvenile Justice – A proposed Guidance Note, final draft, 10 June 2002. It was included in a document package for an EAP Technical Regional Workshop on Juvenile Justice 3-5 July 2002 held in Bangkok, Thailand.

UNICEF has selected children deprived of their liberty as an entry point, because this is viewed as an issue where there is likely to be the most support – or the least resistance. Initiatives believed to have the most potential to reduce the deprivation of liberty are to keep as many children as possible out of the court system and to ensure that viable and appropriate alternatives to custodial responses exist. UNICEF is thus committed to three major programmatic thrusts: (1) supporting diversion in order to avoid court appearances and custody; (2) promoting responses based on restorative justice, and (3) promoting and facilitating other alternatives to the deprivation of liberty, whether pending trial or as a penal or educational/welfare response.

The combined effects of these thrusts, UNICEF hopes, will:

- Lead to improved conditions for children deprived of their liberty, because numbers in detention will be reduced
- Reduce the workload of courts, thereby allowing for a more thorough examination of the needs of the children who do appear before them
- Result in financial savings by avoiding costly institutions
- Increase community awareness of the measures taken and thus improve public awareness regarding appropriate responses to juvenile offending
- Increase support and assistance to parents and the child's family environment
- Foster the social reintegration of the child

During the past decade, UNICEF has supported work on juvenile justice in many African countries, notably: Uganda, Namibia, South Africa, Mozambique, Rwanda, Zambia, Nigeria, Lesotho, Swaziland and Malawi. This has included advocacy, law reform, research, training and publication of materials on the issue of juvenile justice.

In 1998 UNICEF Namibia hosted a training seminar on juvenile justice for the East and Southern African Region.

THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child was adopted by the Twenty- Sixth Ordinary Session of the Organisation of African Unity (OAU) Assembly of Heads of State and Government, who met in Addis Ababa, Ethiopia in July 1990. The Charter came into force in November 1999 after ratification by fifteen member States. As of 2003, only 31 of 53 member States of the AU have ratified the charter.

The Charter provides for the establishment of a monitoring body within the OAU (now the African Union or AU), namely the African Committee of Experts on the Rights and Welfare of the Child.

The first African Committee of Experts was elected in Lusaka, Zambia on 10 July 2001. [263]

Article 43 of the Charter requires each State Party to submit reports on the measures they have taken to give effect to the provisions of the Charter: the first report to be provided within two years of ratification and every three years thereafter. With respect to children in the criminal justice system, States will be required to provide relevant information, including the principal legislative, judicial, administrative or other measures (such as projects, programmes etc), factors and difficulties encountered and progress achieved. They are also required to provide implementation priorities and specific goals for the future in respect of the administration of juvenile justice; children deprived of their liberty (including any form of detention, imprisonment or placement in a custodial setting) and compliance with the prohibition of the death sentences for children provided in article 5(3): Reformation, family reintegration and social rehabilitation.[264]

263 Tshiwula, L [2003]
264Lloyd [2003]

THE KAMPALA DECLARATION AND PLAN OF ACTION ON PRISON CONDITIONS IN AFRICA

A conference took place in Uganda in September 1996, at which 40 African countries agreed to the Kampala Declaration on Prison Conditions in Africa. This was adopted by the United Nations in 1997. The Plan of Action arising from the Kampala Declaration had the following to say about working in partnerships and the role of non-governmental organisations:

Governments should review penal policy in light of the Kampala Declaration and call on other national and international agencies (governmental and non-governmental) to assist them in this task.
Interested bodies and agencies should co-operate to the fullest extent possible to assist in the review process and provide technical assistance and material support

The role that NGOs have to play in prisons is important and should be recognised by all governments. They should have easy access to places of detention and their involvement should be encouraged.

The Kampala Declaration recommended that the African Commission on Human and People's Rights should appoint a special rapporteur on prisons, and in 1996 Commissioner Dankwa of Ghana was appointed to this position, and his term of office extended in 1998 and 1999. In October 2000, the African Commission appointed Commissioner Dr Vera Chirwa of Malawi as the new special rapporteur. Commissioner Chirwa is a lawyer and human rights activist, having herself spent twelve years in prison in Malawi for her role in fighting for democracy and self governance.

