Child Justice Alliance Court Monitoring Project, Phase One: Consolidated research on the criminal justice system pertaining to children in Three Magisterial Districts from June 2005 to September 2005

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Executive Summary

1. INTRODUCTION

In July 2000, the South African Law Commission [Project 106] released the Child Justice Bill, together with its Report on Juvenile Justice. After having been revised by State Law Advisors the Bill was introduced into Parliament in 2002.[1] The Bill is aimed at protecting the rights of children accused of committing crimes as well as regulating the system that deals with children and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The Bill recognises the fact that children do commit serious offences and that they must be held accountable for their actions and take responsibility for its effects on the human rights and fundamental freedoms of others. This is achieved through the provision that allows for children to be imprisoned, however only after certain prerequisites have been met.
Generally the proposed legislation deals with issues such as police powers and duties, arrest and court procedures. It also creates a child justice court, which is a court at district court level that will deal with all matters pertaining to children in conflict with the law. No longer will children appear in courts ordinarily designated for adults, rather they will have a court staffed by a magistrate and prosecutor trained in child justice. Furthermore the Bill regulates the detention and release of children, providing definite guidelines for the exercise of judicial discretion in detaining children in prison while awaiting trial.

The Bill has sought to address the problems encountered in the field of child justice, as it exists within the framework of current legislation. The effect of the Bill being adopted as legislation will be to revolutionise the criminal justice system in South Africa in so far as it affects children in conflict with the law. While ensuring that a child's sense of dignity and self-worth are recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others. In this regard, the formal introduction of diversion and the underlying principles of restorative justice into our child justice system echo the move away from punitive forms of criminal justice and encapsulate the spirit of the United Nations Convention on the Rights of the Child and the South African Constitution. It encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of recognising their actions; making amends for them and reducing re-offending.

As at the date of writing, the Bill has not yet been passed by Parliament. It was debated at length in 2003; however nothing more has happened since then. During the parliamentary debates certain key issues in the Bill were changed, such as the age of imprisonment and the age of children who may be detained in prison awaiting trial. However, most of the core provisions of the Bill that provide for a new and separate child justice system remain, i.e. diversion, assessment, the preliminary inquiry and alternative sentences.[2]

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[1] As Bill 49 of 2002.
[2] However, the actual content of these provisions has been radically reworked by the Portfolio Committee on Justice and Constitutional Development during the Parliamentary debates.

These changes are, however, not final and may yet be revisited once the Bill continues to be deliberated upon in Parliament. It is hoped that the information that emerges from this research report may inform the future debates around the Bill.

2. THE MONITORING RESEARCH PROJECT

This research report constitutes an attempt at obtaining baseline data on the present criminal justice system as it pertains to children in three magisterial districts, namely, Wynberg in the Western Cape, Pretoria in Gauteng and Pietermaritzburg in Kwa Zulu-Natal.[3] It is intended to form the basis of on-going monitoring research that will examine the implementation of the Child Justice Act, once enacted, in that it represents the first phase of a larger monitoring study. This report contains information that relates to monitoring the current practice regarding the management of children who come into conflict with the law. It is envisaged that there will be a second phase of baseline data gathering, along the same lines that this research was undertaken in order to provide a broader and more comprehensive view of the present criminal justice system and how it treats children. Once the Child Justice Bill is enacted and promulgated, further research will be undertaken to monitor the implementation of the legislation and the baseline research will inform the findings of that monitoring research in that the baseline studies will provide comparative data against which the implementation can be measured.

The present study is essentially quantitative research. The decision to monitor using quantitative data only was based on the fact that information of a qualitative nature will only be available once the Bill (Child Justice Act) has been in operation for at least six months. In addition, the quantitative data will potentially provide baseline data once the Act has been implemented for a while.

This research has been undertaken by the Child Justice Alliance. The Child Justice Alliance was formed in February 2001. From 2001 – 2003, the Alliance aimed at creating an awareness campaign around the Bill and garnering support for it during the Parliamentary process.

However, from 2003, once the public hearings on the Bill were completed, the work of the Alliance took on a new focus. The work of the Alliance now concentrated primarily on research projects and awareness raising activities around the content of the law, implementation of the Child Justice Act and monitoring such implementation.

The Child Justice Alliance consists of over 400 members and friends, who are either civil society organisations or concerned individuals. The Alliance is run by a driver group that was formed with a core of eight organisations that has now expanded to thirteen. These are:

- The Restorative Justice Centre (RJC). The RJC is a non-profit organisation that seeks to promote the restorative justice paradigm in all sectors of society. The Centre is based in Pretoria.

- The Children's Rights Project at the Community Law Centre, University of the Western Cape (CLC). The Children's Rights Project (CRP) of the Community Law Centre (CLC) is

[3] The separate reports for each magisterial district are available on request from the Community Law Centre.

one of a number of projects at the Centre which focuses on the needs and status of particularly vulnerable groups such as women, children, people with disabilities and people living in extreme poverty. From the outset, the focus of the CRP was on marginalized and vulnerable children. In addition to contributing to the process of formulating children's rights within the South African interim and final Constitutions, the work of the CRP has concentrated on the goal of law reform within the juvenile justice system and the reform of laws concerning child care and protection. By hosting international seminars on these themes, publishing reports and studies, and soliciting the participation and opinion of children themselves, the CRP has played an important role in transforming and improving the legal landscape for South African children. Nevertheless, much work remains to be done.

- The Defence, Peace, Safety and Security (DPSS) Crime Prevention (CP) Research Group (formerly the Crime Prevention Centre) at the Council for Scientific and Industrial Research (CSIR). The CSIR's crime prevention initiative was formally established in 1996. The CSIR — for more than 50 years the vanguard of technology and innovation in this country — saw a clear role for itself in contributing to this endeavour and mobilising its resources to protect the national well-being. Also, with modern-day crimes showing increased sophistication, it became clear that technology was to be the key factor in preventing and addressing crime. Today the organisation plays a crucial role as a support agency in the arena of crime prevention and combating technologies — not only for South African use — but also, in the future, to the benefit of the region and law enforcement entities around the world.

- The Chapter 2 Network at Idasa. The Chapter 2 Network, named after the second chapter of the SA Constitution, supports civil society organisations involved in social justice advocacy, through information provision, research, training and networking. As a project of Idasa (The Institute for Democracy in South Africa), Chapter 2 supports the development of capacity within government and civil society to enhance democracy.

- Lawyers for Human Rights (LHR). Lawyers for Human Rights, is a non-governmental organisation that strives to promote, uphold and strengthen human rights. The organisation has had a proud history since its inception in 1979 of fighting oppression and the abuse of human rights in South Africa. Almost all of the staff at the head office in Pretoria and its regional offices was active participants in voter education and monitoring in the run up to the historic 1994 elections.

- NICRO National Office. NICRO is a non-profit organisation working towards crime reduction and community development. NICRO supports victims of crime through the community victim support project and challenges ex-offenders to become constructive members of society. The youth focus is on diverting young offenders away from the criminal justice system into programmes that make them responsible for their actions, and on youth development. NICRO fights unemployment through skills training and the support of small business.

- The Institute of Criminology, University of Cape Town (IC). The IC is a multi-disciplinary, inter-faculty unit established within the University of Cape Town. The aim of the unit is to initiate, co-ordinate and develop teaching, research and extension services in the broad field of criminology within and outside of the University, and to promote public interest in, and awareness of, all aspects of criminology. The Institute is affiliated to the faculties of Law and Social Science and Humanities, and offers postgraduate courses leading to degrees in both faculties. The Youth Justice Project specialises in research, advocacy, and teaching in areas that relate to children, young people and crime.

- The Centre for Child Law at the University of Pretoria. This organisation is also involved in research around child rights issues, in particular child justice, and offers a masters degree in Child Law. The organisation also focuses on impact litigation on child rights issues and is a useful partner should at any time it become necessary to litigate around provisions in the Act or incidences that occur as a result of improper implementation of the legislation.

- The Institute for Security Studies is an applied policy research institute working towards the conceptualisation, and enhancement of the security debate in Africa. Its core functions include applied research and analysis, facilitating and supporting policy formulation, raising the awareness of decision makers and the public, monitoring trends and policy implementation, collecting and disseminating information, capacity building and networking on national, regional and international levels.

- The Campus Law Clinic, University of Kwa Zulu-Natal is a university based organisation that offers clinical legal education to law students as well as providing free legal services to indigent members of the public. The Clinic has a specific child rights unit.

- The Civil Society Prison Reform Initiative situated at the Community Law Centre at the University of the Western Cape. The goals of this initiative are to promote civilian oversight over prisons and public participation in the management of prisons with the aim of improving the human rights situation in prisons in South Africa.

- Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) is a children's rights organisation and its primary focus is the development of child abuse prevention strategies to combat the patterns of abuse that affect the lives of children and adults everywhere. This is done through a range of programmes including training and materials development, a Child Witness Programme, an advocacy programme and the RAPCAN Resource Centre.

- The Department of Social Development within the Faculty of Humanities at the University of Cape Town provides education and training for a number of social service professions which includes that of Probation and Correctional Practice. As such, the Department is committed to giving effect to the country's juvenile justice policies. Apart from its academic programmes, it also contributes to this end through dedicated research and by providing in-service training for relevant professionals.

The selection of these organisations is based on their expertise and experience in the field of children's rights, available resources, and shared interests. However, primary responsibility for the execution of the Child Justice Alliance has rested with the CLC who has housed the Programme Co-ordinator, and implemented the various work components of the Alliance including the management of the present study.

This research report will outline the methodology and main research findings undertaken at the abovementioned research sites. It will set out the research results that illustrate the current functioning of the criminal justice system in relation to children, including assessment, detention awaiting trial, diversion and sentencing of children. Finally, it will highlight certain gaps that exist in the system that would require attention in the new child justice legislation.

3. METHODOLOGY

The scope of the research was aimed at monitoring the current practice of the criminal justice system in relation to children, in order to obtain baseline information regarding the management of child offenders in the criminal justice system in relation to:

- The general principles and objects of the Child Justice Bill, in so far as there is adherence thereto in the absence of the Act,
- methods of securing attendance of the child at the first court appearance,
- placement of the child awaiting trial,
- assessment of the child by a probation officer,
- access to diversion, and
- sentencing of children convicted of an offence.

The methodology involved various steps aimed at establishing a sound and credible basis for the research. The methodology also had to take into account the fact that this research constitutes the first of a number of research projects that will commence once the Bill is passed. This study will form the basis against which the implementation of the new child justice legislation will be measured and thus the methodology was designed in such a way that future research can be conducted in the same manner to allow for credible comparison with the present undertaking.

3.1 The development of research indicators and tools

In July 2004, the Gender, Health and Justice Research Unit at the University of Cape Town was contracted to develop monitoring indicators for this research. In doing so they were briefed with the Criminal Procedure Act and Child Justice Bill as the primary documents against which the indicators should be drafted. In addition, to inform the final indicators, a number of meetings with the members of the driver group of the Child Justice Alliance were held in order to get their input and expertise on focus areas for research. The indicators were finalised in December 2004 and a copy is attached marked, Annexure 1.

Once the indicators were finalised, the Gender, Health and Justice Research Unit then proceeded to compile the actual research tools for application at the research sites during the field research. The tools were finalised in May 2005, again with inputs from members of the driver group. In total, four research tools were developed. Four research tools were developed, three of which were

developed in order to collect information from various records and one was developed as an observation template to record information relating to actual court proceedings via observation. These tools were:

- Charge sheet template
- Police docket template
- Probation records template
- Observational template

These tools are attached as Annexures 2 – 5 respectively.[4]

3.2 The appointment of organisations to undertake the research and selection of research sites

It was recognised that the selection of sites at which the research would be undertaken was crucial. After much discussion involving questions concerning the numbers of children arrested at a site, sites where there are amenable magistrates to access the information, sites where the role-players have a greater knowledge of the Bill versus sites where there is no such awareness of the Bill, functionality of the sites, sites where juvenile courts exist, sites near a University so that students can be employed to do the field research, the rural versus urban area debate and also the availability of resources, the members of the driver group agreed that the monitoring projects be done at the following sites, namely Pretoria, Mitchells Plain and Durban or Pietermaritzburg. [5]

The reasons why these sites were agreed upon included the fact that the courts have good resources and all three have NGOs and universities in the area. The sites were ultimately changed to Pretoria, Wynberg and Pietermaritzburg once the research organisations were chosen, on account of the good relationships that existed between those courts and the organisations doing the research.

The driver group of the Child Justice Alliance decided that it would be appropriate and expedient to appoint organisations that served on the driver group structure to undertake the research. This decision was based on the fact that the relevant organisations had a good working knowledge of child justice, had an intimate understanding of the purpose and objects of the research and could source and manage field researchers to undertake the research. In addition, because of the limited resources available to undertake the research, it would have to be carried out in close vicinity of the research organisation, with minimal travel involved. Hence while the Community Law Centre was originally going to undertake the research in Durban or Pietermaritzburg, ultimately Lawyers for Human Rights, Pietermaritzburg was appointed to embark on the research there. In addition to Laywers for Human Rights, CSIR was appointed to undertake the research in Pretoria and the Institute of Criminology at UCT for Wynberg. The Community Law Centre, in its role as Alliance Co-ordinator, would manage the research project.

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[4] The tools were piloted in a process described in section 3.5. The tools attached incorporate the changes that were made as a result of the piloting process.

[5] At a driver group meeting on 27 August 2004.

3.3 Requests for permission to undertake the research

Since the nature of the study involved field research at magistrate's court, involving official documents and various departmental officials, it was necessary to obtain the requisite permission before proceeding.

Letters seeking such permission, which set out the scope and purpose of the research as well as the research methodology, were sent to the following:

- Department of Justice (DoJ) – to conduct research at courts and have access to charge sheets
- National Prosecuting Authority (NPA) – to conduct research at courts and have access to charge sheets
- Provincial Departments of Social Development (Western Cape, Gauteng and Kwa Zulu-Natal) – to have access to probation records
- Legal Services (national office) at the South African Police Service (SAPS)- to have access to police dockets

Permission was obtained from all of the above departments with the exception of SAPS. In a letter dated 7 April 2005, SAPS refused to allow access to police dockets in cases "not yet finalised". It was therefore decided not to pursue the research in relation to police dockets.

Following on the permission that was granted, each research organisation that was tasked with the research proceeded to obtain permission from the relevant officials at each magisterial court.

