

SENTENCING THE JUVENILE ACCUSED

by

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DECLARATION

"I declare that SENTENCING THE JUVENILE ACCUSED is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references."

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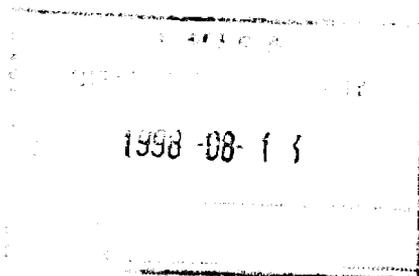
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SUMMARY

The abolition of corporal punishment in *S v Williams and Others* 1995 (3) SA 632 (CC) provided the state with the impetus to consider alternative sentencing options. Unsystematic efforts by the government to reform the juvenile justice system have failed abysmally. The government was forced to review its policies on juvenile sentencing. An examination of international trends reveals the imposition of stricter measures of punishment for serious and violent juvenile offenders. Community-based sentencing options are used mainly for first-time offenders. The focus has also shifted from punishment and retribution to prevention and treatment. It is advocated that serious and violent juvenile offenders be incarcerated in secure-care facilities and/or juvenile prisons and that community-based sentencing options be utilised for first-time offenders. The government should also design programmes that deal with situations that lead to crime and delinquency.

Key terms:

Juvenile sentencing; Corporal punishment; Correctional Services Act; Juvenile crime; Role of government; The Inter-Ministerial Committee; South African Law Commission; Juvenile projects; International trends; Reform agenda



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SENTENCING THE JUVENILE ACCUSED

1 INTRODUCTION

It is submitted that juveniles are sentenced more leniently than adults.¹ The general perception is that they cannot act with the same degree of responsibility as adults, and that they lack the necessary experience and insight.² They are also regarded as being susceptible to influence and psychological trauma. Therefore, our courts have exercised caution in sentencing juveniles and have stressed the importance of determining the most appropriate sentence for the juvenile.³

Juvenile justice issues have recently aroused the attention of the media, the general public, youth advocates and the government. Many human rights activists are very concerned about the plight of children detained in our prisons and police cells. They maintain that these children fall victim to abuse, violence, discrimination and manipulation. These youth advocates believe strongly that children should not be held in custody to await trial unless all other options have been exhausted or they pose a threat to the community. At the same time the increase in juvenile crimes has aroused much public outrage and concern. The abolition of corporal punishment in *S v Williams and Others* 1995 (3) SA 632 (CC) signalled a welcome rejection of this antiquated and barbaric practice. It also provided the state with a "timely challenge" to consider alternative sentencing options for juveniles. However, piecemeal attempts by the government to reform the juvenile justice system have not borne fruit.

¹ Both the South African Constitution Act 108 of 1996 (s28) and the Child Care Act 1983 (s14(4)) define a child as a person below the age of 18. The Criminal Procedure Act 51 of 1977 (s294) defines a juvenile as a person above the age of 18 but below the age of 21. The Correctional Services Act 8 of 1959 defines a juvenile as any person under the age of 21 years. In this dissertation, the term "juvenile" will refer to any young person under the age of 21.

² Geldenhuys T and Joubert JJ *Criminal procedure handbook* Cape Town: Juta (1996) 239.

³ *Ibid.* Also see *S v Jansen* 1975 (1) SA 425 (A) at 428A.

The Correctional Services Amendment Act 17 of 1994 prevented awaiting-trial children under 18 from being held longer than 24 hours. The Act further stipulated that such children had to be accommodated in places of safety. This threw the entire juvenile justice system into disarray. In 1995, President Mandela instructed that children should not be detained in prisons. This led to children being placed in inefficient, insufficient, overcrowded, unhygienic and poorly managed institutions. Numerous children escaped from these institutions only to commit new crimes. Justice officials, like magistrates, prosecutors and the police, became frustrated at the ineffectiveness of the law. The general public expressed great dissatisfaction and concern at what they perceived to be the government's lenient treatment of juvenile offenders. The government was forced to review its policies on juvenile sentencing.

This dissertation will address juvenile sentencing in South Africa. It will focus primarily on corporal punishment and the effect of the landmark Constitutional Court judgment in *S v Williams and Others* 1995 (3) SA 632 (CC); s29 of the Correctional Services Act and the amendment bills; and the recent steps introduced by government to create a streamlined and effective juvenile justice system that does not put young people at risk. The dissertation will also examine international trends in juvenile justice with a view to adopting such trends in South Africa. Finally the conclusion will propose a reform agenda for the future. It is hoped that this agenda will bring us closer to our goal of providing justice for juveniles.

2 CURRENT SENTENCING OPTIONS IMPOSED ON JUVENILES

The Criminal Procedure Act 51 of 1977 (as amended) provides a range of sentences which may be imposed on juveniles. Section 290 of the Act refers to the different methods of dealing with juveniles. A court has a discretion to impose punishment on a convicted juvenile. S290(1) of the Act defines a juvenile as someone under the age of 18 and states that where such person is convicted by

a court, it may, instead of imposing any punishment upon him for that offence, order:

- (1) that he be placed under the supervision of a probation or correctional official
or
- (2) that he be placed in the custody of any suitable person or
- (3) that he be sent to a reformatory.

Section 290(2) of the Act provides that a court may issue such an order even if it sentences a juvenile to the payment of a fine or whipping. Section 290(3) also provides that where a court convicts a person aged between 18 and 21 years of any offence, it may, instead of imposing any punishment, order that he be placed under the supervision of a probation or correctional official or that he be sent to a reform school. A court which makes an order in terms of s290(4) may order that the person who is sent to a reform school be detained in a place of safety until such time as the order of the court can be put into effect.

The other sentences which may be imposed include discharge with a caution and reprimand (in terms of s297 of the Criminal Procedure Act); postponement of sentence, unconditionally or with one or more conditions (section 297); suspension of sentence, with or without conditions; a fine (s287), which the court may suspend or allow to be paid in instalments (section 297(5)(a) and (b); correctional supervision (Section 276A), imprisonment including periodical imprisonment and converting the trial to an enquiry in terms of the Child Care Act 74 of 1983. The Constitutional Court regarded the sentencing provisions in the Criminal Procedure Act as allowing a more flexible but effective approach in dealing with juvenile offenders.⁴

It is submitted that juveniles are not readily imprisoned. Indeed, article 37(b) of the UN Convention on the Rights of the Child stipulates that detention or

⁴ *S v Williams and Others* 1995 (3) SA 632 (CC) at 654.

imprisonment of a child should be used as a measure of last resort and for the shortest appropriate period of time.⁵ Prisons are regarded as universities of crime where juvenile offenders become accomplished criminals. Our courts have in the past often resorted to corporal punishment as a device to keep juvenile offenders out of prison.⁶ The next section will focus on corporal punishment and its abolition in *S v Williams and Others* 1995 (3) SA 632 (CC).

3 CORPORAL PUNISHMENT

3.1 Position prior to the *Williams* decision

The South African Criminal Procedure Act 51 of 1977 (hereinafter referred to as the Act) contains a number of provisions which deal with the infliction of corporal punishment. Section 294 refers to the whipping of juvenile males. No minimum age is fixed in the Act regarding juveniles. However, according to practice and the case law, the lower age limit seems to have been fixed at 9 years.⁷ A whipping could not be imposed on a woman, a person over the age of 30,⁸ or if it is proved that the existence of some psychoneurotic or psychopathic condition contributed to the commission of the offence.⁹ Section 294(1)(a) of the Act provides for whipping to be carried out "by such person and in such place and with such instrument as the court may determine". It is submitted that a cane was used most often in practice, however, the Act left the type of instrument to the

⁵ *South African Law Commission Issue Paper 9 Juvenile Justice* (March 1997) 19.

⁶ See footnote 4 *supra* at 649.

⁷ *Ibid* at 637.

⁸ S295(1) of Criminal Procedure Act 51 of 1977.

⁹ *Ibid* s295(2).

magistrate's discretion.¹⁰ In terms of s294(1)(a), the maximum number of strokes that may be imposed at any one time is seven. Juvenile whipping is inflicted over the buttocks, which must be covered with normal attire.¹¹ The legal guardian or parent of the convicted juvenile was entitled to be present at the whipping.¹² In addition, no whipping could take place unless a district surgeon or an assistant district surgeon has certified that the juvenile "is in a fit state of health to undergo the whipping".¹³ Juveniles over the age of 17 years but under the age of 21 years may be sentenced to a whipping in addition to any other sentence, provided that where a sentence of imprisonment is imposed, the whole period must be suspended.¹⁴ The Criminal Procedure Act contained procedures for automatic review of sentences of whipping imposed by the courts.¹⁵ However, a sentence of whipping imposed in terms of s294 was specifically excluded from review.¹⁶

Prior to the *Williams* decision, South Africa was one of the few countries in the world where corporal punishment was still imposed by the courts. Juveniles were being sentenced to whipping on the basis that it was the only alternative to a prison sentence. However, judges have in the past indicated their distaste for juvenile whipping. In *S v V* 1989 (1) SA 532 (A), the South African Appellate Division held that "whipping is by nature extremely humiliating and physically a very painful form of punishment and ought to be imposed with great circumspection and only when either the personal circumstances of the accused or the nature of circumstances of the crime clearly justify it. It is imposed on

¹⁰ *Ibid* s294(1)(a).