THE OUAGADOUGOU DECLARATION AND ACTION PLAN ON ACCELERATING PRISON AND PENAL REFORM IN AFRICA

A second Pan-African conference on prisons was held in Ouagadougou, Burkina Faso in September 2002. It was attended by 123 delegates from 38 countries, including 34 African countries. The Conference was a follow up to the Kampala conference. The objectives were to assess the progress made since 1996, and to further identify and explore new African models for dealing with people in conflict with the law and ways of influencing policy at national and international level. The African Commission on Human and People's Rights, in its 34th Ordinary Session held in Banjul, the Gambia (6 to 20 November 2003) adopted the Ouagadougou Declaration and Action Plan on Accelerating Prison and Penal Reform in Africa.

INTERNATIONAL NGOS ACTIVE IN JUVENILE JUSTICE IN AFRICA

There are numerous INGOS that have done work on juvenile justice in African countries in recent years. Two have been selected for detailed discussion in this chapter, due to the intensity of their work, as well as the number of countries in which they have been active. These are Penal Reform International (PRI) and Save the Children UK. Other important international NGOs working on juvenile justice in Africa include: Defence for Children International; Radda Barnen; World Organisation Against Torture; Prison Fellowship International; Amnesty International; Prisoners Rehabilitation and Welfare Action; International Catholic Child Bureau; International Centre for the Prevention of Crime, and International Association of Youth and Family Judges and Magistrates.

264Lloyd [2003]

Penal Reform International

Penal Reform International (PRI) has been at the forefront of juvenile justice work in various countries in Africa. The organisation has elaborated some guiding principles that constitute the basis of their work on juvenile justice. This is sometimes referred to as a 10 Point Plan[265].

(1) Arrest and interrogation should be minimised. Use of police bail or bond without surety should be encouraged. Questioning should be done by a trained officer in the presence of a parent or guardian.

(2) Age of Criminal Responsibility should be set as high as possible. Children below that age should not be taken through the criminal justice system.

(3) Diversion is a priority – the development and use of community alternatives (e.g. cautions, home based options, conferencing) to prosecution to be developed and their use encouraged.

(4) Pre-trial detention should not be used except in exceptional circumstances; it should be time-limited and never used for children under 14 years. There must be separation from adults and strict monitoring of conditions. Children should, where possible, be released to families, or alternatively conditional release or bail.

(5) Alternative Sentences are needed, especially those that emphasise the value of restorative justice.

(6) Youth courts should be established and less formal. Parents should be present; legal representation to be encouraged.

(7) Custodial Sentences should be used as a last resort, for the shortest time, and only in exceptional cases. Minimum age of imprisonment should be not less than 14 years.

(8) Detention facilities should be separate from adults and should have good amenities, activities and adequate numbers of trained personnel. NGOs should be encouraged to play a full role.

(9) Inspections – systems of independent scrutiny should be established for institutions for children, involving government inspectors and members of the community.

(10) Family Links should be maintained and visits by family encouraged. Reintegration programmes needed.

PRI work on Community Service Schemes in Africa

This work has not focused specifically on child offenders, although children have benefited from the schemes. Although often used as alternative sentences, community service schemes can also be effectively used as diversion and even reintegration programmes. PRI support to Community Service Schemes in Africa began when it formed a close association with the Zimbabwe Community Service scheme at its inception in 1992. Statistics show that, in December 2000, 41 000 offenders in Zimbabwe had been sentenced to a community service order instead of to prison. On the strength of this success, PRI obtained further funding from the European Union to help with the implementation of community service in Kenya, Malawi, Uganda, Zambia, Burkino Faso, Congo-Brazzaville, the Central African Republic and Mozambique. The approach followed was to hold a national seminar, followed by the setting up a National Committee on Community Service – involving government officials, professionals, NGOs and community based organisations.

In collaboration with the Zimbabwe National Committee on Community Service, PRI organised an International Conference on Community Service Orders in Africa in Kadoma. The conference produced the Kadoma Declaration and Plan of Action on Community Service, together with a Code of Conduct for National Committees on Community Service[266].

265Roy [2000]

Save the Children UK

The Save the Children Fund (SCF) approach to the administration of juvenile justice is mindful of the fact that decisions relating to the implementation and administration of justice systems for children must always reflect local economic, political and cultural realities. SCF promotes the core values found in the UN Convention on the Rights of the Child and other relevant instruments, and is of the view that, where the political will exists, these can be applied to both traditional and modern systems.