3.4 Training of field researchers

In April 2005 a training workshop was held with Lawyers for Human Rights, CSIR, the Institute of Criminology and the field researchers that were appointed by the respective organisations. The training session included:

- An introduction to child justice and the criminal justice system
- An overview of the monitoring research project
- A discussion on research ethics
- A discussion on court process, charge sheets, probation reports and the relevant role-players in the criminal justice system
- Application of the research tools
- Reporting requirements

The purpose of the training was to explain the aim of the research, prepare the field researchers for the application of the research tools and equip them, as far as possible, with knowledge of how the present child justice system works in order to obtain consistency in research in the three sites throughout the research study.

3.5 Piloting of research tools

Once the research tools had been developed and the field researchers trained, the tools were piloted over two days during May 2005. The purpose was to determine the suitability, effectiveness and applicability of the research tools. The pilot constituted a simulated version of the actual field work component of the research process. Once the pilot was completed, written feedback was provided to the project co-ordinators at the Community Law Centre and adjustments were made to the research tools, which were then finalised.

3.6 Field research

The field research commenced at the beginning of June 2005 and was completed at the end of September 2005.

The field research was conducted by two field researchers on any 2 days a week, every week over a 4 month period. The research involved the application of the research tools including data collection on court documents and probation records, as well as interviews with probation officers relating to the number of cases that are dealt with by them on a particular day that the relevant field researcher attended court. The researchers had to collect information on and apply the tools to all the cases that were dealt with at the relevant court on the days that they were stationed there each week.[6]

3.7 Capturing of research data

The Alliance made arrangements for the design and development of a database on which all the information gathered by the field researchers could be captured. It was intended to be a resource that would allow for consistent data capturing and which would generate similar reports for all three sites to allow for the continuous formulation and interpretation of the research information. However, it was very unfortunate that there were unforeseen long delays occasioned by misunderstandings between the co-ordinators and the data-base developers. Therefore the database was not accessible during the actual field work and only came into operation after the completion of the field research. While it was originally envisaged that data would be captured on a weekly basis, the research organisations had to transcribe all information from hard-copy to electronic form after September 2005. Further delays were occasioned on account of the fact that there had been no trial data capturing process and so system bugs then had to be addressed.

As mentioned, due to the fact that the database was not available during the course of the research, many problems with the database only came to light at the end of the field research. The types of problems encountered were mostly of a technical nature. There were problems with the database limiting the types of information that could be entered - thus a significant review had to be undertaken of what, how and why the database was excluding and / or misinterpreting information.

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[6] Towards the end of the research Lawyers for Human Rights reported that their field researchers had not been capturing the data as specified at the outset of the study. The LHR research supervisor then obtained all the dockets and assessment sheets that were on the roll for the days that the field researchers were supposed to have collected the data and then reconstructed the necessary data. See paragraph 4.2 below.

For instance, many of the database interpretations of the data captured were inadequate in that the data lacked a stratified account of the information – for example only providing the numbers of males and females in the sample stratified according to age group but not according to other categories such as crime committed, nor presenting the researcher with the case number so as to refer to the particular case. This resulted in much of the data being manually counted by the researchers - thereby rendering the database inefficient. In fact the database was meant to facilitate easy capturing and access to the data, however very often the data had to be manually counted for the above reasons as well as because the data was misinterpreted by the database on a number of occasions, necessitating a physical review of each monitoring tool by the researchers thereby slowing the research process. The manner in which the data was presented by the database was also not user-friendly in the sense that very often the researchers had to re-produce the collated data so as to create more readable graphs and tables. The database also initially resulted in ambiguity of interpretation on the part of the researchers – thereby allowing different data capturers to enter the data in different ways thereby potentially skewing the results of the study. However this was solved by the numerous manual re-counts and all the researchers ultimately agreeing on how to interpret the data, for example ensuring there was a correct understanding of what was meant by "not applicable", "not available" and "unknown".

Notwithstanding these issues the use of the database did prompt data capturers to conduct cross-checks of all the electronic data with the monitoring tool data as well as discuss amongst themselves the nuances of the data capturing process thereby forcing a systematic check on the validity and reliability of the research results. The database also provided a form of grounded reference point where the researchers could find and review data and despite the many problems encountered with the database, it provided a point of contact for the researchers who were dispersed in the three sites.

3.8 Collation of research findings

Once all the information was captured electronically, the database was used to generate reports on specific fields and provide statistical information on a range of issues.

The research tools informed the development of the database and what fields should be extracted in order to compile the various reports.

The research organisations were tasked with generating the reports from the data-base in order to draft a research report on their specific site that would analyse the data collected. The organisations were required to draft the report in accordance with a standard reporting format that addressed the following issues:

- Description of research site and profile of the area
- Methodology at the specific site
- Findings from the charge sheets
- Findings from the probation records
- Personal observations by the field researchers on the various courts and court process

- Obstacles and challenges to the research
- Recommendations for the specific court– both long term and immediate

However, as indicated from paragraph 3.7 above, there were significant difficulties with the data base that indicated the findings that were generated were incorrect. After this became apparent during the initial drafting stages of this report, the three research organisations were requested to manually capture the data from the research templates into their report. This was done and a number of verification audits of data were conducted on each report.

What follows are the findings from the research undertaken in the three magisterial districts disaggregated by the topics as set out above.

4. RESEARCH FINDINGS

4.1 The research sites

The Pretoria 'Juvenile' Court (PJC) is situated in Pretoria. The Court has a dedicated magistrate and prosecutor – during the monitoring study there was a prosecutor at the Court on a temporary basis. There are four (4) probation officers at the Court; however during the study only three (3) were on duty. The probation officers conduct four to five assessments per day and these are generally not assessments of the cases that appear in Court on that specific day.[7]

The Pietermaritzburg court is one of busiest courts that serve the capital of KwaZulu- Natal and, at regional court level, the outer lying Midlands areas such as New Hanover, Greytown, Camperdown and Cato Ridge. The child justice court (hereinafter referred to as the Court) has one presiding officer, one prosecutor, interpreter and two court orderlies. The prosecutor had approximately 5 years of experience and was during the last month of the research replaced by a new prosecutor. The new prosecutor however was a practicing attorney prior to being employed by the State. During the first three months of the research the Court had 2 probation officers and during the last month of the research one probation officer had resigned.[8]

The Wynberg Magistrate's Court is the largest magisterial district in the country. It has a dedicated juvenile justice court, with a magistrate, prosecutor, court orderlies and a probation officer situated at the court to undertake assessments. The Wynberg Court serves numerous suburbs including Hout Bay, Constantia, Retreat and Grassy Park.

At the outset, although the findings will be discussed in detail hereunder, it was surprising to note that at the Pietermaritzburg Court despite the court hearings being held *in camera* (especially when a trial was conducted), remands of cases were held in open court although recorded in the charge sheet as being held *in camera*.[9]

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[7] Carmen Domingo-Swarts "The Child Justice Alliance Monitoring Project: Report on Attendance of Pretoria Juvenile Court – June to September 2005", CSIR, 2006, p.5 (hereinafter referred to as the Pretoria Report).
[8] Sudeshnee Padayachee, "The Child Justice Alliance Monitoring Project: Research Conducted in the Pietermaritzburg Magistrate's Court from June –September 2005", Lawyers for Human Rights Child Rights Project, 2006, p. 2-3 (hereinafter referred to as the Pietermaritzburg Report).
[9] Pietermaritzburg Report, p. 5.

4.2 Methodology at the specific sites

In Pretoria the research team communicated with the Provincial DSD Regional Probation Officer Manager to make the necessary arrangements with the probation officers. Thereafter the researchers had a briefing session with the Senior Public Prosecutor (SPP), with formal introductions to the Court staff (in particular the prosecutor and probation officers). The reason for this was to ensure that there is clear understanding of the purpose of the study and to get full cooperation from the role players at the Court. The primary research was conducted by two criminology honour students from the University of Pretoria (UP). The CSIR has a partnership programme with the University of Pretoria: Department of Criminology, where honours students are required to complete 112 hours of practical project work within the crime prevention field. This monitoring research was seen as an excellent opportunity to build capacity, transfer skills and knowledge.[10]

In Pietermaritzburg Lawyers for Human Rights personally contacted the provincial Departments of Justice and Social Development and informed them about the research. A meeting with the Chief Magistrate was also arranged to discuss the research and the Chief Magistrate then informed the Child Justice Court Magistrate about the research.

The field researchers were students who were sourced from the University of KwaZulu Natal – Pietermartizburg campus and their supervisors were from the Policy and Sociology Departments. After the training was completed LHR then briefed the supervisors in Pietermaritzburg on the research and took the two researchers and one of the supervisors to the local magistrate's court to show them how it operated. At all times during the pilot and the first three months of the research, in addition to supervision by LHR, the 2 supervisors from the University supervised the two field researchers. It was agreed that in the event of any problems being experienced with the manner of research, that this was to be communicated to the University supervisors who had to then resolve these difficulties. However this did not work out that way and during the last month of the research the two field researchers' services were terminated and a LHR staff member then proceeded to complete the research in court.[11]

The reason that their services were terminated was that it became apparent to LHR that some of the cases had not been documented properly by the two field researchers and some cases were not captured. Upon a closer inspection it was evident that there were a number of cases on the court roll for a specific day that was not being documented. This required LHR to uplift those charge sheets and complete the necessary data. Due to the difficulties experienced with the initial data capturing, the fact that the research supervisor was also ultimately the field researcher and the fact that she left LHR before the report was finalised, CSIR conducted a quality audit and produced the portion of the final report that documented the findings from the Pietermaritzburg site.

The monitoring of Juvenile Court Six of Wynberg Magistrates Court was conducted by two researchers, who were appointed by the Institute of Criminology at UCT. The researchers conducted the monitoring for at least two days a week (36 court days in total) at the designated site

[10] Pretoria Report, p. 9.
[11] Pietermaritzburg Report, p. 4.

over a four-month period. They were conversant in both English and Afrikaans. They had to introduce themselves and the research objectives to each of the respective court officials at the juvenile court (Court Six), prior to the commencement of the research project.[12]

4.3 Findings

It was originally intended that the field researchers would record data from the charge sheets for every case appearing on the court roll for each day they attended court. In addition, they would observe the proceedings from each of these cases and then link the data from the charge sheets to the observations from proceedings. However, this resulted in problems in the practical application of the research tools.

In Pretoria, a total of 494 charge sheets were captured. These charge sheets also represented the number of children whose details the researchers captured during the research period. If there were more than one accused in a matter, they only collected the details of one accused in the matter. So there could conceivably be more children who actually appeared in the 494 matters captured, however this research only deals with 494 of them. In addition, of the 494 children, 31 were over the age of 18 years and the age of 4 children was unknown to the researchers and could not be established. Furthermore, a total of 35 charge sheets for completed observation templates could not be obtained. A process was then set in place to gather the relevant information. The researchers revisited the court books to find information on when the case was heard in Court and then followed those dates in respect of the relevant postponement/remand dates. Cases that were finalised were found in the archives. A list of cases archived was given to the Clerk of the Criminal Court who uplifted them. Only 30 cases could be traced in the court books. Out of the 30 cases only 19 charge sheets were found. During the search for the outstanding charge sheets it was found that:

- 2 were being used by the prosecutor,
- 4 cases were withdrawn (and could not been found),
- 1 case was referred to Court F,[13] and
- 4 of the charge sheets could just not be found.[14]

For the purposes of this report, 459 children out of the total of 494 were between 14 and 17 years of age, and this is therefore the figure that will be used in the following findings and discussion as the number of children over 18 years and the number of children whose ages were unknown is excluded from the findings.[15]

In Wynberg, a number of charge sheets could not be captured in the data-base because of missing information – for instance, the age of the accused was not known, no date was entered on the charge sheet and / or there was no case number (due to dockets not being available) and so forth. Therefore the information does not appear in the findings. 359 charge sheets in total were collected during the four month monitoring project of which only 231 cases were actually inputted into the database on account of the fact that the balance of charge sheets contained such minimal

[12] Wynberg Report, p. 2.
[13] Meaning regional court.
[14] Pretoria Report, p. 13-14.
[15] 31 children were over 18 years of age and the ages of 4 children were unknown.

information that it was impossible to decipher, for example, many charge sheets did not even reflect the age of the accused and therefore it was uncertain that the accused was even a child (because it was found that adults also appeared in the juvenile court on occasion). Many cases were duplicated because of multiple accused or the case appearing at court on more than one occasion – however this was to be expected as it was inevitable that a case may be postponed to a day when the researchers attended court again. Similarly 365 children appeared in total during the research, but the details of only 286 appear on the database that are under the age of 18 years. This must be borne in mind as it impacts the consistency of data collected between all three sites. Some of the observational templates were missing or could not be assigned to a charge sheet because at times, case numbers were missing or incorrectly captured (either because of docket illegibility or researcher error). There are incidences where charge sheets have been duplicated on the database as there were more than one accused. In these instances the observational templates have simply been duplicated as well because the observations were made per case, not per accused (although the observational templates do contain information differentiating the responses of different accused in instances where responses differed).[16]

In Pietermaritzburg, similar problems occurred but these were generally as a result of the difficulties with the researchers. As LHR perused the time sheets that were completed by the researchers and they found that on the 6th July a whole day was spent in court but only 6 templates were completed. LHR then uplifted the court books for the day and found that some of the charge sheets were not captured. They then went through all the court books on the days that the researchers were in court to determine if all the charge sheets were completed. It was found that an additional 57 charge sheets were not completed. Arrangements were made with the Clerk of the Court to uplift these charge sheets. Of the 57 uplifted, 3 charge sheets were not completed. Although attempts were made to locate the charge sheets, they were unable to be found as the matter's had already been finalised. So in total, in Pietermaritzburg, 408 charge sheets were captured and from these a total of 421 children appeared during the research.

4.3.1 Findings from the charge sheets[17]

The findings will be presented under the various subheadings.

4.3.1.1. Profile of the children whose information appeared on charge sheets during the research

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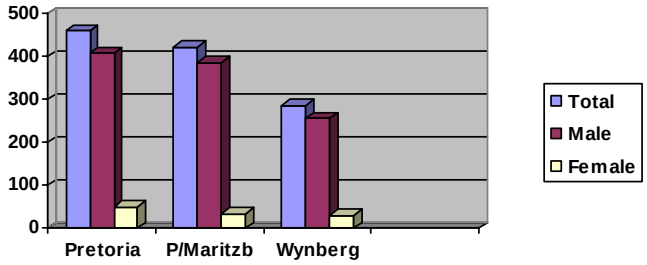
[16] Wynberg Report, p. 15.
[17] What follows in this section is a summary of the findings from all three reports and as such the individual reports will not be referenced for each particular finding.