¹¹ *Ibid* s294(2).

¹² *Ibid* s294(3).

¹³ *Ibid* s294(4).

¹⁴ *Ibid* s294(1)(b).

¹⁵ *Ibid* s302.

¹⁶ *Ibid* s302(1)(iii).

juveniles to keep them out of goal, and on adults where there is a significant degree of cruel violence in the commission of their crime." The Appellate Division stated further that "for some time there has been a growing degree of temperance discernible in the attitude to corporal punishment." In *Jacobs* 1994 (1) SACR 402 (C), it was held that the courts are growing more and more disapproving of whipping in general as a sentencing option. Our courts were thus beginning to question the desirability of corporal punishment. Although the courts could disapprove of judicial corporal punishment and seek to limit its application, they could not declare the practice to be invalid. However, the advent of the Constitution of the Republic of South Africa Act 200 of 1993 gave the courts the power to subject the practice to constitutional attack.

3.2 The judgment of the Constitutional Court in *S v Williams and Others* 1995 (3) SA 632 (CC)

The issue arose of whether the sentence of juvenile whipping, pursuant to the provisions of s294 of the Criminal Procedure Act 51 of 1977, was consistent with the Constitution.

The applicants contended that s294 of the Act violated sections 8, 10, 11 and 30 of the interim Constitution. These provisions are found in Chapter 3, which is generally referred to as the chapter on fundamental rights. Section 8(1) of the Constitution of Republic of South Africa Act, 1993 guarantees to each person "the right to equality and to equal protection of the law" while section 8(2) prohibits unfair discrimination on grounds which include race, gender, sex, colour and age. The argument advanced by the applicants was that the provisions of s294 of the Act discriminated unfairly against male juveniles on the grounds of age and sex and, in the context of South Africa's unjust and unequal past, their application was susceptible to racial bias.

Section 10 guarantees to every person "the right to respect for and protection of his or her dignity". It was submitted that the circumstances under which juvenile whipping is administered, including the fact that it involves the intentional infliction of physical pain on the juvenile by a stranger at the instance of the state, are incompatible with respect for and the protection of the dignity of the person being punished. It was contended that this was a violation of the dignity of both the minor and the person administering the whipping.

The purpose of the provisions of s30 of the Constitution is to protect children. The applicants argued that although the Constitution recognizes the vulnerability of children as a group and sets out to protect them, juvenile whipping infringed their right to security and not to be subjected to abuse.

It is submitted that much of the applicants' argument focused on the alleged violation of s11(2) of the Constitution. This section provides that "no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment". This is the only provision, among those relied upon by the applicants, that expressly refers to punishment.

The court dealt mainly with the impact of sections 10 and 11(2) of the Constitution on the conduct which is prescribed by s294 of the Act. The Court considered the words contained in s11(2) of the Constitution, and noted that the words are read separately and refer to seven distinct modes of conduct, namely torture, cruel treatment, inhuman treatment, degrading treatment, cruel punishment, inhuman punishment and degrading punishment. The court remarked that the interpretation of the concepts contained in s11(2) of the Constitution involves the making of a value judgment which requires to be objectively articulated and identified, regard being had to the contemporary norms, aspirations and expectations and sensitivities of the people as expressed in their national institutions and the Constitution, and further having regard to the emerging consensus of values in the civilised international community. The court added that

while our ultimate definition of these concepts must necessarily reflect our own experience and the circumstances of contemporary South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.

The learned judge Langa J then proceeded to discuss the meaning of the different concepts contained in section 11(2) of the Constitution by referring to definitions in the Oxford English Dictionary and other international authorities. He found that the tendency in international forums was to deal with the words as phrases or a combination of words. The court found the decisions of the Supreme Courts of Namibia and Zimbabwe to be significant, not only because these countries were our geographic neighbours but also because we share the same English colonial experience and the Roman-Dutch legal tradition. The Court looked at *Ex Parte Attorney-General, Namibia : In Re Corporal Punishment By Organs of State* 1991 (3) SA 76 (NmSC), where Mohammed AJA held that the infliction of corporal punishment, whether on adults or juveniles, was inconsistent with article 8 of the Namibian Constitution and constituted "inhuman or degrading" punishment.

In *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZS), the Zimbabwean Supreme Court held that corporal punishment for adults was inhuman and degrading in violation of s15(1) of the Declaration of Rights of the Zimbabwe Constitution which prohibits "torture or inhuman or degrading punishment". A similar conclusion was reached with respect to juvenile whipping by the Zimbabwe High Court in *S v F* 1989 (1) SA 460 (ZHC). In *S v A Juvenile* 1990 (4) SA 151 (ZSC), the Zimbabwe Supreme Court held that juvenile whipping constitutes inhuman and degrading punishment. Gubbay JA described juvenile whipping as an "antiquated and inhuman punishment which blocks the way to understanding the pathology of crime".¹⁷

¹⁷ *S v A Juvenile* 1990 (4) SA 151 (ZSC) at 168I-169B.

Langa J concluded that the common thread running through the assessment of each phrase, whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the United States Constitution and in article 12 of the Canadian Charter or "inhuman or degrading punishment" as in the European Convention and the Constitution of Zimbabwe, is the identification and acknowledgement of society's concept of decency and human dignity. The learned judge remarked that the state must impose punishment that must respect human dignity and be consistent with the provisions of the Constitution. The court found that there is a definite and growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the courts and legislatures of various countries and through international instruments and has established a clear trend. The court also pointed out that corporal punishment has been abolished in a number of countries, including the United Kingdom, Australia (except in the State of Western Australia), the United States of America (except Delaware), Canada, Europe and Mozambique.

The court found that the Constitution offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights. In interpreting s11(2) of the Constitution, the court found that we should not only have regard to the position in other jurisdictions. In seeking the purpose of the particular rights, it is important to place them in the context of South African society. The court pointed out that the process of political negotiations which resulted in the Constitution was a rejection of violence. In this context, Langa J found that the institutionalised use of violence by the state on juvenile offenders as authorised by s294 of the Act is a cruel, inhuman and degrading punishment. A culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands. The conclusion reached by the court was,

therefore, that section 294 of the Act infringes the rights contained in sections 10 and 11(2) of the Constitution.

The next question to be decided was whether this infringement of the rights contained in sections 10 and 11(2) of the Constitution might have been justified by section 33, the limitation clause of the Constitution. The court therefore had to determine whether corporal punishment was reasonable, justifiable and necessary despite infringing the rights contained in sections 10 and 11(2) of the Constitution. The state's attitude was that juvenile whipping was neither cruel nor inhuman and that it was no more degrading than other acceptable punishments. It was further contended that to the extent that the punishment could be said to be in some way humiliating or degrading, it was within permissible constitutional limits because of the provisions of s33(1) of the Constitution. The state argued that it was reasonable, justifiable and necessary for two reasons: first, it offered a practical solution to South Africa's lack of well-established resources to support alternative punishments and secondly, it was suggested that juvenile whipping was a deterrent.

The court noted the primary argument advanced in favour of juvenile whipping was that it constitutes a better alternative to imprisonment, particularly in the so-called "grey area" crimes. This referred to instances where a court has to deal with an offence which is not so serious as to merit a custodial sentence but is serious enough to render inappropriate the use of "softer" sentences. The argument was advanced that sentencing alternatives for juveniles were limited and this country did not have a sufficiently well-established physical and human resource base which was capable of supporting the imposition of alternative punishments. The court's reaction to this argument was that this seems to be another way of saying that our society has not yet established mechanisms to deal with juveniles who find themselves in conflict with the law, and that the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading. The court found this proposition to be untenable.

The court examined available resources to determine whether there are appropriate sentencing options. Langa J referred to a number of available alternatives, of which correctional supervision is particularly acceptable. This allowed for the imposition of finely-tuned sentences without resorting to imprisonment. Langa J was not impressed by the argument that, in the absence of corporal punishment, more juveniles will be imprisoned. He stated that, to the extent that facilities and physical resources may not always be adequate, it seems that the new dynamic should be regarded as a timely challenge to the state to ensure the provision and execution of an effective juvenile justice system. He added that the wider range of penalties now provided for in the Act permits a more flexible but effective approach in dealing with juvenile offenders. The court referred to interesting sentencing options used in the Western Cape, such as the community service orders and victim-offender mediation process. The court remarked that these processes can be developed by state and non-governmental agencies and institutions which are involved in juvenile justice projects.