The work of SCF in Africa has focused to a large degree on the extent to which traditional systems can be used as part of, or as an alternative to, the criminal justice system for children. This work is accompanied by a note of caution as systems of traditional law are in themselves unstable and few have been researched in any depth; moreover, urbanisation has already placed many children beyond the influence of traditional authority[267].

Save the Children UK's Work in Juvenile Justice in Africa, includes:

- Law reform: in, for example, Uganda and Ghana
- Advice, support and training to probation services: Tanzania
- Training of police, magistrates, procurators and other role players
- Establishing diversion systems: Uganda and Kenya
- Reintegration: Rwanda and Uganda
- Data collection
- Adapting community systems in line with CRC: Uganda
- Study of traditional systems: Lesotho and Uganda
- Children in custody: Uganda

SCF's work in Uganda

SCF worked closely with the government of Uganda to start a process of juvenile justice review. It provided funding and technical guidance to a national committee (Child Law Review Committee), which was charged with the responsibility of formulating proposals for legislation. In essence, SCF worked as a catalyst to the process, which was essential to generate demand and consensus for reform. Together with other NGOs, UNICEF and government bodies, it lobbied for the enactment of the statute.

SCF has also been an active player in the implementation phase of juvenile justice reform, particularly in the following areas: researching and documenting the implementation of pilot districts; promoting the development of effective community responses, and documentation thereof; promoting the establishment of a senior level juvenile justice committee; lobbying and advocacy at national and district level, and involving civil society and other NGOs in the implementation of the reforms.[268]

NON-GOVERNMENTAL ORGANISATIONS AT NATIONAL AND LOCAL LEVEL.

Most countries have some NGOs operating at national level, and some at local level. Depending on the governance of the country, some of these organisations are able to play a vibrant and important role.

Monitoring and advocacy

NGOs are often adept at revealing problems or weaknesses in a system from the perspective of the people at the receiving end: in the case of juvenile justice, the children themselves. They also often successfully advocating for change. Because of their links with

266'PRI support to Community Service programmes in Africa' can be found on PRI's website: http://www.penalreform.org
267 Williams, Parry et al [2000]
268Kakama [1999]

communities, they can frequently assist government agencies to link with or consult communities, and to harness the skills and resources of those communities. Many NGOs are funded by donors; this often helps them to maintain some independence from the state and allows them to be critical of the system if need be.

Service delivery

In some countries, NGOs perform important services, such as running diversion programmes or residential care services. However, there is a danger that, if a government becomes too reliant on NGOs for service delivery, the donor funding sources may dry up. It is therefore very necessary that NGOs rendering services on behalf of government enter into dialogue with their government counterparts, so that government eventually takes over the financial responsibility for such services.

In South Africa, the Department of Social Services outsources many of its diversion programmes. This means that the Department pays or financially subsidises NGOs doing this kind of work. This is done through public private partnerships or service level agreements.

An NGO that led the way

In South Africa, despite the absence of laws requiring diversion, a national non-governmental organisation called NICRO led the way by setting up diversion programmes.

NICRO's work began before the democratically elected government came to power. See further chapter 7, Integration)

Research and training

There are a number of experts on juvenile justice in the private sector, attached to NGOs or to academic institutions, who write about juvenile justice and research aspects of it. This is very useful as it allows both government and the public know what is happening to children in the system, and may ideally lead to changes and improvements. Some of these organisations also offer training on juvenile justice for people working in the system; others put out publications.

The Children's Rights Project of the Community Law Centre at the University of the Western Cape produces a regular publication called Article 40. ('Article 40', of course, refers to the article in the Convention that deals with the administration of juvenile justice). This publication is aimed mainly at criminal justice practitioners working with children, and keeps them up to date with law reform, new case law, good examples of projects, research findings and so on.

WORKING TOGETHER: ALLIANCES, FORUMS AND INTER-SECTORAL WORK

Juvenile Justice Project: Namibia

The Juvenile Justice Project in Namibia is an excellent example of co-operation between government and non-government role players.