- Graph 1: Total number of children



While it appears that Pietermaritzburg (n= 421) and Pretoria (n=459) courts dealt with very similar amounts of children over the research period, Wynberg (n=286) dealt with considerably less children. One of the reasons is that the Wynberg results were skewed because not all the data for each case was captured in the database. However despite this the total number of children appearing only totalled 286, still significantly less than the other two courts over the same period. There is otherwise no obvious reason for this discrepancy – in fact because Wynberg is the largest magisterial district in the country one would have expected the largest number of appearances. Two possible explanations are that, firstly, less children may come into conflict with the law in that area or secondly, more diversions are being effected prior to first appearance.

Not surprisingly, most of the children appearing in each court were male (Wynberg 89.5%, Pretoria 88.8% and Pietermaritzburg 91.7%). [18]

- Age profile of the children

This information reflects the numbers of children appearing in court who are either under 10 years, between the ages of 10 and 13 years and those between 14 - 17 years of age. This was done on account of the fact that the Child Justice Bill raises the age of criminal capacity to 10 years and retains the rebuttable presumption that children lack criminal capacity between 10 and 13 years. It was felt that the age differentiation would illustrate the numbers of children at present being prosecuted who would not be so prosecuted under the new legislation. In addition, as the Child Justice Bill provides specific steps that require the State to apply their mind to a prosecution of a child between 10 and 13 years (which do not presently exist), it was decided to collect information on the numbers of children being prosecuted currently to compare with the numbers of those similarly prosecuted once the Bill is enacted.

[18] This accords with findings from previous research on children in conflict with the law that show that child offenders are mostly male. See for example Muntingh L (ed) *Children in conflict with the law: A compendium of child justice statistics 1995-2001* (study commissioned by the Community Law Centre, University of the Western Cape), 2003 – hereinafter referred to as the Muntingh study.

Table 1: Age Profile of the children

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Male under 10 yrs	1	0	2	3[19]	0.26
Female under 10yrs	0	0	0	0	0
Male 10-13 yrs	24	7	18	49	4.2
Female 10-13yrs	0	0	1	1	0.9
Male 14 – 17 yrs	231	379	388	998	85.6
Female 14 - 17 yrs	30	35	50	115	9.9
Total	286	421	459	1166	100

The figures show that while there are very few children under 10 being prosecuted, there are still such prosecutions happening. This constitutes 0.26 % of the total number of children. It can then be argued that the raising of the age of criminal capacity to 10 years in terms of the Child Justice Bill would not make a substantial difference to the number of prosecutions of young children.[20]

However, more importantly the number of children being prosecuted who are aged between 10 and 13 years constitute 4.3 % of the total number of children in the study. While this is not a significant amount, nevertheless these are the children who the state has to prove are criminally responsible. While the onus on state will remain the same under the Child Justice Bill as it exists now, in addition the state will have to ensure that it has applied its mind to the prosecution of children between 10 and 14 years due to the new requirement being introduced by the Bill, namely that a certificate must be issued by the Director of Public Prosecutions (DPP) indicating its intention to prosecute. This provision has been introduced to ensure that the test for criminal responsibility is properly considered and applied by the state. It will be interesting to see whether this figure of 4.3% will decrease or increase due to the introduction of the certificate.

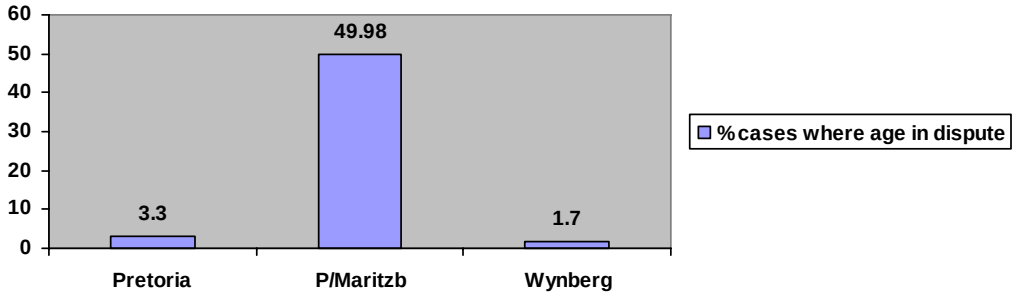
- Cases where the age of the child was in dispute

The Discussion Paper of Project 106 of the South African Law Reform Commission noted that it is not uncommon for South African children to be unaware of their ages and dates of birth and in some cases even the parents are unable to give particulars in this regard.[21] The Discussion Paper also points out that where legislation provides different provisions for

[19] The offences that these children were charged with were theft out of a motor vehicle, housebreaking and theft and shoplifting.
[20] This table indicates that the bulk of children coming into conflict with the law are over 14 years. Again this accords with previous research such as the Muntingh study referred to above.
[21] Discussion Paper 79, Project 106, 1998, paragraph 6.52.

different ages, the issue of age determination is placed firmly on the agenda. Therefore, various proposals were made that culminated in specific provisions in the Child Justice Bill to assist with age determination at the assessment stage. The information obtained in this study as to the numbers of cases where age is in dispute is intended to form the basis against which the success of the provisions of the Child Justice Bill can be measured once enacted.

Graph 2: Age of child in dispute



In Pietermaritzburg, a disproportionately high amount of cases involved a dispute of the child's age (in 202 cases the age of the child was in dispute). This is open to a number of interpretations namely, that Wynberg (in 5 cases the age of the child was in dispute) and Pretoria (in 15 cases the age of the child was in dispute) are either doing their assessments well or the court is not engaging in age determinations or that Pietermaritzburg's assessments are not being completed properly or the court is overly concerned with the child's age. On the other hand, the possibility exists that most children appearing in the Pietermaritzburg court were born in the rural areas and did not have their births registered thereby resulting in a dispute over the child's age.

- Table 2: Race profile [22]

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Coloured	192	30	57	279	23.9
White	9	6	63	78	6.7
Black	84	359	303	746	64
Indian	0	25	2	27	2.3
Asian	0	0	5	5	0.4
Unknown[23]	1	1	29	31	2.7
Total	286	421	459	1166	100

[22] While the authors of the study find racial classification in particular repugnant, categorization of children in the criminal justice system on the basis of their race has been deemed essential for the purposes of this research. When one is considering race disparity in South Africa, it should be recognized that this factor is often correlated with disparity in other factors such as language, literacy and educational attainment, age and socio-economic status.

[23] This category was added as the race was either not filled in on the charge sheet or the particular field researcher could not determine the race of the child accused.

The above table seemingly corresponds not only to the race demographics of South Africa (with the obvious exception of the total number of white accused, though the reason for this is unclear from this research).

- Reasons for matter being placed on the court roll

There have been many reports of delays in court that result in children's matters not being dealt with expediently and that they are held in detention awaiting trial for long periods of time. The field researchers were therefore requested to record the reason for the cases appearing in court on the days that they attended court in order to determine the nature of court proceedings that most frequently occurs on any particular day.

Table 3: Reasons for matter being on the court roll

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
First appearance	26	37	76	139	11.4
Bail application	15	1	0	16	1.3
Age determination	3	1	0	4	0.3
Postponement	58	191	248[24]	497	40.9
Withdrawal of charge	19	28	27	74	6.1
Plea	107	69	0	176	14.5
Trial	21	35	0	56	4.6
Plea and trial	0	0	45	45	3.7
Judgement	0	2	0	2	0.2
Sentence	20	45	10	75	6.2
Unknown	46	12	27	85	7
Other	0	0	46	46	3.8
Total	315	421	479	1215	100

The Child Justice Bill lengthens the remand time for children in custody from 14 days to 30 days for children in prison and 30 days to 60 days for children in welfare facilities. While the reasons for postponement were not clear, the most frequent reason for children appearing in court is a postponement. The lengthening of the time periods will hopefully ensure a speedier finalisation of trials (as this will ensure more time for police investigation and subpoenaing witnesses for example) as well as a less congested court roll. It will be interesting to see the effect of the enactment of the Child Justice Bill on these figures, especially in light of the fact that the reasons for postponements in Pretoria court relate to issues that extend beyond further investigation. What

[24] The various postponements were for reasons such as the child to complete a programme; the child to obtain legal aid; for the child's guardian to appear in court; disclosure; the assessment of the child; obtaining a pre trial report and warrant of arrests.

will also be interesting is whether the amount of children appearing for plea or trial will decrease once the preliminary inquiry and the regulation of diversion is introduced.

4.3.1.2. Crime categories, gender and age distribution

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The following information was collected to illustrate the prevalence of types of offences committed by children and disaggregated.[25]

Table 4: Offences committed by children at the three courts

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Theft	38	84	96	218	18.6
Theft of a M/V	8	0	3	11	0.9
Theft out of a M/V	18	11	3	32	2.7
Theft of a cell ph.[26]	0	0	30	30	2.6
Shoplifting	28	1	88	117	10
Receiving stolen property	0	0	0	0	0
Possession of stolen property	16	2	21	39	3.3
Possession of housebreaking implements and possession of motor vehicle breaking equipment	1	0	8	9	0.8
Housebreaking and theft	34	85	29	148	12.6
Housebreaking with intent to commit offence unknown to prosecutor	8	0	12	20	1.7
Fraud	0	0	4	4	0.3
Malicious injury to property	10	18	16	44	3.8
Animal abuse	1	0	0	1	0.0.9

[25] The information is set out according to offence categories that exist in our common law or statutory law. However, there were instances where the charge sheets reflected offences that did not constitute a valid criminal offence – e.g. in Wynberg one accused was charged with sodomy despite this being declared unconstitutional in 1999. This instance was recorded in the indecent assault category above. Likewise, a charge of theft of sheep was included in the category of stock theft.

[26] Although this offence, as well as shoplifting, constitutes the offence of theft, it has become practice in the courts to single out these as "specific" theft offences.

Illegal possession of crayfish or perlemoen	3	0	0	3	0.3
Driving M/V without owner permission	0	0	0	0	0
Driving M/V without driver's license	0	0	1	1	0.0.9
Negligent driving	3	0	2	5	0.4
Driving under the influence of alcohol or a narcotic substance	2	0	0	2	0.2
Pointing of a firearm	2	14	2	18	1.5
Possession unlicensed firearm	6	0	2	8	0.7
Possession of illegal ammunition	3	0	0	3	0.3
Possession of a dangerous weapon	2	0	3	5	0.4
Possession of drugs	16	2	34	52	4.4
Dealing in drugs	1	0	0	1	0.0.9
Assault common	22	26	30	78	6.6
Assault with intent to do grievous bodily harm	32	58	19	109	9.3
Murder	2	0	1	3	0.3
Attempted murder	2	0	0	2	0.2
Culpable Homicide	0	0	0	0	0
Robbery	19	86	29	134	11.4
Armed robbery	0	0	6	6	0.5
Attempted robbery	2	0	0	2	0.2

Indecent assault	7	1	5	13	1.1
Rape[27]	12	0	0	12	1.02
Assault of a police officer and resisting arrest	0	0	1	1	0.0.9
Crimen iniuria	0	0	1	1	0.0.9
Any conspiracy, incitement, attempt to commit an offence	3	0	18	21	1.8
Unknown (charge not listed on charge sheet)	8	0	2	10	0.9
Contravening a peace order	0	1	0	1	0.0.9
Failure to attend court	1	1	0	2	0.2
Perjury	0	4	0	4	0.3
Stock theft	0	1	0	1	0.0.9
Trespassing	2	0	0	2	0.2
Total	312	395	466	1173	100

The above figures confirm the statistics that show that children mostly commit economic offences (for example the Muntingh study, Children in conflict with the law: A compendium of child justice statistics, 2003). However, some of the figures do raise some concerns. Firstly, there seems to be inconsistency of practice in relation to sexual offences with these offences only passing through Wynberg. Second, while shoplifting and theft of a cell phone are essentially theft – all three courts use the separate terms instead of just including these offences under theft. This implies that the courts are perhaps treating the two separately from theft and this may have implications for sentence for all three. It raises the question as to what now constitutes theft and if shoplifting and theft of cell phones are singled out why not sub-categorise all other types of theft, for example theft of bicycles or pick-pocketing? Finally, there are some offences which should perhaps be considered for admission of guilt rather than prosecution – in particular the offences relating to contravening a peace order and driving without a driver's licence – and it is surprising that these offences are on the roll.

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[27] In Pretoria all sexual offence matters are referred to the sexual offences court from first appearance. This accounts for the fact that there are no rape offences recorded in this magisterial district. In Pietermaritzburg, the same procedure as in Pretoria is followed. In a personal communication with a representative of the National Prosecuting Authority based in the Western Cape, it appears that the rape matters that appear in the Wynberg district court could possibly be only for purposes of remand as all rapes are actually dealt with at regional court level.

Table 4.2: Offence disaggregated by age and gender

	Male under 10yrs	Female under 10 yrs	Male 10-13 yrs	Female 10-13yrs	Male 14-17 yrs	Female 14- 17 yrs	Total	Percentage
Theft	1	0	15	0	165	37	218	18.6
Theft of a M/V	0	0	1	0	8	2	11	0.9
Theft out of a M/V	1	0	0	0	31	0	32	2.7
Theft of a cell ph.[28]	0	0	1	0	25	4	30	2.6
Shoplifting	0	0	8	0	79	30	117	10
Receiving stolen property	0	0	0	0	0	0	0	0
Possession of stolen property	0	0	2	0	33	4	39	3.3
Possession of housebreaking implements and m/v breaking equipment	0	0	0	0	9	0	9	0.8
Housebreaking and theft	1	0	4	0	142	1	148	12.6
Housebreaking with intent to commit offence unknown to prosecutor	0	0	1	0	19	0	20	1.7
Fraud	0	0	0	0	4	0	4	0.3
Malicious injury to property	0	0	0	0	36	8	44	3.8
Animal abuse	0	0	0	0	1	0	1	0.09
Illegal possession of crayfish or perlemoen	0	0	0	0	3	0	3	0.3
Driving M/V without owner permission	0	0	0	0	0	0	0	0

[28] Although this offence, as well as shoplifting, constitutes the offence of theft, it has become practice in the courts to single out these as "specific" theft offences.