The state stressed the deterrent nature of juvenile whipping. However, no clear evidence could be advanced that juvenile whipping is a more effective deterrent than other available forms of punishment. The court found the deterrence value of corporal punishment to be so marginal that it does not justify its imposition. The court found that corporal punishment can satisfy only one "object" of punishment, namely retribution, which cannot on its own justify the existence of the punishment. The court concluded that no compelling interest has been proved which can justify the practice. Therefore, the court rejected both the state's contentions. The court found that the provisions of s294 cannot be saved by section 33. It therefore declared the whole of section 294 to be invalid and of no force and effect. The same happened to the words "or a whipping" in section 290(2). The abolition of corporal punishment for juveniles provided "a timely challenge to the state" to consider alternative sentencing options.

The next section will focus on s29 of the Correctional Services Act and the amendment bills.

4 S29 OF THE CORRECTIONAL SERVICES ACT 8 OF 1959

The Correctional Services Act of 1959 provides that a person under the age of 18 years who is accused of having committed an offence shall, before his or her conviction, not be detained in a prison or police cell or lock-up unless his or her detention is necessary and no suitable place of safety mentioned in terms of s28 of the Child Care Act 74 of 1983 is available for his or her detention. Many children were detained in South African prisons in terms of s29 because of a lack of accommodation at places of safety or because such places have not been established throughout the country.

4.1 The Correctional Services Amendment Act 17 of 1994

The Correctional Services Amendment Act, 1994 was promulgated in May 1995. The object was to amend s29 of the Correctional Services Act, 1959 to prevent the detention of an unconvicted child in prison or police cells. It was also necessary to provide for the detention in prison of an unconvicted child accused of committing an offence in terms of Schedule 1 of the Criminal Procedure Act where admission to a place of safety could not occur immediately. Such detention was an emergency measure and was intended for a period not beyond 48 hours, and only allowed if the court ordered so.

However, many unforeseen practical problems arose in connection with the interpretation of certain aspects of Section 29. Some courts were also faced with few placement possibilities in existing places of safety, and not being able to remand children in custody, they had no alternative but to release children on their own recognisance or into the care of their parents or guardians, in the hope that they would return to court for trial. Many did not return. It is submitted that s29 prohibits the detention of unconvicted accused in police cells or prisons but does not mention the position of those juveniles who have been convicted but not yet sentenced. Therefore, convicted children are liable to lengthy periods of detention in custody after conviction pending the imposition of a sentence. The wording in

s29 also did not clarify the meaning of the 48-hour clause. This has led to different interpretations in different jurisdictions. Some magistrates returned children for repeated periods of 48 hours ("roll over" fashion) whilst others regarded it as a finite period, in that if there was no appropriate place of safety available, juveniles should be released.

However, the most pressing problem related to the position of juveniles charged with serious crimes. Places of safety proved to be overcrowded, ill-equipped, poorly managed and insecure. They could not cope with the influx of hardened juvenile inmates and many escaped only to commit new crimes.¹⁸ Some regions also had no places of safety available at all, and detaining a juvenile entailed lengthy interprovincial journeys to the nearest facilities. The Act therefore achieved notoriety and this led to a crisis in the juvenile courts.¹⁹ Escape of juveniles charged with serious offences from places of safety featured prominently in news items. It caused widespread concern among the public, police and justice officials. Members of the public became extremely concerned about the rampant juvenile crime and the apparent leniency of the Act towards juvenile offenders. Prosecutors and magistrates became frustrated at the abscondment of the juvenile offenders from places of safety. There were also allegations that police were arresting fewer juveniles.²⁰ This arose from their duty to submit reports to magistrates in order to detain a juvenile prior to his first appearance in court in terms of s29(3) of Act 17 of 1994. The Act's failure led to readjustment of the provision.

¹⁸ The former Eastern Cape Premier, Raymond Mhlaba expressed his concern and shock when he visited the Enkusekweni Place of Safety in Port Elizabeth. This juvenile haven was notorious for its continuous string of escapes, and it was also found to be "dirty, crammed and unhygienic" as reported in the *Eastern Province Herald* "Shock for Mhlaba and Faku" 12 January 1996: 2.

¹⁹ There are no special juvenile courts at present. An adult court can become a juvenile court and hearings be held in camera.

²⁰ Sloth-Nielsen J "Juvenile Justice Review 1994-1995" 1995 *SACJ* 333.

4.2 The Correctional Services Amendment Act 14 of 1996

The Correctional Services Amendment Act 14 of 1996 was introduced on 10 May 1996 to reverse the effects of the previous legislation. Courts are given a limited discretion in terms of the Act to order the detention of unconvicted young persons accused of having committed certain serious offences. These measures are intended to be temporary to address exceptional circumstances. Courts are granted the discretion to order the detention of accused persons between the ages of 14 and 18 in prisons, police cells or lock-ups if the presiding officer is convinced that such detention is necessary in the interests of justice and that no suitable place of safety is available for such detention. These offenders may only be detained if they are accused of having committed certain serious offences which the Minister determines by notice in the Gazette. A further safety mechanism requires the courts to order the detention of youths in prisons and to renew these orders on a weekly basis. The amendment came into effect for a year and was intended to give the provinces the opportunity to build secure-care facilities for young offenders. It has been extended for another year.

The principal features of the Act were as follows:

- (1) S29(2) was amended so that persons between 14 and 18 years could be held prior to first appearance in court for 48 hours, rather than 24 hours. The 24-hour provision for the younger category of juveniles still applies. The reason for this amendment was to allow a more reasonable period of time for the state and the accused to prepare for an oral hearing to decide the place of further detention.
- (2) The juvenile is entitled to legal representation at the hearing. This right is contemplated in s28 of the Constitution of Republic of South Africa Act, 1996 and s3 of the Legal Aid Act 1989. Julia Sloth-

Nielsen argues in favour of strong wording in the section.²¹ She maintains that juveniles who are liable to detention should be informed soon as possible after arrest in a language that they understand of their availability to state legal aid and their right to legal representation at the oral hearing. They should also be assisted by the South African police to secure such representation.

- (3) The juvenile is entitled to the "most expeditious processing of trial".²² This illustrates the desirability of speediness to magistrates, investigating officers and others who are able to affect the finalisation of the trial.

- (4) Regulations on awaiting trial persons should be brought in line with relevant internationally recognised human rights standards. Julia Sloth-Nielsen states that although the directive to the Minister in the legislation does not merely envisage regulations which contain only legally binding international principles (that is, those contained in the Convention which has now been ratified by the State), the wide reference in the legislation to international standards and norms indicates that other international documents such as the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice (1985)* (the Beijing Rules), the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty (1990)*, the United Nations *Guidelines for the Prevention of Juvenile Delinquency (1990)* (the Riyadh Guidelines) should also be considered by the Minister.²³ The *Rules for the Protection of Juveniles Deprived of their Liberty* include references to physical environment, accommodation, the

²¹ Sloth-Nielsen J "Pre-trial detention of children re-visited: amending s29 of the Correctional Services Act" 1996 SACJ 69.

²² S29(1)(c) (5A(d)) of Correctional Services Amendment Act 14 of 1996.

²³ See footnote 21 *supra* at 70.

design of detention facilities, sanitary requirements, privacy and the right to education. They focus on specialised juvenile detention facilities. To illustrate this, there should be qualified personnel for juveniles deprived of their liberty (educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists) in terms of R81 of the Rules and a prohibition on the carrying and use of weapons by personnel in juvenile detention centres (R65).²⁴ It is submitted that South African prisons, including those where juveniles are detained, fall far short of international standards and norms. Section 28(1)(g)(i) of the Constitution of Republic of South Africa, 1996 requires the separation of juveniles from adults but this is not applied in practice. The question arises whether the Department of Correctional Services will be able to implement such regulations in the future. Julia Sloth-Nielsen believes that the prospects do not look promising.²⁵ To illustrate this, there is serious overcrowding in prisons including facilities where juveniles are detained. Educational programmes, vocational training, skills development and other programmes are also not available to detained juveniles.

It should be noted that the Correctional Services Amendment Act, 1996 is not without criticism. Many of the sections in the Act relate to aspects of trial rather than the form or manner of detention.²⁶ The latter is also subject to abuse and should be addressed. The Act does not address the plight of convicted juvenile offenders. The Correctional Services Act is not readily accessible to police, magistrates and practitioners who apply the provisions of the Act. They usually apply the Criminal Procedure Act. The Department of Correctional Services will

²⁴ *Ibid* at 71.

²⁵ *Ibid*.

²⁶ *Ibid* at 72.

find it difficult to comply with international standards and norms where juveniles will be detained for a short period in juvenile detention facilities. The Department also does not have the expertise or sufficient funds for this purpose. Thus there arose a need for comprehensive juvenile justice legislation in South Africa.