Namibia ratified and signed the CRC in 1990 and is therefore bound by its provisions; Article 144 of the Namibian Constitution states that Namibia shall be bound by all the international instruments it ratifies[270]. The ratification was a springboard for a programme of co-operation between the Namibian government and UNICEF. This co-operation gave birth to a multi-disciplinary study of children in prisons in 1993. The findings of the prison survey shocked both children's rights specialists and the Namibian public because it was found that the rights of arrested children were being seriously abused.[271] To address the situation of children who come into conflict with the law, a Juvenile Justice Forum (JJF) was set up in 1994. The JJF comprises government line ministries, NGOs and individuals.

Today, almost every Namibian region has its own JJF. The JJF aims to analyse the juvenile justice system and takes concrete steps for change. In 1995, the Windhoek JJF mandated a national NGO called the Legal Assistance Centre (LAC) to start a pilot pre-trial diversion programme, which is today the Juvenile Justice Project. The Prosecutor-General also granted permission for the pre-trial diversion programme. The JJP has become a centre-piece in the functional framework of the development of a cohesive Namibian juvenile justice system.

Its aims and objectives are:

- To advocate and lobby for restorative instead of retributive justice in cases involving children. This means diverting children from the criminal justice system and rehabilitating rather than punishing them
- To help ensure that court decisions are guided by the best interests of the child and also by the right of all Namibians to live in a crime free environment
- To empower young people by assisting them to serve the community and be accountable for their actions
- To advocate and lobby for the implementation of a juvenile justice policy in Namibia
- To train all role players in juvenile justice so that the system can be decentralised to all regions of Namibia, and solicit national support for and commitment to the programme
- To conduct research on juvenile justice issues in order to inform planning and project design

Reform of juvenile justice system in Malawi

The reform of the juvenile justice system in Malawi has grown through a tripartite relationship between the Ministry of Justice, Malawi Prisons Service and the NGO community.[272] The non-government role players were UNICEF, PRI, Amnesty International, Malawi CARER, Centre for Human Rights and Rehabilitation, Malawi Institute for Democratic and Economic Affairs, Eye on the Child and the Centre for Youth and Children Affairs.

According to Adam Stapleton[273] of PRI Malawi, the impetus for change came from the Kampala Declaration on Prison Conditions in Africa and the plan of action attached to it. He records that the peaceful transition to multi party democracy in Malawi in 1994 and the open-door approach of the Ministry of Justice and prison authorities have led to changes for to children in prison and approved schools in Malawi. The process of reform has been based on thorough research: there was a study carried out by UNICEF[274] and another by the Centre for Youth and Children Affairs (CEYCA), with funding from the Danish Centre for Human Rights[275]. A number of NGOs then collaborated in preparing a Para Legal Case Review on juveniles in Malawi's prisons[276].

The research was interspersed with action. In 1997, PRI secured funds from CIDA to install shower units and toilets for use by children in prison, and in the same year medicines and soaps were provided by UNICEF. In 1998, Amnesty International started an awareness campaign on the situation of children in Malawi's prisons. After the first visit of the paralegals carrying out research in Zomba prison, children were separated from young people over the age of 18 years, and some children were transferred

269For more information about Article 40, write to the Children's Rights Project, Community Law Centre, University of the Western Cape, or e-mail to jgallinetti@uwc.ac.za. Information is also available at www.communitylawcentre.org.za/children

270Mukonda [1999]

271Schulz [2002]

272Othmani [1999]

273In the introduction to a report by CARER Malawi et al [1999].

274Jolofani [1997]

275Centre for Children and Youth Affairs [1999].

276CARER et al [1999]

from prison to approved schools. According to the paralegal report:

> *The approach taken has been to involve all the actors from the outset and lay special emphasis on co-operation and coordination between the relevant agencies. So each visit was prefaced by a stake-holders' meeting (judiciary, police, social services and prisons) and dates agreed with follow-up action.*[277]

An international conference was held at the end of 1999, hosted jointly by UNICEF Malawi, PRI, the British aid agency, DFID, the Ministry of Justice and the Malawi Human Rights Commission. Areas agreed upon for further reform in the Malawi juvenile justice system were:

- More attention to the prevention of juvenile crime, with emphasis on the role of education and other programmes
- Training of police to eradicate illegal arresting practices
- Improvements to the administration of juvenile justice, including the introduction of diversion and alternative dispute resolution, alternatives to remand, speeding up of trials with time limits, increased judicial activity in prison and training for all personnel.
- Various improvements to prisons and approved schools
- Law reform to raise the age of criminal responsibility and in relation to HIV issues in prisons

A Juvenile Justice Forum has now been established in Malawi. The forum works closely with a paralegal advisory service and together they have developed screening forms for use in prison, police stations and courts[278].