Driving M/V without driver's license	0	0	0	0	1	0	1	0.09
Negligent driving	0	0	0	0	5	0	5	0.4
Driving under the influence of alcohol or a narcotic substance	0	0	0	0	1	1	2	0.2
Pointing of a firearm	0	0	0	0	18	0	18	1.5
Possession unlicensed firearm	0	0	0	0	8	0	8	0.7
Possession of illegal ammunition	0	0	0	0	3	0	3	0.3
Possession of a dangerous weapon	0	0	0	0	5	0	5	0.4
Possession of drugs	0	0	2	0	47	3	52	4.4
Dealing in drugs	0	0	0	0	1	0	1	0.09
Assault common	0	0	2	1	66	9	78	6.6
Assault with intent to do grievous bodily harm	0	0	8	0	91	10	109	9.3
Murder	0	0	0	0	3	0	3	0.3
Attempted murder	0	0	0	0	2	0	2	0.2
Culpable Homicide	0	0	0	0	0	0	0	0
Robbery	0	0	1	0	131	2	134	11.4
Armed robbery	0	0	0	0	5	1	6	0.5
Attempted robbery	0	0	0	0	2	0	2	0.2
Indecent assault	0	0	0	0	13	0	13	1.1

Rape[29]	0	0	3	0	9	0	12	1.03
Assault of a police officer and resisting arrest	0	0	0	0	1	0	1	0.09
Crimen iniuria	0	0	0	0	1	0	1	0.09
Any conspiracy, incitement, attempt to commit an offence	0	0	0	0	20	1	21	1.8
Unknown (charge not listed on charge sheet)	0	0	0	0	10	0	10	0.9
Contravening a peace order	0	0	0	0	0	1	1	0.09
Failure to attend court	0	0	0	0	0	2	2	0.2
Perjury	0	0	0	0	4	0	4	0.3
Stock theft	0	0	0	0	1	0	1	0.09
Trespassing	0	0	0	0	2	0	2	0.2
Total	3	0	48	1	1005	116	1173	100

The following graph represents a breakdown of the offence profile of the children aged below 14 years.[30]

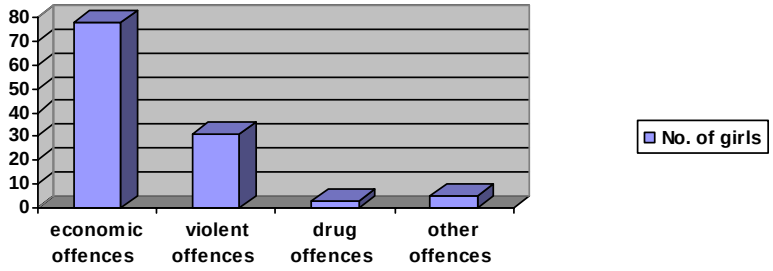
[29] In Pretoria all sexual offence matters are referred to the sexual offences court from first appearance. This accounts for the fact that there are no rape offences recorded in this magisterial district. In Pietermaritzburg, the same procedure as in Pretoria is followed.

[30] The offences included under economic offences(n=35) are: theft; theft out of a m/v; theft of a m/v; theft of a cell phone; shoplifting; possession of stolen property; housebreaking and theft and housebreaking with intention to commit offence unknown. The offences under violent offences (n=15) are: rape; robbery; assault GBH and assault common. The drug offences (n=2) are possession of drugs.

Graph 3: Offence profile of the children aged below 14 years

Likewise the following graph illustrates the offence profile of girls charged with offences during the duration of the study.[31]

Graph 4: Offence profile of girls charged with offences during the duration of the study



4.3.1.3. Detention of children

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Detention of children is a high priority issue in child justice. Section 28 (1)(g) of the South African Constitution provides that detention of children should be a last resort and for the shortest appropriate period of time. There have been numerous developments over the last 10 years to attempt to manage this issue, for example, section 29 of the Correctional Services Act. In 1995, section 29 of the Correctional Services Act was amended to allow for the release from detention of all children in prison awaiting trial except in certain limited circumstances. Due to the fact that

[31] The offences included under economic offences(n=78) are: theft; theft of a m/v; theft of a cell phone; shoplifting; possession of stolen property; housebreaking and theft. The offences under violent offences (n=31) are: robbery; attempted robbery; assault GBH; assault common and malicious injury to property. The drug offences (n=3) are possession of drugs. The other offences (n=5) are: Failure to attend court; contravening a peace order; conspiracy, attempt, incitement to commit and offence and driving a motor vehicle under the influence of alcohol.

welfare facilities could not cope with the sudden influx of children, the implementation of this provision was not successful and section 29 was amended again. This amendment, which came into effect in May 1996, provided for the detention in prison of children awaiting trial who were older than 14 years of age and who were charged with certain offences. Although it was only intended to be in force for a maximum period of two years, due to a drafting error the provision still remains on the statute books. Since September 1996, when there were only approximately 600 children awaiting trial in prison on any one day, this amount steadily increased to the point when, in March 2000, a total of 2800 children were being detained countrywide. Recent statistics show that the average number of children awaiting trial in South African prisons in 2004 was 1921, down from 2329 in 2003.[32]

The following information is intended to illustrate the trends of placing children both pre-first appearance and awaiting trial. On account of the fact that there is little guidance given to presiding officers at present and their discretion is very wide, the Child Justice Bill attempts to curtail that discretion by providing specific guidelines to regulate such placement. Therefore, the data collected in this research as well as in future studies, will seek to measure whether the provisions of the Child Justice Bill impact on the detention of children.

- Placements of the child

Table 5: Placement of children after arrest and awaiting trial

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
Care of parent/guardian	88	309	290	687	56.5
Place of safety	35	13	68	116	9.5
Police cells	6	99	36	141	11.6
Prison	5	49	43	97	8
Secure care facility	0	0	1	1	0.08
Unknown	152	0	21	173	14.2
Other	0	0	0	0	0
Total	286	470	459	1215	100

What is interesting from the above breakdown is that it appears that children in Pietermaritzburg children are held in police cells after arrest on a far larger scale than the other two courts. Likewise, children in Pretoria are sent to places of safety far more often than the other two districts.

[32] Muntingh L, "Children in prisons: some good news, some bad news and some questions", *Article 40*, Volume 7, Number 2, August 2005, p. 8.

The age breakdown is particularly important as far as placement in prison is concerned because no child may be held in prison awaiting trial if they are below 14 years of age. In Pietermaritzburg all of the children held in prison were 14 - 17 years. In Pretoria all of the children placed in prison were aged 14 – 17 years. Likewise, in Wynberg there were no children held in prison under 14 years – they were all males 14- 17 years of age.

Of further concern is the fact that while children were being held in prison, only 1 was held in a secure care facility.

As for the rest, the following table breaks down the age and gender of the total number of children placed in the care of parents/guardians, places of safety, police cells, secure care facilities and prison across the three magisterial districts.

Table 6: Placement of a child after arrest and awaiting trial disaggregated by age and gender

	Care of parent/ guardian	Place of safety	Police cells	Secure care facility	Prison	Total	Percentage
Girls under 10 yrs	0	0	0	0	0	0	0
Boys under 10 yrs	2	0	0	0	0	2	0.2
Girls 10 – 13 yrs	1	0	0	0	0	1	0.1
Boys 10-13yrs	32	1	4	0	0	37	3.6
Girls 14 - 17 yrs	79	5	12	1	3	100	9.6
Boys 14 - 17 yrs	573	110	125	0	94	902	86.6
Total	687	116	141	1	97	1042	100

These findings are of concern in a number of aspects:

- 97 children are being placed in prison and 141 in police cells, yet only 1 in secure care facilities, despite the fact that all these courts have secure care facilities within travelling distance.
- In addition, the amount of children in places of safety is also not as much as children placed in police cells, and the number of children placed in prison is not significantly less than those placed in places of safety. In addition, it should be noted from the offence tables listed above, that the children involved in the study were mainly charged with economic offences and appearing in the district courts – certainly distinguishable from

children charged with serious violent offences and being tried in the regional courts – the latter more likely to be held in prison.
- 4 boys aged 10 – 13 years were held in police cells, a situation that does not sit well given their young age.
- 3 girls were placed in prison, despite general acceptance that prisons do not have adequate facilities to hold girls children separately to adults.

It should also be noted that in Pretoria, 1 child was released on police bail after arrest but prior to their first appearance. They were all between 14 and 17 years and both of them were males. In Wynberg 9 boys, all between 14 and 17 years were released on police bail before the first appearance. In Pietermaritzburg 2 boys were released on police bail and they too were all between 14 and 17 years of age.
While it is encouraging to note that placement with a parent or guardian is the most frequent placement, the numbers of children held in prison exceed the number placed in secure care facilities.

- Change in placement of children

In Wynberg, there were 2 changes of placement after the initial appearance – but this does not reflect the real number as there were many incidences where the placement of the child after arrest was simply not known.

In Pretoria the placement of the child after arrest was changed by the court in 45 cases. The reasons for the changes that appeared from the charge sheets were as follows:
- In 33 of the cases the child was released into the custody of his or her parents after they were located (though it is not clear from which institutions they were released)
- In 4 of the cases the child was sent to a place of safety because no parent or guardian could be traced
- In 3 cases the child was rearrested and kept in police cells
- In 2 cases the child was released on bail into the custody of his or her parents
- In 1 case the child was released into the custody of his or her parents after a plea had been noted
- In 1 case the child was sent to prison as no parent could be traced
- In 1 case the child was sent to prison as bail was not paid

In Pietermaritzburg, only in one case did the placement of the child change after the first court appearance. However, the reason for the change is unknown.

Bail

At present the Criminal Procedure Act 1977 (CPA) provides that all accused can be released on bail, although the issue of bail is linked to specific offence schedules in the Act that determine the standards against which the granting of bail is measured. The draft of the Child Justice Bill that was introduced into Parliament in 2002 contained provisions that allowed for bail without all the onerous provisions contained in the Criminal Procedure Act 51 of 1977 (CPA). However, during the

deliberations of the Portfolio Committee on Justice and Constitutional Development, the bail clause was substantively reworked and now contains provisions very similar to those in the CPA.

The following information relates to the current practice of the juvenile courts in relation to the granting or refusal of bail for children.

In Wynberg 16 children were released on bail by the court. All of these were boys between 14 and 17 years of age. The offences for which these children were charged were assault (1); assault GBH (4), housebreaking and theft (4), housebreaking with intent to commit and offence unknown to the prosecutor (1); possession of unlicensed firearm (2); possession of illegal ammunition (2); possession of stolen property (1); rape (2); theft (1) and theft from a motor vehicle (3). The reasons for granting of bail reflected in the charge sheets included:

- Accused had a fixed address with no previous convictions or cases pending against him
- The court concluded that the accused would not pose any significant threat to society
- The court concluded that the accused would not abscond and would return to court on the next date to stand trial
- The child was a first offender and there were no outstanding warrants or previous convictions
- The court was of the opinion that it would be in the interests of justice that bail be granted
- The court felt that the child met the conditions for release on bail

In Pretoria the court released 7 children on bail. In one case the reason given was that the child was a minor and in the remaining 6 cases no reason was given as to why bail was granted. The reason that so few children were released on bail in Pretoria is not evident from the findings.

In Pietermaritzburg the data shows that the total number of children released on bail was 30. All of these children were males between 14 and 17 years of age. The offences for which these children were charged were robbery (16), assault GBH (2) theft out motor vehicle (3), theft (5), housebreaking and theft (4). It should be noted that in some cases even though children had no previous convictions, bail was nevertheless set and the amounts ranged from R200.00 to R2000.00 – amounts that it would be surprising that children could raise. In cases where bail was denied, some of the reasons noted were the fact that the children constituted “flight risks” and that some children had other cases pending or were already in custody for other matters.

4.3.1.4. Assessment[33]

The Child Justice Bill provides for a framework whereby assessment of the child becomes a standard procedure in the child justice system. The Child Justice Bill is the mechanism whereby prosecutors, magistrates and police officers are obliged to facilitate and take assessments into account. In terms of the proposed legislation, an assessment must occur prior to the child’s

[33] More information on assessments will appear from the section that analyses the probation officer’s records.

appearance at the preliminary inquiry and as the preliminary inquiry must occur within 48 hours of arrest, the assessment must occur within that 48 hour period. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity. At present the Probation Services Act 116 of 1991 as amended provides that assessment is one of the core responsibilities of probation officers. However, assessments in the present system are not uniformly applied or regulated and delays often occur. Therefore the present study will hopefully lay a foundation against which to evaluate improvements in the overall child justice system in relation to assessment once the Child Justice Bill is enacted.

- Release of children from court prior to assessment

In terms of the proposed child justice legislation, children should be assessed within 48 hours of arrest. As children have to appear in court within 48 hours of arrest, they should be assessed prior to the first court appearance. This can be largely facilitated by the fact that the child is initially in police custody and if assessed and then released, for example into his or her parent's care, this practice would assist in averting further delays at court when the child would have to be assessed before appearing for the first time.

The study showed, however, that children are released by the police before being assessed. The intention is that the mechanisms provided in the Child Justice Bill would stop this practice and require police and probation officers to ensure the child is assessed as early as possible.

In Pretoria, out of the 459 children 11.1%, of them were released before being assessed. In Wynberg, 0.7%, out of the 286 children were released and in Pietermaritzburg, 19.2%, out of 421 children were released prior to assessment. This seems to indicate there is a problem with assessments at the Pietermaritzburg court as it appears that 19.2 % of the children are not being assessed before they are released, possibly occasioning delays at court.

4.3.1.5. Court Proceedings

Formatted: Bullets and Numbering

The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry, which makes use of current resources and personnel. This inquiry has a number of objectives, which include establishing whether a child can be diverted and if so identifying a suitable diversion option and determining the release or detention of a child. As our present child justice system has no similar procedure, this study was unable to collect information against which to measure the future implementation of the preliminary inquiry.

Instead the research sought to assess the current functioning and practice of the three juvenile courts.

- Plea

Table 7: Status of pleas at all sites

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
How many children entered a plea	48	162	24	234	40.9
No. of guilty pleas	35	102	10	147	25.7
No. of not guilty pleas	13	60	12	85	14.9
Nature of plea unknown	104	0	2	106	18.5
Total	200	324	48	572	100

Table 8: Children who pleaded guilty

	Wynberg	Pietermaritzburg	Pretoria	Total	
Girls under 10 yrs who pleaded guilty	0	0	0	0	0
Boys under 10 years who pleaded guilty	0	0	0	0	0
Girls between 10 and 14 yrs who pleaded guilty	0	0	0	0	0
Boys between 10 and 14 years who pleaded guilty	2	0	0	2	1.4
Girls over 14 yrs who pleaded guilty	3	10	1	14	9.5
Boys over 14 yrs who pleaded guilty	30	92	9	131	89.1
Total	35	102	10	147	100

Of concern is the fact that 2 children aged between 10 and 13 years pleaded guilty. The reason for the concern relates to the fact that the state bears the onus of proving that children below 14 years of age have criminal responsibility. It is unclear from the research whether the state proved this in the 2 cases or whether the courts established criminal capacity from the guilty pleas themselves.