The next section will examine the formulation of new juvenile justice legislation in South Africa.

5 FORMULATING NEW JUVENILE JUSTICE LEGISLATION IN SOUTH AFRICA

The Department of Correctional Services has disclosed alarming statistics about our juvenile offenders. It has been reported that the number of juvenile offenders between the ages of 7 and 15 in jail for violent and non-violent crimes is increasing.²⁷ It has further been reported that a quarter of all crimes perpetrated in South Africa are committed by persons under 21.²⁸ Most of these youngsters are petty offenders who never strike again. However, an estimated 5% of them become habitual violent criminals and the South African justice system cannot cope with this influx. These offenders are known as "untouchable" because, although the police try to put them behind bars, the justice system inevitably allows them to slip through the net.²⁹ This reinforces the frustration of justice officials and police with the ineffective range of punishments available to juvenile offenders. It is submitted that the real problem facing the justice officials and police is not the question of the juvenile's guilt but what to do with young people who are in trouble with the law.

²⁷ *The Star* "Child Prisoners putting strain on South Africa's correctional facilities" 31 May 1996 : 7.

²⁸ *The Saturday Star* "Kids who kill" 21 June 1997 : 11.

²⁹ *Ibid.*

Many studies were undertaken by non-governmental organisations and government departments to address juvenile justice issues. The following recommendations focus on the best interests of children and the need to return such children to a society where they can become useful and law-abiding citizens.

5.1 Recommendations of various institutions

The Department of Welfare has stressed that the prevention of crime among youth should be made a priority.³⁰ They are seeking various ways to address the needs of juveniles in and outside prisons. These include protecting juvenile offenders from all forms of exploitation, discrimination and abuse, promoting sports and cultural activities, allowing them privacy and providing education. It is submitted that these proposals provide a welcome shift in focus from punishment and retribution to treatment and prevention.

Amanda Dissel from the Centre for the Study of Violence and Reconciliation maintains that juveniles in prisons are forced to live with strangers in a place where violence, intimidation and manipulation are rife.³¹ The lack of rehabilitation programmes outside prisons is said to contribute to an increase in juvenile crime. The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) is the only organisation which has a programme aimed at reshaping the lives of young offenders. However, the programme is not easily accessible to youngsters who live in smaller towns and rural areas. Another problem facing released juveniles is that they learn to master other crimes whilst in prison. This usually happens with juveniles who share the jail with adult prisoners even though the department policy and s28 of the Constitution of Republic of South Africa, 1996 stipulate that juveniles should be housed separately. Dissel also states that most of the rehabilitation programmes in prisons are not directed at the needs of

³⁰ See footnote 27 *supra*.

³¹ *The Star* "Self-defeating violence of wasted youth" 31 May 1996 : 13.

juveniles.³² Some prisons have insufficient teachers and the juveniles are also not encouraged to become part of these rehabilitation programmes. She recommends reviewing existing rehabilitation programmes and also juvenile sentencing. She also advocates the implementation of restorative justice in cases of minor crimes. A juvenile should only be sent to prison if he has committed a serious crime and failed to rehabilitate. Restorative justice should be used to ensure that a juvenile is "not only accountable for the crime but responsible".³³ To achieve this, rehabilitation should occur in the community. This encourages the victim to decide on the type of punishment, and the offenders can do community service to repay the community for their crimes. Society can also monitor them. It is submitted that this proposal is commendable in that society has a say in the offender's punishment and the offender is given another chance. Restorative justice appears to be a good sentencing option for minor offenders.

Nicro Director, Zeeniph Domingo stresses the need for societal involvement and a system which will help reintegrate juveniles into the outside world.³⁴ When the juveniles are released from prison, they should move back into a society that is more positive towards them, not one that rejects them. She also recommends that children should be given their rights in prison and be helped to have a positive attitude to life.³⁵ It is submitted that both Dissel and Domingo's recommendations are commendable in that they stress societal involvement and juvenile accountability and responsibility. They also indicate a welcome shift in focus from punishment and retribution to prevention and treatment.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

According to the Nedcor Report on Crime, Violence and Investment, the immediate cause of young people embarking on a life of crime for the first time is the break-up of the traditional family structure, resulting in poor parental guidance and a loss of values and norms that provide a basis for resisting the attractions of crime.³⁶ It is submitted that factors like rural to urban migration, families with both parents working (or unemployed), poverty and inadequate housing lead to the break-up of the family. Apartheid has intensified the processes that cause family breakdown and therefore created the conditions for entry into crime.³⁷ The report recommends that a curriculum be introduced at primary school level which would focus on developing key life skills that would contribute to a reduction in victimisation, conflict and violence. The community should also condemn crime and inculcate the principles of accountability, responsibility and respect for the law in youth. I agree with the above recommendations. Children should be taught at primary school to respect the law. Curriculums should be introduced in schools to assist children cope with their problems rather than embark on a life of crime. If our children are taught to condemn crime from a young age, they will become better law-abiding adults.

In 1993 members of non-governmental organisations, such as the National Institute for Crime Prevention and Rehabilitation of Offenders, Lawyers for Human Rights and the Community Law Centre at the Western Cape, were requested by Dullah Omar (the former director of the Community Law Centre) to draft juvenile justice legislative proposals. The draft contains some exciting and innovative proposals, like keeping the mainstream criminal process in abeyance until a range of other options had been tried, ensuring that diversion became the first option and the central consideration of the juvenile justice system, ensuring that processes were culturally sensitive, locating a family conference within the community, giving both young offenders and their victims a say in the legal- decision making

³⁶ *The Star* "Nearly 15 000 Gauteng children arrested in 1995" 14 July 1996.

³⁷ *Ibid.*

process, searching for individual sentences which transformed and did not stigmatise, and keeping young offenders out of prisons.³⁸

There are at present no special juvenile courts and an adult court could be converted into a juvenile court. The new proposals emphasised the need to have specially trained personnel in juvenile courts and the use of the diversion principle in these courts. It was also recommended that juveniles be entitled to special procedural rights, such as the case being held in camera, provision of legal representation, and automatic review of results.³⁹ The court was entitled to consider the principles of proportionality, accountability and family preservation in the sentencing process. The sentencing options would include restitution or compensation, providing some benefit to the aggrieved person, community service, submission to instruction or treatment, submission to supervision, residence in some centre for a specified purpose or "any other programme".⁴⁰ It is submitted that these sentencing options would encourage officials to use non-custodial sentencing options. It should be pointed out that the court in *S v Williams and Others* 1995 (3) SA 632 (CC) also favoured the use of non-custodial sentencing options (see *supra*).

The draft also stressed the need for open and secure care to replace detention, reformatories and imprisonment. It was recommended that closed access detention be utilised for serious offenders where there was a possibility of abscondment, destruction of evidence and interference with witnesses.⁴¹

A set of guiding principles was formulated with the emphasis on the best interests of the young person, role of the family or the community, accountability of the

³⁸ Pinnock D *et al* "New juvenile justice legislation for South Africa: giving children a chance" 1994 SACJ 341.

³⁹ *Ibid* at 344.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at 345.

young person, age as a mitigating factor, involvement of the victim etc. These principles were considered to be among the most advanced in the world.⁴² These proposals should be considered as they represent an exciting advance in juvenile justice.

5.2 Recommendations of the Inter-Ministerial Committee (IMC)

The Inter-Ministerial Committee was set up after the crisis sparked by the release of children in May 1995. The IMC comprises members of the departments of welfare, justice, education, health, correctional services, safety and security and labour and non-governmental organisations. The Committee's task was to implement an integrated child and youth care system. The Committee presented an unfavourable report to Cabinet on the poor conditions for juveniles in state care. The Committee recommends that youths between the ages of 13 and 18 and who have committed serious offences should be accommodated in secure-care facilities.⁴³ This is a sound proposal. It is submitted that serious offenders should be dealt with strictly by the law. The Committee is also in favour of increasing the lower age limit for criminal capacity from 7 to 14. It is submitted that this is a radical proposal. It is a trite fact that many children under the age of 10 years have turned to a life of crime. In the Cape, street gangs comprising members as young as 9 years are robbing and intimidating tourists.⁴⁴ Therefore, I disagree with the above proposal to place all children under 14 years beyond the reach of the law. The aim of the juvenile justice system should be to make children accountable and responsible, not "untouchable". The IMC also recommends amending the present system of preserving the fingerprints and

⁴² *Ibid* at 341.

⁴³ *The Saturday Star* "Changes in secure care for youth when new centre opens" 28 January 1997.