Juvenile justice law reform in Nigeria

Nigeria has embarked on a law reform process, and a Child Rights Bill has been drafted. Supporting this process is a Juvenile Justice Project, which is looking at juvenile justice administration with a view to effective implementation and the development of an over-arching policy on juvenile justice. This project was born out of a collaborative effort between the National Human Rights Commission (NHRC), the Constitutional Rights Project (CRP), UNICEF and Penal Reform International.

A study undertaken by the CRP in the six zones of Nigeria revealed serious problems in the administration of juvenile justice. This led to a National Conference on Juvenile Justice Administration in July 2002. Arising from this, a National Working Group on Juvenile Justice was established. A draft concept paper was drafted, and two zonal workshops were held to discuss the paper. Study tours were done in South Africa, Malawi, Namibia and the United Kingdom. Field studies within Nigeria continued, with visits to numerous prisons, police and other facilities. A National Experts meeting was held in Abuja in August 2003, where the findings of the field studies and the study tours were discussed. The draft National Policy on Child Justice Administration on Child Justice Administration in Nigeria was introduced for discussion as well as a Course Manual for Law Enforcement Officials working with Juvenile Justice[279].

The Child Justice Alliance: South Africa

The Child Justice Alliance is a good example of a strategic approach to lobbying and advocacy by a group of non-governmental organisations. The Alliance has a very specific target – to see the Child Justice Bill passed and successfully implemented. The establishment of the Alliance followed a workshop that was held by the UN Child Justice Project in May 2000. The workshop was called 'Promoting Informed Debate about Child Justice in Civil Society'[280]. The idea was that the Child Justice Bill would need to be surrounded by informed debate as it went through Parliament. The politicians and the public would need to understand what the Bill was about and not be distracted by anecdotal reports or manipulated statistics.

Accordingly, a number of key NGOs got together and, with funding received from Swiss Development Co-operation, established the Child Justice Alliance. There was a small driver group made up of the Child Rights Project at the Community Law Centre (which coordinates the alliance), NICRO, Institute of Criminology (UCT), IDASA[281], Restorative Justice Centre, and the CSIR[282] Crime Prevention Project. The driver group came up with nine broad principles that organisations who join the alliance could all agree to, launched a web site and publicised the Alliance through a series of workshops throughout the country.

Within a year of being established, the Alliance boasted 120 members and 118 friends of the Alliance. When the Bill was introduced into Parliament, the Alliance was well prepared. It had produced a compendium of statistics relating to children in the criminal justice system, an annotated bibliography on the issue of Child Justice as well as a set of fact sheets, setting out issues in a simple but striking manner. The South Africa Parliament allows for a good measure of participation, and the opportunity was well used in the case of the Child Justice Bill.[283] Several members of the Alliance made presentations to the Justice Portfolio Committee that was dealing with the Bill. The Child Justice Alliance has maintained a presence throughout the hearings on the Bill and has kept its members informed of developments.

9 principles underpinning the vision of the Child Justice Alliance:

- **The Child Justice Alliance supports a child justice system that:**
- **Is fair to children in conflict with the law and that balances their rights and responsibilities**
- **Provides the prompt assessment of arrested children and treats them according to their best interests and individual circumstances**
- **Is aimed at reducing crime through a crime prevention model that focuses on diversion and restorative justice principles**
- **Recognises that children make mistakes but can nevertheless be guided to become law-abiding adults**
- **Respects the rights and interests of victims and provides the opportunity for their participation**
- **Encourages collective responsibilities between the state, families, communities and civil society**
- **Is achieved through inter-departmental co-operation in implementation and monitoring**
- **Ensures the protection of society through a proportional response to crime while maintaining a humane treatment of children**
- **Recognises that the detention of children be a measure of last resort and for the shortest possible period of time.**

277Malawi CARER et al [1999]: 15

278Penal Reform International 'Good Practices in Reducing Pre-trial Detention'. A draft document available on the following website: www.penalreform.org. The screening forms mentioned in the paragraph are available from PRI Malawi.

279Article 40, October 2003

280Report of the workshop available on www.childjustice.gov.za

281Institute for Democratic Alternatives in South Africa

282Centre for Scientific and Industrial Research

283De Villiers (2001).