This issue was raised in the recent case of M v S.[34] In that case a 13 year old boy was charged with murder and was tried in the regional court in Pietermaritzburg. He pleaded guilty and in the section 112(2) statement prepared by his legal representative he admitted that his actions were "unlawful and intentional". No other evidence was led and he was found guilty on the basis of his guilty plea. On appeal it was argued that the trial court erred in finding M guilty on the basis of the section 112(2) statement in that the court failed to establish the criminal capacity of M. The appeal court was not convinced and held that as M was legally represented, the court was entitled to accept what was said in the section 112 (2) statement without questioning the accused. The court pointed to the words unlawfully and intentionally and noted that the fact they were included in the statement implied that the legal representative had canvassed the issue of criminal capacity. An application for leave to appeal on the merits has been lodged.

This is an issue that has not really been addressed in the Child Justice Bill as the issues relate to common law principles of criminal capacity. It will be interesting to see the outcome of the application for leave to appeal the decision that has been lodged.

Table 9: Children who pleaded not guilty

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Girls under 10 yrs who pleaded not guilty	0	0	0	0	
Boys under 10 years who pleaded not guilty	0	0	0	0	0
Girls between 10 and 13 yrs who pleaded not guilty	0	0	0	0	0
Boys between 10 and 13 years who pleaded not guilty	0	0	1	1	1.2

[34] Discussed in Skelton, A "Examining the age of criminal capacity", *Article 40*, Volume 8, No. 1, August 2006.

Girls between 14 and 17 yrs who pleaded not guilty	2	1	2	5	5.9
Boys between 14 and 17 yrs who pleaded not guilty	11	59	9	79	92.9
Total	13	60	12	85	100

- Time period between first appearance and plea

There are ongoing concerns expressed about lengthy delays experienced in the criminal justice system. Therefore the following information should illustrate the time delays involved between first appearance and plea for the random sample that this study used. As will become evident, the delays that are occasioned are at times shockingly excessive and inexplicable.

Unfortunately in relation to Wynberg court the database produced two results of -27 and -6 days and it is unclear as to why these values are being processed but they have been disregarded due to the impossibility of this occurring. – it may have been that the data was incorrectly entered. Another problem that emerged was that there is a discrepancy between the number of recorded first appearances per case for the period spent in Wynberg court (n=26) and the results below, which indicate 29 first appearances by children – however this may be on account of the fact that some of the cases had more than one accused in them.

It should be noted that in Wynberg 48 children were recorded as entering a plea, yet the following table only provides details of 29 pleas. [35]

It should be noted that even though a total of 24 children pleaded in Pretoria, in only 15 of the cases were dates indicated on the charge sheets, therefore the above table illustrates the time difference in only 15 cases. This is of concern as date of plea is an important component of any charge sheet and therefore it is imperative that this be noted. Failure to do so indicates a lack of proper performance on the part of the presiding officer.

The following table represents the delay between first appearance and plea for the 3 courts separately and together:[36]

Table 10: Delays between first appearance and plea per site

	Wynberg	PMB	Pretoria	Overall

[35] Likewise, while there were 107 cases on the roll for plea during the research period, that doesn't necessarily mean that the child actually pleaded on that day. So when the calculation regarding the delay between first appearance and plea was done, it used the delays between first appearance and actual date of plea. It may also be that in some instances, the child had pleaded (hence the recorded number of 48 pleas) but the date of plea was not recorded and so the delay could not be calculated (which is what occurred in Pretoria). The same reasoning will be applicable when dealing with delays between first appearance and judgment and first appearance and sentence below.

[36] There are data errors regarding the number of pleas, but the differences are minimal and do not significantly impact the average and median delays.

Average no. of days	70	130	162	124
Median no. of days	29	65	150	70
N =	29	165	15	209

Specific details are available of each matter in order to gain an exact idea of what kind of matters are being delayed and the age and gender of the children involved.[37] What is evident is that some matters are taking a very long time to be resolved in the district courts. What is of even more concern is the fact that the offences are not serious ones – so the longest delay in Pretoria is over 1 year for theft involving a boy between the ages of 10 and 13 years, while the longest delay for Pietermaritzburg is over 3 years for an offence of housebreaking and theft. Furthermore, Pietermaritzburg court has 5 cases where the delay between first appearance and plea is over 1 year. Nonetheless Pretoria has on average the longest delays between first appearance and plea – over double that of Wynberg and most certainly a cause for concern regarding the functioning of that court.

Unfortunately, the research did not determine what the reasons for the actual delays were and this can be seen as a shortcoming as it may well have been that the child absconded and this caused the delay rather than a fault on the part of the criminal justice system. However, it might also be that the plea is delayed for good reason by either the prosecutor or defence attorney since once the plea is noted, there is no possibility for withdrawal. Prosecutors may therefore be delaying the plea because they may still wish to withdraw or divert the matter but are awaiting certain further information. Nevertheless what the research has done is to note the number of postponements that occurred during the research period and note what the main reasons for these postponements were. This information appears later on in the report under the sentencing section.

- Time period between first appearance and judgment

Again, because of the lengthy delays in the criminal justice system at present, the research investigated time delays between all the key procedural stages in a matter in order to lay the basis for determining whether the new child justice laws will have prevented such delays.

It should be noted that in this category, it is possible to have a judgment on first appearance if the accused has pleaded guilty on that date. For children, it is submitted that this may not be the best way to go, as it begs the question of whether the child was assessed or had the opportunity to obtain legal representation or legal aid.

In Wynberg there was one problem with the results as, again, the database shows a result of -27 days which is impossible and therefore this finding was ignored.

In Pretoria, there should have been information on at least 10 matters (as this was the number of matters on the roll for sentence i.e. after judgement) where there would have been a lapse of time between first appearance and judgment. However, the field research only produced information relating to the delay in four matters on account of the fact that yet again the date of judgment did

[37] This information is available on request from the authors as it is contained in the individual reports from each site.

not appear from the charge sheet in the other matters (refer to the same problem in relation to pleas).

Likewise there is a difference between the numbers of judgments handed down and the delays between first appearance and judgement and again this could be attributed to failures to record the date of judgment.

The following table represents the delay between first appearance and judgment for the 3 courts separately and together:[38]

Table 11: Delays between first appearance and judgement per site

	Wynberg	PMB	Pretoria	Overall
Average no. of days	75	105	520	97
Median no. of days	77	21	127	30
N =	25	49	4	78

As in the case of the delay between first appearance and plea, there are lengthy delays between first appearance and judgment and again the lack of reasons for the delays are not determinable from this report. However Pretoria again seems to be the court where the longest average delays occur and it stands out against the other two courts particularly regarding delays in court process.

- Sentence

The Criminal Procedure Act contains a wide range of sentencing options to be used in matters pertaining to children. However, in drafting the original version of the Child Justice Bill, the South African Law Reform Commission decided to re-appraise the sentencing of child offenders as it recognised the impact of the concept of restorative justice on the criminal justice system, the effect of our Constitution on the traditional aims of punishment and the shift in the international approach to sentencing from rehabilitation to reintegration into society.

The various types of sentencing in terms of the current juvenile justice system are illustrated below. It is envisaged that the new Child Justice Bill will impact on a wide range of matters in relation to sentencing including pre-sentence reports, the type and nature of sentences and the delays occasioned in sentencing children.

- Time period between date of first appearance and date of sentence

[38] It may appear there might be a discrepancy between the delays between first appearance and plea as compared to the delays between first appearance and judgment but the data collected for both do not necessarily involve the same case (although in certain instances they might). There are data errors regarding the number of judgements, but the differences are minimal and do not significantly impact the average and median delays.

In Wynberg the following observation by the researchers was made, namely, that again the database is showed a result of -27 days, which is impossible (probably an inputting error) and the number of first appearances recorded for the period at Wynberg court is different to the number reflected below, which is 24. While it is unlikely that the time period between dates of first appearance and sentence would take place on the same day or only take one day, it is possible. Nevertheless, therefore, this data must be viewed with caution and is probably skewing the results. Also it was not always the case that the dates of sentence were known to the researchers and this may have also skewed the results generated by the database.

The following table represents the delay between first appearance and sentence for the 3 courts separately and together:[39]

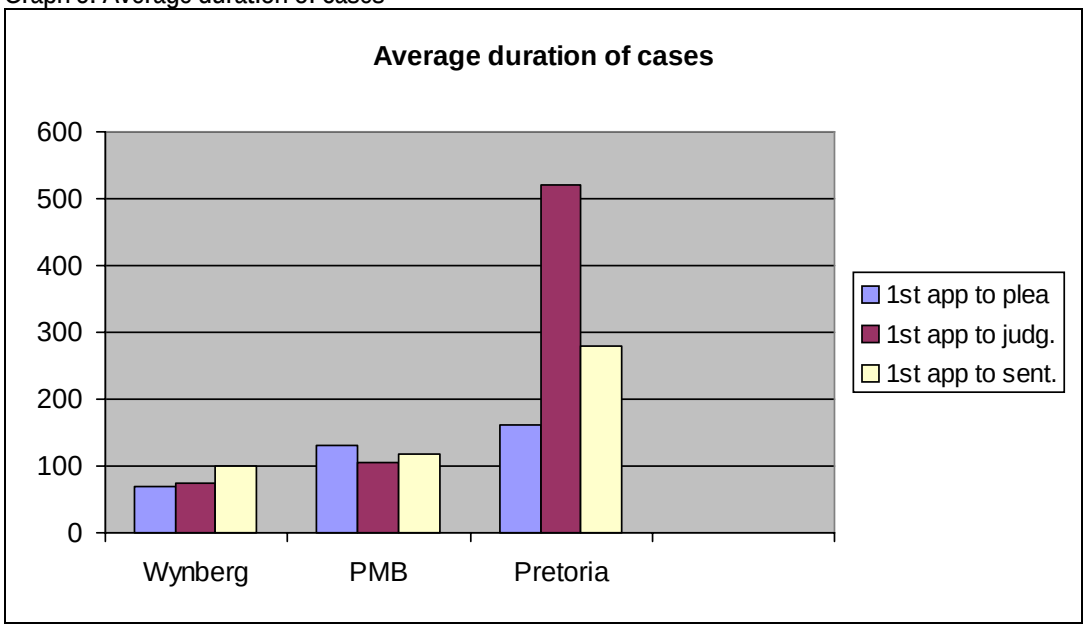
Table 12: Delays between first appearance and date of sentence per site

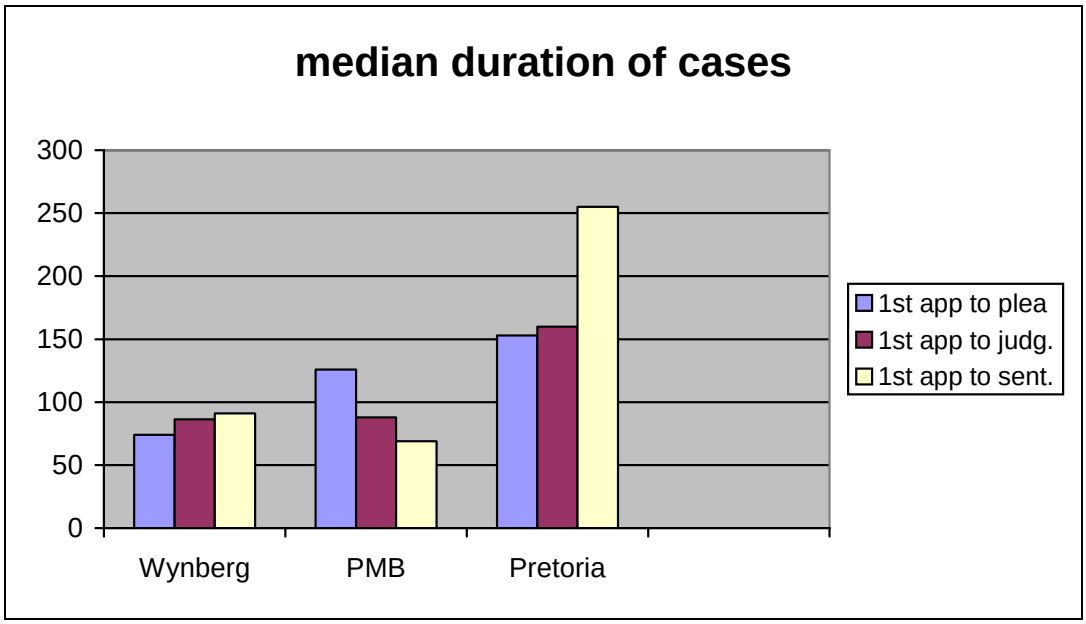
	Wynberg	PMB	Pretoria	Overall
Average no. of days	101	118	280	119
Median no. of days	76	55	213	61
N =	24	55	3	82

Apart from the delays between first appearance and sentence, the following graphs illustrate the average and median number of delays between first appearance and plea, judgment and sentence together.

[39] There are data errors regarding the number of sentences, but the differences are minimal and do not significantly impact the average and median delays.

Graph 5: Average duration of cases





Graph 6: Median duration of cases

- Sentences handed down

In Pietermaritzburg, a total of 43 children were sentenced during the research period (although 45 children appeared in court for sentence- the remaining 2 children were not sentenced on the day that they appeared for sentence). The remaining 2 were not sentenced because they were transferred to regional court for sentence.

In Wynberg a total of 22 children were sentenced during the research period (even though only 20 is recorded under the reasons for being placed on the court roll).

In Pretoria, 3 children were sentenced during the period of the research although 10 cases were presented to court for sentence. The remaining 6 children were not sentenced for the reasons that in 2 instances the case was postponed, in 2 cases the child was absent from court, in another it was decided that the trial should continue and in the remaining two cases the reason was unknown.[40]

The following table summarises the information collected on sentence to illustrate the types of sentences passed down by each court.