⁴⁴ *Cape Times* "Compensation by offenders proposed" 20 May 1997.

records of convicted juvenile criminals when they turn 18.⁴⁵ Criminologists maintain that the destruction of criminal records will hinder efforts to transform juvenile offenders into law-abiding adults. Public safety is also seriously jeopardised when violent criminals are given a clean slate. Youth advocates, like NICRO and Lawyers for Human Rights, are also in favour of preserving the records of murderers, rapists and armed robbers. It is submitted that the records of convicted juvenile criminals should be preserved. The interests of the community demand that these records be preserved. It is submitted that the protection of the community should not be secondary to society's treatment of those who violate it.

5.3 Recommendations of the South African Law Commission

The Commission's paper on juvenile justice emphasises the need for a separate juvenile justice system designed to promote the well-being of children and to deal with offenders individually. It recommends that the system should focus on diverting cases of less serious offences from the criminal justice system at an early stage, and that the welfare system or diversion programmes be used as alternatives to the criminal justice system.⁴⁶ The Commission also suggests that the age limit for criminal capacity be lowered as a result of increasing juvenile crime.⁴⁷ The minimum age of criminal capacity is seven years. Where offenders are aged 7 to 14, South African law provides a rebuttable presumption that children lack criminal capacity unless the state proves that a child can distinguish between right and wrong. It is submitted that the age limits have hindered police efforts to control gangs of youths who often exploit their age to commit crimes. The Commission also emphasises that there is a need to strike a balance between the interests of young people in conflict with the law and those of the broader

⁴⁵ See footnote 28 *supra* at 11.

⁴⁶ See footnote 44 *supra*.

⁴⁷ *Ibid.*

community. It is submitted that lowering the age limit for criminal capacity will not only prevent exploitation of their ages by juvenile criminals, but will also prevent manipulation of juvenile offenders by adults who use them to further their own nefarious ends. This will also help police efforts to address juvenile crime. It is also submitted that diversion can be used to deal favourably with minor offenders, who will benefit from not coming into contact with the criminal justice system.

The Commission also recommends that custodial sentences should be used as a last resort for juveniles. Where such sentences are used, they should be for a minimum period and should be conducive to the return of children back to society. The Commission advocates the use of non-custodial measures.⁴⁸ It is submitted that those recommendations are in line with international norms and standards (see Beijing Rules and the UN Convention on the Rights of the Child, s28 of the Constitution of the Republic of South Africa, 1996 and the judgment of Langa J in *S v Williams and Others* 1995 (3) SA 632 (CC) in this regard).

Post-conviction strategies include not only sentencing but conversion of a criminal matter to a children's court inquiry in terms of section 254 of the Criminal Procedure Act. This has the effect that the criminal conviction falls away. The Child Care Act 74 of 1983 provides a number of options which include, inter alia, placement of the child in the custody of a foster parent, placement in a children's home and sending the child to a school of industries. The Commission suggests that further post-conviction strategies might include referral after conviction to a family group conference or restorative justice process.⁴⁹ The conviction would then fall away. It is submitted that these post-conviction strategies can be used favourably for non-violent offenders.

⁴⁸ See footnote 5 *supra* at 30.

⁴⁹ *Ibid* at 31.

The Commission also recommends that a Sentencing Commission may promote equality in the use of imprisonment and other custodial sentences for children.⁵⁰ It may also assist in implementing the constitutional requirement that detention be used as a last resort and for the shortest period of time.⁵¹ It is submitted that the establishment of a Sentencing Commission will ensure that sentencing policies are coherent and that they comply with the Constitution. The Commission considers some interesting options in this regard:⁵²

- (a) The Commission advocates the drafting of sentencing guidelines (based on international rules and accepted sentencing) to assist sentencers in the exercise of their discretion. The guidelines could propose the use of imprisonment for serious and violent offences, and alternative sentences (such as restorative justice and community service) for minor offences.
- (b) A further option could exclude the use of certain sentences in certain instances. For example, imprisonment could be excluded for children under 14.
- (c) It recommends improved monitoring and review of sentences. It also proposes the establishment of a juvenile sentencing commission or similar monitoring body to review all juvenile sentences.

It is submitted that these guidelines are innovative and emphasise the "best interests" of children.

Presently no custodial sanction exists besides imprisonment or a sentence to attend reform school. The imposition of imprisonment as a sentencing option

⁵⁰ *Ibid* at 32.

⁵¹ S28(1)(g) of the Constitution of Republic of South Africa, 1996.

⁵² See footnote 5 *supra* at 32.

should be excluded because prisons are universities of crime which encourage criminal tendencies. Reform schools are also unfavourable institutions. They are not evenly distributed throughout the country; they do not promote reintegration and maintenance of family contact; and they also result in unequal sentencing where children serve longer sentences than they would in terms of imprisonment. The Law Commission therefore recommends that the sentencing option of reform schools be reviewed.⁵³ It is submitted that suitable secure-care facilities should be constructed for the use of custodial sentences. If children are committed to reform schools, they should spend a minimum period of time there and be placed in reform schools which are as close to their families as possible.

Research indicates that **fin**es are used in practice as a sentence for juvenile offenders.⁵⁴ Where some children or their families cannot pay these fines, the children serve alternative prison sentences instead. It has been argued that these fines are inappropriate and that it is unfair to expect the families of the juvenile offenders to pay them. It is submitted that where the families are in a position to pay the fines, they should do so. Families of offenders should be held accountable in some way for the misdemeanours of their offspring. It is also submitted that indigent families should not be compelled to pay the fines. However, the offender should make some reparation to the victim. Thus, I agree with the Commission's suggestion that the possibility of payment of money should be considered as an aspect of reparation or restorative justice options.⁵⁵ It is submitted that the above proposals emphasise juvenile and parental accountability and responsibility.

The Law Commission also recommends that alternative sentences be imposed independently without linking them to suspended or postponed sentences.⁵⁶

⁵³ *Ibid.*

⁵⁴ *Ibid* at 33.

⁵⁵ *Ibid* .

⁵⁶ *Ibid.*

Non-compliance with alternative sentences can be referred back to the court to consider the sentences afresh. In this instance the court can either include the imposition of another alternative sentence or sentence the offender to a secure-care facility.

The Law Commission also recommends the possibility of a referral to a Family Group Conference or Community Sentencing Circle after conviction.⁵⁷ The family group conference principle works through collective shaming within the group. The accused's compliance is necessary for the process. If the family conference fails to reach consensus, the matter should be referred to the prosecutor to consider the charges. It is submitted that the Family Group Conference is an appropriate alternative sentencing option for non-violent first-time offenders.

The Law Commission also recommends the use of correctional supervision as an alternative to a reform school sentence.⁵⁸ It is submitted that the Criminal Procedure Act sets the minimum age limit for this sentence at 15 years. Therefore, it cannot be applied for juveniles younger than 15. Similarly, it has been argued that the sentence entails a great degree of responsibility to fulfil the reporting and attendance requirements and compliance with house arrest conditions. However, it is submitted that correctional supervision is preferable to imprisonment or reform school. It entails close contact with the family, which is vital to the development of juveniles. The Commission further recommends that the maximum period for which correctional supervision be imposed should be two years.⁵⁹ It is submitted that this would be appropriate for juveniles. Conditions imposed should also consider the children's capabilities and responsibilities.

⁵⁷ *Ibid* at 34.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

The Law Commission recommends that pre-sentence reports should be mandatory before a custodial sentence is imposed.⁶⁰ It is submitted that pre-sentence reports are vital and should be considered prior to sentencing. This would also be in line with international norms. The question also arises whether evidence of pre-trial diversion is admissible at the sentencing stage at a later trial.⁶¹ It is submitted that allowing this evidence has both advantages and disadvantages. It is advantageous in that if the evidence is allowed, it would give the diversionary sanctions some basis. The disadvantage is that the previous diversion could have been granted on the basis of an "acceptance of guilt" and is not a previous conviction.

5.4 Juvenile projects

The Government hopes to build twelve secure-care facilities for young offenders before the end of 1997. The purpose is to remove hundreds of children who are being held in prisons alongside hardened criminals. To this end, R33 million rand from the Reconstruction and Development Fund (RDP) has been allocated to the nine provinces to construct twelve centres or institutions for young offenders. The provision of secure-care facilities forms one part of the Government's plan to deal with children at risk, especially those in trouble with the law. The Government also plans to transform the probation services and to implement diversion and family preservation programmes.

The Walter Sisulu Child and Youth Care Centre, the first of the centres, has opened in Soweto. It is intended to rehabilitate and provide secure care for juveniles awaiting trial, and accommodate abandoned, abused or neglected children and babies. These secure-care facilities are intended for young people who have committed serious crimes and who are deemed to be in need of care.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

The intention is to provide a balance between society's need for safety and protection from criminals with the child's right to safety, dignity and development. The system provides for young people who may harm or threaten society or who pose a threat to society. Programmes will be implemented in the centre to stop children from becoming criminals. At the same time, the centre will empower the local community and provide job creations for the residents. The centre is a pilot project of the Inter-Ministerial Committee (IMC). The complex has a community-based philosophy and its multidisciplinary teams will assess the needs of each child. This approach will be adopted in existing places of safety throughout the country.

This project is a step in the right direction and it is hoped that many young people will benefit from it. One 16 year-old inmate made the following remarks on his transfer to the Walter Sisulu Child and Youth Care Centre:

I never expected this, it is better than home.... If I go back to live with my aunt, I'll have to go back to hanging out with friends. But here I can go to school and, even with a standard four (education), I can learn to be a mechanic.⁶²

These are indeed encouraging words from a 16 year-old charged with house breaking and bodes well for the project. However, it is submitted that these secure-care facilities should also accommodate convicted juvenile offenders but they should be separated from juvenile offenders who are awaiting trial.

Juveniles awaiting trial in serious cases such as murder, rape and armed robbery should also not be housed together with juveniles charged with minor offences. They should be housed in separate facilities. Similarly, juveniles should be detained separately from adults (see s28(1)(g)(i) of the Constitution). This is to avoid a similar situation to that where a 13 year-old was murdered by his 21 year-old cell mate in police custody. The teenager had been held on a charge of

⁶² *The Star* "Home never like this, says reformatory boy" 29 April 1997 : 6.

shoplifting whilst the "young" adult had been arrested for the brutal assault of his sister.⁶³ Needless to say, many youth advocates, including NICRO, expressed their outrage and anger at this senseless murder of a young person held in police custody. According to campaigners for juvenile justice, "locking a young person up with an adult, even for 5 minutes, may be 5 minutes too long."⁶⁴

A prison centre for juveniles has also opened near Newcastle in KwaZulu Natal. It is called the Ekuseni (Dawn of New Day) Youth Development Centre. This project represents a radical departure from the past. In the past, convicted children were doomed to remain on the fringes of society all their lives. They can now be given the opportunity to become useful citizens. The Ekuseni Centre will provide 600 convicts with life skills, education and training in an environment which is conducive to their successful reintegration into society. The project includes a registered training school, a range of training workshops and modern sporting facilities. The project represents a "good start" in creating prison environments that are conducive to the transformation and development of young prisoners.

The President's Award Youth Empowerment Programme has also been implemented in prisons to assist young offenders. It has been applied in numerous prisons in the Western Cape for example, Die Bron Brandvlei Youth Correctional Centre in Worcester. It places a strong focus on rehabilitation of the young offender. The programme involves the young offenders in community service, expeditions to build self-reliance, skills-training and sporting activities. The success of the project has encouraged the Department of Correctional Services to implement the programme nationwide.⁶⁵ Participants are assisted in finding employment when they complete their programme and sentence. The programme

⁶³ *Sunday Times* "Still no justice for juveniles" 11 May 1997.

⁶⁴ *Ibid.*

⁶⁵ *Cape Times* "President's programme is freeing young prisoners from their pasts" 10 October 1996.

aims to teach youngsters ethical and academic values. They learn respect for religious values, moral standards, trust, etiquette, problem solving and the importance of education. This programme goes a long way towards the positive development and successful reintegration of youth into society.

It is a trite fact that many street children turn to crime. However, the implementation of the Hillbrow-based Children's Project has given such street children a second chance. The Klipspruit brickmaking project is one of several projects run by the organisation for homeless children. Other projects include training in juice-making, painting and tile-fitting. These projects teach youth skills that will assist them to become useful and productive citizens. The Twilight Children's Project aims at the rehabilitation of street children. Children are taught basic skills to discourage them from returning to the streets and a life of crime. They are encouraged to pass on their new skills once they return to their families. The bricks are not sold for a profit nor do the bricklayers receive a wage. However, they receive a monthly allowance (between R100,00 and R200,00) as an incentive to learn new skills. This is a commendable project. It teaches street children basic skills and gives them an opportunity to improve their lot in life.

South Africa has taken a step in the right direction in meeting the "challenge" laid down by the Constitutional Court in *S v Williams and Others and Others* 1995 (3) SA 632 (CC), and developing a new juvenile justice system. However, there is room for improvement, and the government needs to urgently put into action the many plans and recommendations that have been drawn up.

In *S v Williams and Others* 1995 (3) SA 632 (CC), the court remarked that "valuable insights may be gained from the manner in which the concepts (regarding punishment) are dealt with in public international law as well as in foreign case law".⁶⁶

⁶⁶ See footnote 4 *supra* at 640.

Next innovative sentencing trends in international law in the United States of America, Great Britain and the Netherlands will be examined to gain some valuable insights.

6 JUVENILE SENTENCING TRENDS IN INTERNATIONAL LAW

6.1 United States of America

Until the 19th century, the United States treated juvenile offenders the same way as adults. There were no separate facilities for juveniles and juvenile offenders were sent to prisons for adults. However, during the 19th century, reformers sought specialised institutions for juveniles. This led to the construction of the House of Refuge in 1824 in New York which provided separate treatment for juveniles. The concept of *parens patriae* (where the courts assume guardianship over juvenile offenders) was followed by the juvenile courts. This gave the state the power to act on behalf of deviant or dependent children. The juvenile court was regarded as a "benevolent treatment agency".⁶⁷ Juveniles had less procedural protection than adults but their best interests were considered. However, in *In re Gault* 387 US 1 (1967), additional due process rights to juveniles were granted, and the juvenile court's status to process and treat juveniles separately from adults was upheld.

The juvenile court has become more punitive as state legislatures have responded to public demand for tougher policies on juvenile crime. Thus the exclusive rehabilitative model has been replaced by the combined goals of rehabilitation and punishment. The integrated serious and habitual juvenile offender programmes (SHJO programmes) are designed to achieve a workable balance between the rehabilitative and punitive goals of the juvenile justice system. Common

⁶⁷ Hinshaw SA "Juvenile diversion: an alternative to juvenile court" 1993 *Journal of Dispute Resolution* 307.

characteristics of these programmes are an initial period of incarceration or detention and the use of small facilities. According to Scheffer, there is substantial evidence that the integrated SHJO programmes effectively balance the goals of rehabilitation and punishment, not only in theory but also in practice.⁶⁸ Scheffer also maintains that the real source of the problem is society's unwillingness or inability to commit resources to children on a broader scale.⁶⁹ The integrated SHJO programmes are regarded as one piece of the solution. Society must place greater emphasis on providing for the needs of children if such programmes are to lead to any lasting or significant reduction in the problem of serious juvenile crime.

There is also widespread concern about the rising juvenile crime in the United States. Citizens have been urging the state legislators to reform the juvenile justice system so that the juveniles who commit the serious offences will be held accountable for their acts and receive punishments proportionate to their crimes. The public concern stemmed from a worry that serious juvenile criminal activity would continue to increase because there appeared to be little deterrent to committing such crimes for juveniles under 15 who were too young to be transferred to the adult criminal courts. The proponents of a more punitive justice system were concerned with the accountability of the serious juvenile offender, the plight of the crime victims and the protection of the community. They wanted to subject the serious juvenile offenders to a more punitive adult criminal system. A promising rehabilitation programme for youthful offenders was recommended by former Texan governor, Ann Richards. She advocated a three-tiered approach where first-time, non-violent juvenile offenders should be sentenced to community service, repeat offenders should be sent to work camps where they are disciplined but trained in real job skills, and serious and violent offenders should be

⁶⁸ Scheffer JP "Serious and habitual juvenile offender statutes: reconciling punishment and rehabilitation within the juvenile justice system" 1995 *Vanderbilt Law Review* 506.

⁶⁹ *Ibid* at 511.

incarcerated but they must be separated from adult prisoners.⁷⁰ It is submitted that this approach could be adopted in South Africa where non-violent juvenile offenders could be sentenced to community service; repeat offenders be sent to secure-care facilities where they are disciplined and taught life skills and job skills; and serious and violent offenders be incarcerated in separate secure-care facilities or juvenile prisons.

Many alternative sentences are used in the juvenile courts in the United States. These alternative sentences are aimed at non-violent offenders. Restitution is commonly used in the juvenile courts. Restitution requires an offender to make payment, either in the form of money or by performing a service to the crime victim. The aim of restitution is to make juveniles responsible for their actions and to give some recognition to the claims of victims. The state as intermediary facilitates, enforces and transfers payments from the offender to the victim. It is submitted that our courts could use restitution as an alternative sentencing option. Not only are the victims' claims recognised but the juveniles are made responsible for their actions. The South African Law Commission has also proposed a compensation scheme for crime victims in its system of restorative justice (see *supra*). Restorative justice depends on reconciliation rather than punishment and on the offenders accepting responsibility for their actions. It involves the offenders and their victims negotiating an agreement, which might include restitution. The system would facilitate the offender's reintegration into society. However, one must also be aware of the fact that restitution also depends on the financial means of the offender, and it is a trite fact that most juveniles in South Africa turn to a life of crime to escape poverty. Therefore, it is doubtful that they would be able to compensate their victims. However, offenders could reach an agreement with their victims, and perform some service to atone for the wrongs committed against them. This would be a feasible option.