Table 13: Sentences handed down per site

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Imprisonment	0	6	0	6	8.8
Correctional supervision	0	0	1	1	1.5
Suspended sentence	15	12	1	28	41.2
Postponed sentence	0	23	0	23	33.8
Imprisonment with option of a fine	5	1	0	6	8.8
Warned and discharge	1	1	0	2	2.9
Reform school	1	0	1	2	2.9
Total	22	43	3	68	100

Because of the harsh nature of imprisonment for children, the following table breaks down the information available on the prison sentences handed down by the Pietermaritzburg court:

[40] It is not clear what the reasons were for postponing the trial or continuing with the trial. It might be that the matter was postponed for a probation officer's report or that further evidence was brought to light.

Offence	Age and gender of child	Period of imprisonment (in months)	Additional period of suspended period of imprisonment (in months)
Robbery	Male aged 17 years	6	18
Theft	Male aged 16 years	24	0
Common assault	Male aged 17 years	24	0
Housebreaking and theft	Male aged 15 years:[41] Count 1 Count 2 Male aged 16 years	 18 12 24	 0 0 12
Theft out of a motor vehicle	Male aged 17 years	24	0
Total	6		

The information obtained during the research raises a number of concerns:

- Of the 6 children the Pietermaritzburg court sentenced to direct imprisonment, 2 were sentenced for housebreaking and theft and the others for theft, theft out of a motor vehicle, robbery and common assault. These offences are not serious offences and in particular common assault is considered a minor offence. Although the children's previous convictions were unknown to the researchers, the sentences of direct imprisonment still seem harsh in the circumstances, taking into account the ages of the children and the type of offences committed.
- A total of 28 suspended sentences were handed down between the three research sites. Suspended sentences are also considered a harsh sentence for children as the failure to comply with the sentence means the imposition of direct imprisonment. This issue was raised by the court in *S v Z en 4 ander sake 1999 (1) SACR 427 (E).* Although this is not binding on high courts except in the Eastern Cape, the court outlined progressive sentencing guidelines that included the principle that the court must not impose suspended imprisonment where direct imprisonment is inappropriate for the particular accused.

[41] In this matter the child was charged with 2 counts and sentenced to imprisonment on both, however the sentences were to run concurrently.

- While only one sentence of correctional supervision was imposed, many of the sentences were suspended on condition the child be placed under correctional supervision. This is also a drastic measure for children as correctional supervision is perhaps the next most restrictive sentence to imprisonment and to couple it to a suspended sentence may be a disproportionate sentence considering the circumstances.
- Many of the sentences seem to be formulaic and similar in nature, giving the impression of "one size fits all".[42]

It is hoped that the Child Justice Bill will open up the scope of sentencing options for children and that judicial officers become more creative in imposing sentences for children that are appropriate taking the child's age, needs and circumstances into account.

- Pre-sentence reports

This is an issue which our high courts have taken up strongly in the absence of a mandatory legal provision requiring pre sentence reports for children. In S v Van Rooyen (unreported) the Cape High Court, referring to the Convention on the Rights of the Child as underlining the policy that as far as possible children should be dealt with by the criminal justice system in a way that takes into account their special needs, held that it was difficult to see how the court a quo could properly have determined an individualized punishment without the benefit of a pre sentence report.

In the case of *S v J and Others*,[43] a 16 year old first offender had been sentenced on the basis of an "assessment record", instead of a proper probation officer's pre-sentence report. The court found that the form was unnecessarily complex, and on the other hand that it was wholly inadequate for the purposes of sentencing.

In S v P 2001 (2) SACR 70 two probation officers reports were provided to the court. The first recommended inter alia community service and supervision by a probation officer. The second, submitted a month later, departed "drastically" from the first recommendation and recommended committal to a reform school. The apparent reason was that the child did not regularly attend school. The court a quo imposed the sentence of reform school without analyzing the recommendation as to why it had changed in such a short time. The court held that committal to reform school should only be considered as a measure of last resort and that the magistrate had misdirected himself by following the pre sentence report and not carefully applying his mind to the recommendations in the report. In deciding the matter the court stated that a probation officers recommendation is merely an expression of opinion and a presiding officer has an obligation to subject the report and any recommendation to critical scrutiny and analysis and especially in the case of a child.

The decision of S v Peterson 2001 (1) SACR 16 (SCA) confirms that sentencing a child to a residential sentence should not be done without a proper pre-sentence report and serious consideration of all appropriate alternative sentencing options. In this case the two appellants were

[42] The details of the actual sentences are available from the authors.
[43] 2000 (2) SACR 310 (C).

only 15 and 16 years old and were convicted of murder and sentenced to 18 years imprisonment. The matter had been postponed for pre-sentence reports but none were obtained for reasons that were inexplicable. The trial court had accepted the excuses for no report. The Supreme Court of Appeal set aside the sentence and remitted it to the trial court to pass sentence after obtaining proper pre-sentence reports. Again in S v D 1999 (1) SACR 122 (NC), S v J and others 2000 (2) SACR 310 (C) and S v N and another 2005 (1) SACR 201 (CkH), the courts, sitting as appeal and review courts, set aside the sentences imposed by the courts a quo as in none of the cases pre-sentence reports were provided despite in all cases sentences of imprisonment being imposed.

S v M and Another,[44] citing *S v Petersen en 'n Ander*, found that the magistrate had erred in sentencing the accused in the absence of a pre-sentence report. The matter was referred back for probation officer's report and sentence, with a direction that the time already served by them would be taken into consideration when setting the sentence afresh.

In the unreported case of *M*,[45] a correctional officer had presented a report that a child of 13 years old was not suitable for correctional supervision and should be sentenced to imprisonment. The court found that this report had been an insufficient basis on which to sentence the child as it concentrated on suitability for correctional supervision, and did not assess the broader ambit of sentencing options provided by sections 290 and 297 of the Criminal Procedure Act 51 of 1977. The prison sentence was thus set aside and the child was remitted back to the regional court for probation officer's report and a new sentence.

These cases have affirmed the need for sentencing officers to have the accused's personal circumstances properly placed before them in order to hand down an appropriate sentence.

In Wynberg, pre-sentence reports by a probation officer or correctional official were available in 14 known cases out of the total number of cases. There were 14 pre-sentence reports for children of the 22 children who were actually sentenced, while it was unknown whether there was a pre-sentence report available in 6 out of the 22 sentenced children's matters and in two there was no pre-sentence report.

Of the 6 where it was unknown whether there was a pre-sentence report available and the child was nevertheless sentenced, 3 involved the children receiving a suspended sentence of a fine or imprisonment (2 of which also included a declaration that the child was unfit to possess a firearm), 2 children were given a suspended sentence and declared unfit to possess a firearm and 1 child was warned and discharged. This indicates that magistrates have sentenced children to sentences of direct imprisonment or a fine or a suspended sentence possibly without the benefit of a pre-sentence report, despite the numerous precedents handed down by our courts requiring such reports before sentencing children.

In the 2 cases where there was no pre-sentence report, the children were sentenced to a suspended sentence of imprisonment with the option of a fine. Again, it is of concern that these

[44] 2005 (1) SACR 481 (E).
[45] See further A Skelton, "Examining the age of criminal capacity" (2006) *Article 40,* Vol. 8 p. 1.

children were sentenced to a suspended sentence without the benefit of a probation officer's report.

It was verified in 14 cases out of the total number of 286 that the probation officer's pre-sentence report recommendation was followed. In these matters the sentences included:

- Suspended sentences on conditions which include attendance of programmes
- Referral to a drug rehabilitation programme
- Fine or imprisonment suspended for a period of time
- Postponed sentences

In Pietermaritzburg, the cases of 45 children appeared in court for sentence. Of these, 43 children were sentenced during the period of the research study while the matters for the remaining 2 were postponed for either a probation officer's report or other reasons such as postponement for the docket or the case being referred to a regional court for sentence. Of the 43 matters in which sentence was given, 43 probation officer's pre-sentence reports were handed into court. The court followed the probation officer's recommendations in all of the 43 cases. In no matter was there not a probation officer's report present.

In Pretoria, there were 10 matters on the role for sentence during the research period, but sentences were only handed down in 3 matters. There were however, only 5 pre-sentence reports handed in to court for the 10 matters that were placed on the roll for sentence, meaning that in 5 of the cases pre-sentence reports were either not compiled or not yet ready.

- Referral to Children's Court

The possibility of referring the matter to a Children's Court in terms of section 254 of the Criminal Procedure Act is important and affords the presiding officer in a criminal matter a powerful tool, if he or she considers the child a child in need of care in terms of one of the grounds set out in section 14 (a)(B) of the Child Care Act 74 of 1983 as this means the criminal proceedings are stopped and the child does not obtain a criminal record even if he or she has already been found guilty. The circumstances of children in many criminal matters potentially make the child a child in need of care and referral to the welfare system may be the appropriate route to follow for that child. However, it has been reported that this section is not often made use of and when it is used, it only occurs at the stage of sentence with the recommendation of a pre-sentence report.[46] These concerns, however, have been confirmed by the data collected during this research.

In Wynberg, 2 boys (one between 10 and 13 years and one between 14 and 17 years were found to be in need of care and referred to the Children's Court at the sentencing stage. No reason for the referral was available. In Pretoria, no children were referred to the Children's Court. In Pietermaritzburg, no children were referred to the children's court.

- Diversion

[46] Skelton, A. *Children in trouble with the law: A practical guide,* Lawyers for Human Rights, 2003, pages 13- 16. Also see Sloth-Nielsen, J "The role of international law in juvenile justice reform in South Africa" (2001) (LLD thesis) (Unpublished), pgs 346-352

Diversion involves the referral of cases, where there exists a suitable amount of evidence to prosecute, away from the formal criminal court procedures.[47] Diversion can be closely linked to the concept of restorative justice, which involves a balancing of rights and responsibilities. The purpose of restorative justice is to identify responsibilities, meet needs and promote healing.[48] In this way a child that is accused of committing a crime takes responsibility for his or her conduct and makes good for his or her wrongful action. Through this process diversion can involve a restorative justice component depending on the nature of the diversion.

Diversion can involve a referral away from the criminal courts conditionally or unconditionally. This illustrates the flexible nature of diversion as a procedure aimed at achieving the best result suited to an individual child. An unconditional diversion can involve for example, cautioning by a magistrate or presiding officer. A conditional diversion, however, can involve referring the child away from formal court procedure on condition that the child attends a programme or undergoes a restorative justice process such as a family group conference. Often the outcome of such a conference can also include referring a child to a particular programme, for example, a life skills programme.

The benefits of diversion are many and include the child gaining insight into the consequences of his or her actions, taking responsibility for them, making good the harm caused (by, for example, compensating the victim or performing some sort of community service or service to the victim), allowing for victim participation where appropriate and ensuring the child does not obtain a criminal record thereby granting him or her the opportunity to forge a path in life without the stigma of a criminal conviction.

Having noted these 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.

It is imperative to ensure that children are not diverted to programme or other informal diversion options in lieu of the possibility of prosecution. In other words, if the State does not possess sufficient evidence against the child to prosecute the 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 that it could otherwise not obtain. This would constitute a serious invasion of the accused's right to be presumed innocent until proven guilty.

Likewise, an accused person's right to remain silent can potentially be compromised by the possibility of diversion. Diversion involves the acceptance of responsibility for the child's actions. The danger exists 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 and it is only a voluntary acceptance of responsibility that would give credence to diversion procedures and a proper child justice system.

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[47] Muntingh, L. (ed) *Perspectives on Diversion*, NICRO National Office, Cape Town, 1995.
[48] Skelton, A. "Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control", in Davel, C.J. (ed) *Children's Rights in Transitional Society,*1999, p. 93.

It is therefore important to ensure that diversion is properly regulated. The Child Justice Bill proposes various forms of diversion. The options range from receiving a formal caution or compulsory school attendance order to the attendance of a specified programme or referral to a programme with a residential element. As diversion is intended to meet the individual needs of a child and as diversion services are not as readily available in rural areas as they are in urban areas, the Bill allows the preliminary inquiry magistrate to develop an individual diversion option which meets the purposes of and standards applicable to diversion in the Bill. This last-mentioned provision allows for flexibility and the utilisation of existing community resources where formal diversion programmes are lacking.

The present research was designed to try assess the extent of diversion in the present system, although there is no regulatory framework available yet. This will show whether prosecutorial discretion is being made use of in order to further the rights of children. When the Bill is finally enacted, the present information will be useful as baseline data against which to measure the implementation of formal diversion.

In Pretoria, 40.9%, children were diverted. Of these 84.6% was male and15.4% female. In Wynberg 1.05% children (66.7% boys and 33.3% girl) were diverted. Despite the low level of diversions, these figures represent what is known about children appearing before court during the time of the study and who were diverted following this appearance - it is likely that many children had been diverted prior to appearing in court and so do not appear in the study.

In Pietermaritzburg, a total of 8.1% children were diverted. Of these there were 14.7% males 10-13 years, 11.8% females were 14 - 17 years and 73.5% males 14 – 17 years of age. Similarly to Wynberg, this figure is quite low for reasons that it represents what is known about children appearing before court during the time of the study and who were diverted following this appearance - it is likely that many children had been diverted prior to appearing in court and so do not appear in the study.

The following table represents the age and gender of the children who were diverted.

Table 14: Number of children diverted

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Male under 10 yrs	0	0	1	1	0.4
Female under 10yrs	0	0	0	0	0
Male 10-13 yrs	2	5	11	18	8
Female 10-13yrs	0	0	1	1	0.4
Male 14 – 17 yrs	0	25	147	172	76.4
Female 14 - 17 yrs	1	4	28	33	14.7

Total	3	34	188	225	100

The above information again illustrates inconsistent practice in the different courts. It is illustrative that there is a need for a legislative framework within which procedural certainty can be established.

In Pretoria, the number of children who were not diverted totalled 264. There were various reasons for the failure to divert these children namely:[49]

- No acknowledgement of responsibility or guilt (n=84)
- Previous convictions (n=35)
- No parent or guardian (n=24)
- Seriousness of offence (n=8)
- No assessment yet (n=29)
- No reason indicated (n=57)
- Other reasons (n=30)

In 7 cases of boys between 14 and 17 years there was no indication of whether the child was diverted or not.

In Pietermaritzburg, the number of children who were not diverted totalled 379. The reasons for the failure to divert are as follows:

- Seriousness of the offence (n=222)
- No acknowledgement of responsibility or guilt (n=136)
- No parent or guardian at court (n=4)
- Previous convictions (n=11)
- Other reasons (n=5)
- Reasons unknown (n=1)

In 8 cases there was no indication of whether the child was diverted or not.