⁷⁰ Reno TL "The rebuttable presumption for serious juvenile crimes: an alternative to determinate sentencing in Texas" 1995 *Texas Tech Law Review* 1441.

Community service is also used as an alternative sentence in the United States. It is used either before or after a guilty conviction. Community service allows juveniles to work off their sentences by doing unpaid social service work. It is used as an alternative to incarceration, and is applied where there is no risk to the community. It is described as an ideal alternative for juveniles. It gives juveniles the freedom to work off their debt to society. Working in the community also produces a sense of responsibility and pride. However, it has been criticised as being too lenient on the offender. Constitutional objections have also been raised that it involves involuntary servitude.⁷¹ It is submitted that community service is a useful alternative. It can be used as an alternative sentencing option in South Africa for non-violent first-time juvenile offenders. Both the Inter-Ministerial Committee and the South African Law Commission have also advocated the use of community-based sentencing options (see *supra*).

Another approach that is commonly used is mediation. Mediation reduces long-term costs by decreasing the likelihood of future conflicts and the necessity of subsequent police and court involvement. McConnell maintains that the third party technique of mediation is preferable for dealing with juvenile offenders.⁷² Mediation aims at a mutually acceptable agreement. It is more therapeutic than a judgment and has the ability to produce long-term changes and greater satisfaction for victims. It is suitable in parent or child conflicts. Research on mediation indicates positive results for the victim, the offender and the community. Dispute resolute legislation comprising community arbitration programmes for juveniles is found in almost every state, like Texas, New York and New Jersey. According to McConnell, mediation programmes produce encouraging results and a study of juvenile victim offender programmes concluded that mediation programmes reduce recidivism, promote rehabilitation of the offender, and increase

⁷¹ Silberman S "Community service as an alternative sentence for juveniles" 1986 *New England Journal on Criminal and Civil Confinement* 146.

⁷² McConnell M "Mediation — an alternative approach for the New Jersey juvenile justice system?" 1996 *Seton Hall Legislative Journal* 453.

victim satisfaction and offender accountability.⁷³ Mediation is also effective in cases involving trauma and loss, including homicides. It is submitted that mediation can also be adopted in South Africa. Mediation will give juveniles the opportunity to interact with their victims. This will increase victim satisfaction and offender accountability.

Another approach applied in the United States is electronic monitoring of juveniles. It has made juveniles responsible for their behaviour and provided an opportunity for juveniles to avoid criminal activity. A programme was implemented in Indiana. The characteristics of the programme were as follows:⁷⁴ it provided on-guard monitoring by means of an encoder device attached to the juvenile's wrist. An encoder device was also inserted into a verifier box which was attached to the telephone. The probation officer was required to provide intensive supervision of the juveniles. The programme was intended to be a cost savings alternative. Because the juvenile was under constant threat of discovery by the computer and the surveillance officer, he could not violate the conditions of his probation without being caught. The juvenile experienced no problems regarding his social acceptance by teachers, fellow students or friends. The wristlet reminded the juvenile of his status and helped counter peer pressure. It had a sobering effect on the life and lifestyle of the juvenile. It had a positive influence on other family members, and improved the relationship between the parent or guardian and the offspring. Major problems experienced were the length of the sentence and the systems violation at night. However, it was found to be a good alternative to incarceration of juveniles. Electronic monitoring, which utilizes developing technology designed to monitor convicted individuals, is a new alternative to incarceration. However, it is doubtful whether our present juvenile justice system would be able to cope with such developing technology designed to monitor juveniles. It would also be problematic and unsafe for the probation officers to

⁷³ *Ibid* at 460.

⁷⁴ Charles MT "Electronic monitoring for juveniles" 1989 *Journal of Crime and Justice* 151.

provide intensive supervision of juveniles especially in isolated, rural areas. This mechanism also requires the presence of a telephone in the juvenile's home, and the majority of South African households cannot afford telephones. Therefore, expertise and additional funds will be required to implement this mechanism. Unfortunately, at present we do not have the capabilities or means to implement this mechanism.

The diversion programme is also used as an alternative method of treatment for juvenile offenders. Juvenile diversion programmes are said to have achieved much success in diverting a person from a criminal career. Negative peer pressure and rebellious attitude, poor family relationships, poverty, inadequate schooling, lack of suitable employment facilities, unstructured time and drug and alcohol abuse have been advanced as reasons for youth's involvement in delinquent activity. Different types of community-based programmes have been used to help divert the youth from further criminal activity, such as probation involving the police; treatment involving well-trained staff; education and work involving in-house programmes; remedial teaching and job counselling; community volunteering designed for smaller communities involving educational tutors who provide employment opportunities; recreational programmes involving athletic activities and team sports.⁷⁵ Diversion therefore offers a variety of services and diversion programmes could also be implemented in South Africa. A variety of community-based programmes, including treatment, counselling, education, recreational activities and job skills, can be used to divert juveniles from criminal activities. They can be implemented in secure-care institutions (for serious and repeat offenders) and in the community (for minor offenders). The South African Law Commission also recommends the use of diversion programmes (see *supra*). A more effective way to fight crime would be to implement programmes designed to deal with situations that can lead to crime and delinquency and diversion programmes can be favourably used to achieve this.

⁷⁵ De Angelo AJ "Diversion programmes in the juvenile justice system: an alternative method of treatment for juvenile offenders" 1988 *Juvenile and Family Court Journal* 24.

Curfew enforcement programmes have also been implemented in the United States. These programmes involve the participation of people like the law enforcement community, the juvenile, family court judges, representatives from the social services and the education, recreation, religious and medical communities. It has been demonstrated that juvenile delinquency and victimization can be reduced when communities work together to implement a comprehensive curfew programme.⁷⁶ Public curfews were enacted in response to increasing juvenile delinquency, reduced parental supervision and other social trends. Comprehensive community-based curfew programmes provide community and recreation centres. The atmosphere is suited to investigation, processing, counselling and planning follow-up services. Curfew is regarded as an effective means to combat late evening crime and to protect youth from becoming victims of crime. Curfew programmes have been implemented successfully in Dallas, Chicago, New Orleans, Denver and several other states. According to Bilchik, communities that develop and implement curfew awareness in conjunction with programmes and services that assist youth and families to solve individual and family problems have an opportunity to enhance positive youth development, prevent delinquency and reduce victimisation of children.⁷⁷

Although curfew programmes are innovative, they will be difficult to implement in South Africa. We require our police to urgently combat serious crime that is presently pervading our society. Therefore, we will not have sufficient police to implement curfews. Curfew enforcement programmes also require community involvement. Community policing is currently being implemented in some of our communities. However, there is room for improvement. We also require additional funds to implement curfew programmes. Curfew programmes should therefore be considered as a future option when we have sufficient police, expertise and resources.

⁷⁶ Bilchik S "Curfew: an answer to juvenile delinquency and victimization?" 1996 *OJJDP Juvenile Justice Bulletin* 1.

⁷⁷ *Ibid* at 18.

A recent trend adopted in the United States is boot camps for juvenile offenders. These camps have a strong military structure, drill and discipline and provide a short period of incarceration in a quasi-military environment, followed by a period of supervision in the community. They provide juveniles with an opportunity to pursue rehabilitative goals in an environment that does not coddle them. The OJJDP describes the boot camp target population as "adjudicated, non-violent juvenile offenders who are under 18 years of age".⁷⁸ Youths could be excluded on the basis of their criminal record, histories of mental illness or if they were considered escape risks. Boot camps last for 90 days, provide intensive training and the programmes return the participants to a community setting with intensive supervision and aftercare. The focus is also on juvenile accountability. Demonstration programmes were held in Ohio, Mobile and Colorado with a view to alleviating overcrowding while still providing innovative services. Features of the programme included exposing youths to military-like routine, drills and discipline, rigorous physical conditioning, rehabilitative components such as education, counselling, work and life-coping skills, drug and alcohol abuse treatment and family involvement. Boot camps depend on staff supervision rather than fences for security. "Challenge" or "adventure" programmes provide a series of stressful, physically demanding tasks that require group co-operation and problem solving. All programmes emphasise basic skills and remedial education in reading, writing and mathematics. Programmes also provide a "life skills" curriculum, family involvement and community service (park, school and beach clean ups, landscaping work, etc). Sanctions imposed comprise summary punishment or sanctions on the spot. The programme terminates as a result of escape or assault on staff. Aftercare programmes focus on preparedness and accountability and provide supervision and support required to successfully reintegrate them into the community.

⁷⁸ Bourque BB *et al* "Boot camps for juvenile offenders: an implementation evaluation of three demonstration programmes" 1996 *NIJ Research Report* 17.