The emphasis on the seriousness of the offence being a disqualifier for diversion illustrates the fact that the individual needs of the child may be being outweighed by other concerns, causing prosecutors to prosecute in a high proportion of cases. It is hoped that the preliminary inquiry may lead to a more detailed and comprehensive consideration of diversion that would avoid this result.

In Wynberg, the number of children who were not diverted totalled 148.[50]

[49] The reasons total 267, but in some cases there was more than one reason for the child not being diverted.
[50] There was no indication regarding diversion for the remaining 135 children. In other words, while the study confirmed that 3 children were diverted and diversion was refused for 148, no indication regarding acceptance or refusal of diversion for the 135 appeared from the court records.

The gender and ages of the children who were not diverted is as follows:

Table 15: Number of children not diverted

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentage
Male under 10 yrs	1	0	1	2	0.3
Female under 10yrs	0	0	0	0	0
Male 10-13 yrs	8	4	6	18	2.3
Female 10-13yrs	0	0	0	0	0
Male 14- 17 yrs	126	366	235	727	91.9
Female 14 - 17 yrs	13	9	22	44	6.1
Total	148	379	264	791	100

There have been studies[51] that have shown that the younger the child, the more effective interventions are. It is therefore of concern that 20 children under the age of 14 years were not diverted –despite the actual reasons for these failures to divert being unknown. It is hoped that once the Child Justice bill is enacted and a legal framework for diversion created, more children will be diverted than is happening at present.

In Pretoria, children who are diverted are referred to NICRO, the Department of Correctional Services (DCS) Drug Programme, the Department of Social Development (DSD) Youth Crime Prevention Programme, National Youth Development Outreach (YDO) and the Restorative Justice Centre (RJC) for diversion. The breakdown of these referrals is as follows:[52]

- Adolescent Development Programme at YDO (19.4%)
- Youth Empowerment Skills at NICRO (24.4%)
- Pre-Trial Community Service at NICRO (12.9%)
- Youth Offender School (DSD) (12.9%)
- SANCA (1.8%)
- Drama Therapy at RJC (8.3%)
- Victim Offender Mediation at RJC (6.5%)
- Family Group Conference at RJC (1.4%)
- Drug Rehabilitation at NICRO (4.2%)
- Youth Crime Prevention Programme at DSD (1.4%)
- Eduventor at NICRO (0.9%)
- Other (2.8%)

[51] For example Loeber, R. and Farrington, D.P. (eds.), *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions*, Sage Publications, 1998.

[52] These add up to 217, which is more than the number of children diverted – the reason is that some children were referred to more than one diversion programme.

- Unknown (3.2%)

In Wynberg, the 2 boys who were diverted were referred to the SAYStOP programme for young sex offenders. It is unknown what programme the girl was diverted to.

In Pietermaritzburg, children who are diverted are primarily referred to NICRO but are also referred to community service and family group conferences offered by other organisations (however, these organisations are not specified) The breakdown of these referrals is as follows:

- Youth Empowerment Skills at NICRO (61.8%)
- Pre-Trial Community Service at NICRO (2.9%)
- Victim Offender Mediation at NICRO (5.9%)
- Family Group Conference at NICRO (2.9%)
- Family Group Conference (organisation not specified) (2.9%)
- Drug Rehabilitation at NICRO (2.9%)
- Journey Programme at NICRO (11.8%)
- Community Service (organisation not specified) (5.9%)
- Other (2.9%)

It is clear that while Pretoria seems to have a number of diversion options available, Pitermaritzburg has to depend heavily on NICRO for diversion services. This can be quite limiting and raises the issue of the need for more diversion programmes.

- Postponements

One of the main concerns about the present juvenile justice system is the fact that there are lengthy delays before matters are finalised. This is evidenced by the information listed above relating to the average and median length of delays between the various stages of the criminal justice system.

In Wynberg, there were 209 incidences of postponements (the data collected may have related to the same case being postponed more than one time and therefore one cannot say whether there were 209 actual postponements) during the period of the research. In Pretoria there were 367 incidences of postponements and in Pietermaritzburg there were 321 incidences.

The present research therefore examined the nature of postponements in each site. The following results were obtained:

Table 16: Reasons for postponements per site

Reason	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
Further investigations	45	48	10	103	11.9
Docket not available	0	15	4	19	2.2
Accused (s) not in court	5	27	19	51	5.9
For the completion of a diversion programme	0	14	16	30	3.5
Postponed for disclosure	0	0	21	21	2.4

Waiting for probation officer's report for sentencing/assessment	45	44	35	124	14.3
Absence of accused and guardian/ absence of guardian	3	19	45	67	7.7
Legal aid/legal representation absent/ delay on part of legal aid	3	9	53	65	7.5
Regular magistrate absent	0	0	1	1	0.1
Prosecutor absent	0	0	0	0	0
Witness(es)/complainant absent	4	7	0	11	1.3
Postponed for observation	0	0	1	1	0.1
Postponed for plea/ trial/ judgment/sentencing	40	61	94	195	22.4
Postponed for co-accused to attend court	0	5	0	5	0.6
Postponed for NICRO report	0	8	0	8	0.9
Postponed for further evidence / part heard	0	20	23	43	4.9
Postponed for bail application	5	1	0	6	0.7
Postponed for setting of a regional court date or trial date	3	12	0	15	1.7
Postponed for further observation/evaluation after completion of diversion programme	1	0	0	1	0.1
Postponed for further assessment of accused's age	0	11	4	15	1.7
Postponed for witness statement	0	2	0	2	0.2
DPP's decision	0	2	0	2	0.2
Trial within a trial	0	1	0	1	0.1
Separation of trials	0	2	0	2	0.2
Case transferred to another court	0	3	1	4	0.5
Postponed for defence's case	0	0	0	0	0
Postponed for	0	1	0	1	0.1

interpreter					
Investigating officer's report	0	2	0	2	0.2
Possible transfer to Children's Court	0	0	0	0	0
Accused to settle amount	0	0	0	0	0
New prosecutor to be appointed	0	0	0	0	0
Evaluation by Child Therapy Centre	0	0	1	1	0.1
For child to finish school exams	0	0	0	0	0
More than one reason	47	0	0	47	5.4
Reason unknown	8	7	11	26	2.99
Total	209	321	339	869	100

Insofar as many of the reasons listed relate to the staffing of the court (prosecutor, magistrate and interpreter), reports by probation officers, the unavailability of the docket or the police, there is cause for concern that the role-players in the criminal justice system can contribute to delays. However, it must be noted that many delays are also occasioned by the absence of guardians, parents, legal representatives and even the accused. The other postponements seem to be the natural consequences of the criminal justice system, for example, postponements for further evidence, part-heard trials and referral to diversion programmes.

- Withdrawal of cases

One of the concerns in the child justice system is that children are unnecessarily arrested when there is no prima facie evidence against them, or that cases are inordinately delayed because of poor investigation. The research therefore set out to determine the frequency of cases being withdrawn and what those reasons for the withdrawal were.

In Wynberg, 45 of the cases were withdrawn. The reasons and age, gender and offence breakdown given are as follows:

Table 17: Reasons for Withdrawal at Wynberg

Accused referred to SAYStOP[53]		
Offences committed	Rape	1
Accused	Males aged over 10 yr and under 14 yrs	1
As per probation officer report / recommendations		
Offences committed	Possession of drugs Malicious injury to property Assault GBH	2 1 1

[53] While 2 boys were diverted to SAYStOP, the records show a withdrawal of charge for only one.

Accused	Males aged 14- 17	4
Witnesses unavailable		
Offences committed	Theft of motor vehicle Assault Possession of a firearm Offence unknown Shoplifting	2 2 2 1 4
Accused	Males over 10 and under 14 Males aged 14- 17 Females aged 14 – 17	1 7 1
Section C3		
Offences committed	Common assault Attempted robbery	1 1
Accused	Males aged 14- 17	1
Section C6		
Offences committed	Malicious injury to property Animal abuse	1 1
Accused	Males aged 14- 17	1
Complainant not present		
Offences committed	Housebreaking and theft	1
Accused	Males aged 14- 17	1
Complainant uncooperative		
Offences committed	Possession of dangerous weapon Robbery	1 1
Accused	Males aged 14 – 17	1
Reasons unknown		
Offences committed	Malicious injury to property Theft – value unknown Assault GBH Assault when a dangerous wound is inflicted Common assault Housebreaking and theft Theft from motor vehicle Attempted theft from motor vehicle Pointing of a gun Possession of stolen property	2 3 3 1 2 5 1 1 1 2

	Shoplifting Possession of drugs Indecent assault Possession of ammunition Negligent driving Robbery	5 5 1 1 1 1
Accused	Males aged 14 – 17 Males over 10 and under14 Females aged 14- 17	25 1 1

In Pretoria 69 cases were withdrawn. The table below provides information on the reasons and a breakdown of the age and gender of the child as well as the type of offence committed.

Table 18: Reasons for Withdrawal at Pretoria

Successful completion of a diversion programme		
Offences committed	Driving a motor vehicle without a licence Negligent driving Common assault Theft Housebreaking and theft Malicious injury to property Possession of drugs Robbery Shoplifting	1 2 9 9 3 5 4 1 7
Accused	Males aged 10-13 Males aged 14 - 17 Females aged 10-13 Females aged 14- 17	3 27 0 10
Charge withdrawn by complainant		
Offences committed	Common assault Theft Assault GBH Malicious injury to property Armed robbery	2 3 1 1 1
Accused	Males aged 14- 17	7
Witnesses unavailable		
Offences committed	Theft Unknown	4 1
Accused	Males aged 14 - 17	4

	Male aged 10-13	1
Reason unknown		
Offences committed	Shoplifting Possession of drugs Theft Theft of cell phone Malicious injury to property	2 2 1 1 1
Accused	Males aged 14- 17	7
Accused deported		
Offences committed	Possession of stolen property Shoplifting Possession of dangerous weapon	1 1 1
Accused	Males aged 14- 17	3
Lack of evidence		
Offences committed	Possession of drugs	1
Accused	Males aged 10-13	1
Admission of guilt by co-accused		
Offences committed	Shoplifting	1
Accused	Female aged 14- 17	1
Complainant could not be traced		
Offences committed	Common assault	1
Accused	Males aged 14- 17	1
Child too young to be diverted		
Offences committed	Theft	1
Accused	Males under 10	1
Docket lost		
Offences committed	Robbery	1
Accused	Males aged 14 – 17	1
Co-accused can't be traced		
Offences committed	Robbery	1
Accused	Males aged 14- 17	1

No lab report available		
Offences committed	Possession of drugs	1
Accused	Males aged 14 – 17	1

In Pietermaritzburg 44 cases were withdrawn. The table below provides information on the reasons and a breakdown of the age and gender of the child as well as the type of offence committed.

Table 19: Reasons for Withdrawal at Pietermaritzburg

Insufficient evidence		
Offences committed	Common assault Theft value unknown Housebreaking and theft Robbery Assault GBH	1 3 1 9 4
Accused	Males aged 14- 17	18
Successful completion of a diversion programme		
Offences committed	Common assault Malicious injury to property Shoplifting Possession of drugs Theft where value unknown	1 1 1 2 4
Accused	Males aged 14 - 17 Male aged 10- 13	8 1
Complainant did not want to proceed		
Offences committed	Housebreaking and theft Theft value unknown Common assault Assault GBH	2 1 1 1
Accused	Males aged 14 – 17	5
Mediation process		
Offences committed	Theft value unknown Robbery	1 1
Accused	Males aged 14 - 17 Male aged 10-13	1 1
Provisionally withdrawn		
Offences committed	Common assault Housebreaking and theft	1 1
Accused	Males aged 14- 17 Male aged 10-13	1 1
Complainant's statement outstanding		
Offences committed	Theft where value unknown	2
Accused	Males aged 14 – 17	2
No reason specified		
Offences committed	Robbery Theft	1 1
Accused	Males aged 14 – 17	2

Complainant could not be found		
Offences committed	Robbery	1
Accused	Males aged 14- 17	1
Charge withdrawn against accused in absentia		
Offences committed	Robbery	1
Accused	Males aged 14- 17	1
Accused committed suicide		
Offences committed	Housebreaking and theft	1
Accused	Males aged 14 – 17	1
Co-accused could not be found		
Offences committed	Theft	1
Accused	Males aged 14 - 17	1

While some of these reasons are unavoidable, the reasons relating to poor police investigation, loss of dockets and insufficient evidence point to bad management of cases – something that the preliminary inquiry has been developed to try to overcome.

It should be noted that many of the withdrawals relate to the successful completion of diversion programmes or referral to a diversion programme yet again illustrating inconsistency of practice where some courts withdraw on referral to a diversion programme whereas other only withdraw after successful completion of the programme. The Child Justice Bill will ensure consistency in that the order for diversion will remove the matter from the roll and it will only be re-enrolled if the child fails to complete the programme. However it is unsure whether this procedure will be changed by the Portfolio Committee on Justice and Constitutional Development.

4.4. PROBATION RECORDS

In the proposed Child Justice Bill an assessment is conducted by a probation officer and it is intended to serve a number of purposes, namely, estimating the age of a child, establishing the prospects for diversion, establishing whether a child is a child in need of care, making recommendations relating to the release or detention of a child and determining steps to be taken in relation to children below 10 years of age.

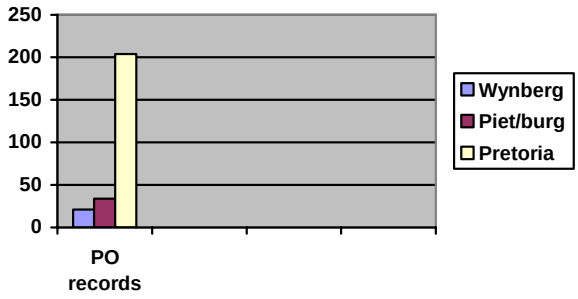
At present the Probation Services Act 116 of 1991 as amended provides that the assessment of children, after they have been arrested, is one of the core responsibilities of probation officers.

However, assessments in the present system are not uniformly applied or regulated and delays often occur.

In terms of the proposed legislation, the result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity.

This section of the research concentrated on an analysis of probation records. On the research days that the field researchers were at court, they were also tasked with collating information from the probation records of that particular day.[54] These records primarily relate to the assessments of children that were undertaken on the day in question. The following information reflects the number of records that were analysed throughout the duration of the research period:[55]

Graph7: Probation records analysed through the duration of the research period



The following table reflects the breakdown of age and gender for the children who appeared before the probation officers during the research:

Table 20: Children appearing before Probation Officers

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
Male under 10 yrs	0	0	1	1	0.4
Female under 10yrs	0	0	0	0	0

[54] Note that while the probation records information and charge sheet information were collected on the same day, the two sets of records do not necessarily match as they were not necessarily related to the same case. The purpose was not to compare the two sets of records but collect information from the two sets of records that reflect procedures followed and children affected in each process (probation assessment and court appearances).

[55] Wynberg has a total of 21 probation records, broken up according to the office that conducted the assessment as follows: "Benjamin" – 2; Wynberg probation office – 12; information on the probation service office not available – 7. It is assumed that "Benjamin" is the probation officer that filled out those two probation records. This indicates that in 9 of the 21 cases, basic information (such as the location of the probation service office) was not filled in correctly. In Pretoria, the Pretoria the researchers examined the probation records for a total of 204 children during the research period. Of these 23 were females and 181 were males. Of the females 23 were over the age of 14 years. Of the males, 175 were over the age of 14, 5 were between the ages of 10-14 and 1 was under the age of 10. In Pietermaritzberg a total of 34 probation records were examined involving 34 children. Of these 27 were males over 14. There were 7 females, 6 were over 14 and 1 was between the ages of 10-14.

Male 10-13 yrs	1	0	5	6	2.3
Female 10-13yrs	0	1	0	1	0.4
Male 14 -17 yrs	16	27	175	218	84.2
Female 14-17 yrs	4	6	23	33	12.7
Total	21	34	204	259	100

- Family circumstances

The assessment procedure allows for valuable information on the family circumstances of children to be established. This information can determine whether the child is from a single- parent home and whether the child is lacking a father-figure. This information can assist in decisions as to whether the child is a child in need of care, for instance.

Table 21: Family circumstances of children appearing before a probation officer per site

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
No. of children with both parents	3	22	127	152	58.2
No. of children with only mother	4	6	54	64	24.5
No. of children with father only	0	3	14	17	6.5
No indication of either a mother or a father	9	3	1	13	4.98
Indication of a parent (unknown whether mother or father)	2	0	0	2	0.8
No. of children with a family member other than a parent	4	0	0	4	1.5
Child without a parent	0	0	9	9	3.4
Total	22	34	205	261	100

- Previous involvement with a social worker

The assessment form indicates whether or not a child has had previous interaction with social workers. This is valuable, as if there has been such interaction, it may indicate the child is a child in need of care and may also point to children who have special needs or who require a more in-depth assessment.

Table 22: Children who had previous involvement with a social worker

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
Male under 10 yrs	0	0	0	0	0
Female under 10yrs	0	0	0	0	0
Male 10-14 yrs	1	0	0	1	1.8
Female 10-14yrs	0	0	0	0	0
Male over 14 yrs	14	5	31	50	87.7
Female over 14 yrs	3	0	3	6	10.5
Total	18	5	34	57	100

In Wynberg, 18 out of the 21 (85.7%) had previous involvement with a social worker. In Pretoria, only 34 children out of the 204 (16.6%) had previous involvement with a social worker. And in Pietermaritzburg only 5 (14.7%) children had previous involvement with a social worker. This may indicate that these children had previously been at risk or in need of care.

- Recommendations

The following table indicates the types of recommendations made by probation officers relating to the manner in which the matter should be disposed of:

Table 23: Recommendations made by the probation officer per site in terms of which manner the case should proceed

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
No further action	0	1	10	11	4.4
Prosecution	16	0	66	82	32.7
Diversion	4	8	120	132	52.6
Unknown	1	0	0	1	0.4
Formal caution with conditions	0	22	0	22	8.8
Formal caution without conditions	0	3	0	3	1.2
Total	21	34	196	251	100

The following table relates to the types of recommendations made by probation officers in relation to the placement of children:

Table 24: Recommendations made by the probation officer per site in terms of the placement of the child

	Wynberg	Pietermaritzburg	Pretoria	Total	Percentages
Care of parent or appropriate adult	8	30	179	217	83.8
Place of safety	4	1	20	25	9.7
Home-based supervision	2	1	0	3	1.2
Residential facility/children's home	0	0	2	2	0.8
Prison	0	1	0	1	0.4
Other	3	0	1	4	1.5
Unknown	4	0	0	5	1.9
Secure care facility	0	1	2	3	1.2
Total	21	34	204	259	100

It is encouraging that most recommendation relate to the release of a child into his or her parent's/guardian's custody. However it is of concern that one recommendation was that a child be placed in prison awaiting trial and that the offence involved theft - an offences that is not regarded as particularly serious.

In Wynberg, the field researchers' main observation was that the probation records were generally incomplete. This is of concern as the Child Justice Bill requires accurate record keeping by probation officers in order to make appropriate recommendations – in particular in relation to diversion.

5. OBSERVATIONS BY RESEARCHERS, LIMITATIONS AND CHALLENGES

Generally, it should be noted that the research undertaken was a snapshot of three district courts and is not reflective of the types of crimes and processes dealt with at Regional Court level. The reason for this is that the Child Justice Bill will essentially deal with most district court matters, but it will also be applied in each and every court where a child appears. The problem with not having collected data on Regional Court practice is that lengthy delays and prison sentences for children, which have been said to be particular concerns at Regional Court level, have not been addressed by this study and so the effects of the implementation of the Child Justice Bill in Regional Courts in relation to those concerns can not be measured from this study.

The field researchers were also requested to provide their general observations and perceptions of the practice at the various court sites. These provide useful insight into possible challenges that

need to be addressed. Some of these challenges can be overcome, whilst some are unfortunately difficult to manage – for example, personality and attitudinal issues.

In Wynberg the following was noted:

Gaining access to the probation officers' assessment reports proved difficult, particularly in the early stages of the research project. On numerous occasions and for various reasons (including being away on training programmes, being short staffed, etc.), probation officers were not always present at court. Irregular attendance on the part of the probation officers was also a feature of the court process. Similarly, a high turnover of staff within the court (for instance the regular court 6 magistrate went on maternity leave, the state prosecutor and legal aid attorney also went on leave) contributed to postponements. Different personalities and styles of operation impacted on the number of cases being processed and the manner in which they were dealt with. However, despite this, the court officials were generally co-operative and helpful.

Other obstacles experienced included the shortage of court translators; the failure of police to deliver dockets to the state prosecutor in time for trials; the failure of police and places of safety to deliver children in time for trials and, the failure of accused children and/or guardians to appear in court on specified day. All of these factors played a significant role in hampering the juvenile justice process as they resulted in many cases being postponed or withdrawn.

Some observations related to data collection and interpretation and how this impacted on the research as well as general court practice. Data collection was restricted by illegible and incomplete information from the probation officer records and charge sheets. At times, the speed with which proceedings were conducted within the court meant that it was difficult for the researchers to keep up with the proceedings and the data capturing process, particularly when there were consecutive postponements or withdrawals of cases. On a few occasions, bits of information relevant to the data-capturing process were missed or overlooked during the course of the proceedings and, consequently, had to be consolidated during court adjournments.

It is difficult to gauge the impact that the researchers' presence as participant observers may have had on the court setting and on those being studied as research was limited to only two days per week. As such, one can only account for what occurred in court on the days that the researchers were physically present in the court. On the whole, the researchers' presence in court seemed to go relatively unnoticed. However, due to the high turnover rates the researchers were required to frequently re-introduce themselves and the project to certain court officials, as well as to re-negotiate a means of accessing the docket/case information required from the replacement state prosecutor, for instance.

Initially it was decided that the researchers themselves would input the data onto the database but due to the timing of the database completion it was necessary that one of the supervisors perform much of this task. This may have negatively impacted on the manner in which the data was inputted due to the fact that the researchers have a better understanding of the court process and data collected due to their regular attendance at the court.

Very often the researchers were unable to confirm much of the data due to reasons cited. The relative dearth of information necessarily impacts on the quality of the data as, in certain areas of analysis, only a select portion of the research is reliable and therefore useable and applicable. Also due to the aim of collecting quantitative data, the structure of the research templates and the design of the database necessarily mean that a lot of the data collected is manipulated to accommodate the research tools rather than vice versa. Thus, a fuller reflection of the juvenile court experience may not always be reflected in the findings particularly that related to the atmosphere in the court, although the observational template does accommodate this to some extent.

In Pietermaritzburg the following was noted:

The researchers noted often that the criminal justice process is not fully comprehensible to a lay-person. Although the children appeared in court with their guardian or parent and they indicated to the Court that they understood the court process, one nevertheless had the sense that they and their parents or guardians did not fully understand the process.

Secondly, difficulty was experienced in obtaining every charge sheet and tracing the charge sheets once the case was finalized also presented a s a challenge. The clerk at the Pietermaritzburg court, who was a temporary employee at the time, assisted the field researchers in collecting the relevant data to a large extent.

In Pretoria, the following are general observations made during the study:

The probation officers were not coping with the assessment of cases, which may be as a result of them having to provide services to three (3) different courts (Pretoria, Pretoria North and Hatfield). There seemed to be a massive backlog of cases that needed to be assessed and it was clear that the probation officers might not be able to deal with all these cases (old and new). This has huge implications for the court as cases are being postponed, as it awaits the assessment reports from the probation officers.

Most of the children appear to come to court for a first appearance only for the sake of having a first appearance within 48hours, with the result being that the case is postponed for assessment. This results in problems with children that are called to appear in court who had not been previously assessed, as neither the prosecutor nor the magistrate is informed on the recommendations for the child.

Secondly, it was also found during the study that not all the cases have dockets and the court sometimes only works with the charge sheets. This may result in all relevant information not being available for prosecutors to make decisions – for example there may not be a prima facie case against the accused and so a missing docket might delay the case ultimately being withdrawn.

Thirdly, there seems to be a language barrier between some of the Legal Aid attorneys and their young clients, in that they have no appropriate means to communicate with the young offenders. In addition, the lack of an Afrikaans interpreter also led to delays and problems with effective communication in the court. Another issue appears to be the lack of planning on the part of the

attorneys where cases had to be postponed because they were busy in other courts and had double-booked their diaries. This is a serious concern that should be addressed sternly by the presiding officer to ensure that this does not become common practice. Organising court diaries is a core responsibility that attorneys, as officers of the court, need to properly adhere to, failing which sanctions or consequences should ensue.

Furthermore, from the field researchers' observations, there seems to be no communication between parents/guardians and children before or during the Court, especially to ensure that the young offender understands what is happening or for them to ask for assistance as is their right. The provisions of the Child Justice Bill which requires all officials and role-players to advise children of their rights and the immediate procedures that are followed should hopefully facilitate better understanding and communication in this regard.

Again, in some cases the parents indicated that the investigating officer did not contact them regarding the progress of the case or a court appearance. This reflects poorly on the responsibilities of police officials – something that the defined roles and responsibilities as set out in the Child Justice Bill aim to address.

6. CONCLUSION

This is a modest study looking at limited procedures in the present criminal justice system. What emerged from the study was fairly predicable, and generally confirmed perceptions and other information available on the child justice system at present, for example that male children are the most common perpetrators of crime and that economic offences are generally the crimes with which children are charged.

What is helpful about the study is that it highlights the inconsistency of practice amongst certain courts – in particular in relation to diversion and how each court manages children charged with sex offences.

Likewise, it also provides information that tends to shed light on how courts are operating. It appears from some of the information that Pietermaritzburg court presents some concerning trends:

- It was the only court to impose direct imprisonment for the research sample
- It was the court that consistently had the longest delays between first appearance and plea, judgement and sentence

The site specific recommendations are as follows:

Wynberg:

- The absence and/or irregular attendance of probation officers at the court necessitates an immediate solution such as the assignment of two probation officers to the court or the allocation of assistants to the dedicated court probation officer.

- High turnover within the court necessitates an improved communication system amongst court role-players so that replacements to absent court officials are made timeously so as to ensure that court activities are not postponed indefinitely.
- Various staff shortages (such as shortage of court translators) need to be addressed through the appointment of more personnel or of assistants to dedicated court officials, an internship programme is also a possibility.
- The failure of police to deliver dockets on time as well as to deliver children in time for trials impacts on the efficiency of the court system and needs to be addressed through better interdepartmental communication or the creation of a post dedicated to grass roots court management and co-ordination between departments.
- There is also a need to enhance the capacity and use of programmes for diversion and alternative (non-custodial) sentencing and the development and introduction of new programmes.
- A systematic campaign of information and awareness on the judicial/legal rights of the child would seek to provide accessible information in this regard to children, including through the school system, as a means to strengthen the prevention of violations of their fundamental rights or neglect of fundamental legal safeguards.
- There is a need to ensure that systematic training activities are provided for relevant professional groups working with and for children in the area of child justice. Particular reference should be made to the role played by judges/magistrates, lawyers, social workers and probation officers, law enforcement officials, and personnel working in institutions for such children.
- Mechanisms should be established to assist the government in the establishment of a monitoring structure and procedure for the child justice system at all levels.

Pietermaritzburg:

- Training of court personnel in child justice issues is important and this will have to be intensified once the Child Justice Bill is enacted. Prosecutors who appear in the court should also have experience
- The caregivers/ parents/ guardians of the youth who appear in the court should be encouraged and empowered to be more active in the proceedings. information should be made available at the Justice Centres and the court on the court process and informing children and parents of their rights and court procedures

Pretoria:

- Dedicated probation officers should be assigned to the three courts currently being served by the 4 probation officers. Gauteng Social Development should consider assigning assistant probation officers (APOs) to these courts. These APOs could help with some of the administrative tasks; this can include alerting the probation officers if a case has resulted in too many postponements.
- Dedicated Legal Aid Attorneys should be appointed to the Court to ensure that they are present in Court to represent their clients (will result in less postponements). There should be Legal Aid attorneys at the court that speak various languages, in particular the 11 official languages (however, it is questionable whether this is feasible – at the very least

there should be Legal Aid attorneys stationed at the court that can communicate in the languages most used in that area – for e.g. Afrikaans in Wynberg and Zulu in KZN).

There are some overall recommendations that can be made, for example, in relation to training and information dissemination however it is hoped many of the procedural uncertainties will be addressed by the child justice bill once enacted. The other problems experienced relate mainly to work performance and lack of training and specialisation. It is these issues that the Departments of Justice and Social Development will have to pay attention to as they cannot be solved by legislation. Quality control, training and court management are issues that need to be addressed if any child justice system, present or future, can function properly.