The rationale behind the demonstration programmes was to provide intensive experiences during boot camp that would produce changes in the participants' knowledge and skills, attitudes, values and behaviour. These changes would increase self-sufficiency in the community and reduce crime and delinquency. Indications were that youth improved their educational performance, physical fitness and behaviour during boot camp. The experiences of the three demonstration programmes indicate that boot camps can be implemented in the juvenile justice system.⁷⁹ The implementation of boot camps for juvenile offenders in South Africa would be a good alternative. It is ideal for non-violent and repeat offenders. The emphasis on discipline, military-like routine, vigorous physical exercise, vocational training and treatment is conducive to the development and transformation of rebellious youth. Not only can youth improve their knowledge, skills, attitudes, values and behaviour, but they can also learn to become self-sufficient. This experience will help to make juveniles more responsible and accountable, and help their successful reintegration into society. Such camps can also introduce juveniles to a satisfying future career in the army.

Another new strategy is being employed in major US cities to reduce crime. This new strategy is called "zero tolerance" policing and works on the assumption that small crimes lead to big crimes.⁸⁰ The police are cracking down on minor offenders. This has led to declining juvenile arrest rates. There is growing awareness of the problems arising from children being unsupervised from the time they get home from school until their parents return from work. The authorities have responded to this by increasing the number of after-school programmes, members of the clergy have gone into the streets to arrange basketball games, companies are offering summer jobs and scholarships and universities are sending tutors and mentors to high schools.⁸¹ Some cities are trying night curfews to

⁷⁹ *Ibid* at 102.

⁸⁰ *Cape Times* "US cities tackle petty offenders and bring the bigger crimes down" 30 August 1996.

⁸¹ *Ibid*.

keep young gangs off the street after dark. Zero tolerance policing has made it difficult for teenagers to carry guns and allows the police to set the limits traditionally set by parents. The implementation of zero tolerance policing in South Africa would also help to crack down on minor juvenile offenders. After-school programmes (educational and recreational) should also be introduced to cater for unsupervised youth. These programmes can provide youth with an alternative to being on the street. Sporting and business personalities should visit schools and provide youth with positive role models. This approach will lead to declining juvenile arrest rates.

A comprehensive plan has been formulated in the United States to address the increase in violent juvenile crime. The plan is to provide early and effective intervention to prevent juvenile delinquency, target at risk children and families, and also to consider children who are in need of care. Early intervention is necessary to ensure the healthy development of children. It is regarded as critical that parents should also be taught to nurture their children effectively through parent training classes and home visitation programmes; keep students in school with the aid of truancy and dropout prevention and intervention programmes; youth should be provided with a positive alternative to being out on the street by providing after-school activities and conflict resolution programmes; youth should also be provided with positive role models through mentoring programmes.⁸² The community must also meet the treatment needs of the child and the family. There must also be a range of sanctions to meet the needs of each juvenile in the juvenile justice system. Innovative early intervention programmes, such as neighbourhood resource teams, informal probation, peer mediation, community service, victim awareness programmes, restitution, day treatment, alternative education and outpatient alcohol and drug abuse treatment, have been successfully implemented for first-time non-violent offenders.⁸³ Appropriate

⁸² Bilchik S "Final comprehensive programme plan for fiscal year 1995" 1995 *Office of Juvenile Justice and Delinquency Prevention* 2.

⁸³ *Ibid* at 3.

sanctions, like drug testing, weekend detention, intensive supervision for probationers, inpatient drug and alcohol abuse treatment, electronic monitoring, community-based residential programmes and boot camps, have been implemented for more serious offenders and offenders who have failed to benefit from early intervention.⁸⁴ Secure facilities are needed for serious, violent and chronic offenders who require a structured environment or who pose a threat to community safety. Early intervention programmes, such as peer mediation, community service, alternative education, restitution, alcohol and drug abuse treatment, should be introduced in our communities for non-violent offenders. The government should provide funds for such programmes. The private sector can also make contributions to the development of such programmes. Schools, community centres and youth centres can be used to implement such programmes. Such programmes should be implemented in urban and rural areas and be accessible to all youth.

Thus the American approach illustrates that the juvenile justice system is seen as an instrument of protection for young offenders. Early intervention is regarded as the key to steering young people away from criminal activity. The true solution to violent juvenile crime is said to lie in the communities, the lifestyles and the moral choices of the families and the economy. What is advocated is a change of heart towards youth; a change of heart that places the emphasis on providing for the needs of children in conflict with the law.

6.2 Great Britain

Through the ages different punishments were imposed on children. In the Middle Ages child beggars were whipped. During the 17th and 18th centuries, severe punishments such as branding and whipping, were imposed on children. The focus in the early part of the 19th century was to punish and deter, not reform the

⁸⁴ *Ibid.*

offender. The Victorian era was characterised by a paternalistic attitude to children. The turn of the century saw separate courts being established for young offenders with the focus on rehabilitation.

The juvenile courts in the United Kingdom followed a welfare-oriented ethos. There was greater use of community-based sentences and a reduction in the use of custody according to the severity of the crime. It has recently been reported that tough new proposals are to be introduced by the British Government to prevent juvenile crime.⁸⁵ This ensures that the sins of the children will be visited upon their parents. The new proposals empower the courts to impose parental control orders on parents who are deemed to have failed in their child-rearing duties and whose offspring get into trouble with the law. In terms of these proposals, parents would have to make some reparation for the harm caused by the child's criminal behaviour or they could be required to ensure that the child makes good. These orders apply in cases involving children under the age of 10 who display evidence or strong indications of behaviour that would be criminal if the child was older than 10 years. This under 10 age reference overturns an older rule that states that children younger than 10 cannot be held criminally responsible. Local organisations, called child crime teams, will be established to provide programmes and services to families in difficulty, identify children at risk and refer these children and their parents to suitable schemes that will reduce the risk of juvenile delinquency. These new proposals also stipulate that parents might be ordered by courts to attend suitable therapeutic programmes or to ensure that the child is at home during certain hours or is attending school.⁸⁶ These orders could be imposed for about three years or until the child attains the age of 17. The British Government's proposal to make parents accountable and responsible for their children's actions is commendable. Parents should supervise their children and ensure that they don't get into trouble with the law. Parental control orders will be necessary to ensure that parents supervise their children closely.

⁸⁵ *Cape Argus* "Spare child, blame parent" 6 March 1997.

⁸⁶ *Ibid.*

In the United States, parents also bear responsibility for their children who break the law, particularly in the areas of restitution and counselling. Thus there is a new trend to visit the sins of children upon their parents.

Another new option being tried in Britain for the first time is for victims to "sentence" their offenders. The offenders confront their victims, who can then decide on the form of compensation. This approach was pioneered in Australia and is known as restorative cautioning. It was launched against teenage car thieves stealing vehicles for kicks in Windsor, Maidenhead and Ascot.⁸⁷ Restorative cautioning gives the offender the opportunity to put things right. It is regarded as an alternative to caution for first-time offenders, and could be used in more serious cases as an alternative to imprisonment. Offenders are required to sign an agreement detailing their sentence, which could range from a simple verbal apology to undertaking repairs or financial compensation. This approach was initially applied in Wagga Wagga in New South Wales. It was a successful pilot project and led to a reduction in re-offending rates. It also experienced a 40% reduction in reported offences and the number of juveniles appearing in court was reduced. Restorative cautioning could also be used in South Africa. It would give offenders the opportunity to meet with their victims and to put things right. It would also give the victims a say in the "sentence". This would also reduce the number of juveniles appearing in court, which is a cost-effective exercise. It is advocated that restorative cautioning be applied for non-violent first-time offenders.

6.3 The Netherlands

Alternative sanctions were introduced in the Netherlands in the 1980's as a result of increasing crime figures and increasing pressure on the prison system and the need for a wider and more pedagogically-oriented range of penal sanctions for

⁸⁷ *Cape Times* "Victims 'sentence' offenders" 11 October 1996.

juveniles.⁸⁸ Alternative sanctions for juveniles were imposed to replace custodial sentences and existing traditional sanctions, including fines and suspended sentences. The alternative sanctions comprised work projects (community service) and training projects, such as skills training programmes and educational activities. The objective of the introduction of alternative sanctions was to promote a more educational and a pedagogically-oriented juvenile justice system.⁸⁹ This would lead to changes in behaviour resulting in no re-offending. Intensive intermediate treatment was introduced because of the need for more intensive and lengthy alternatives. It was imposed instead of detention to cover serious crimes such as armed robbery. It comprised three months day programmes. Halt ("the alternative") programmes were considered as a disposition for offences of vandalism and shoplifting. Alternative sanctions have proved to be popular for juveniles in the Netherlands. They have produced positive results and indicated an improvement on long-term custody. Alternative sanctions, such as training projects and work projects, could be applied in South Africa. The focus on community service, skills programmes and educational activities can be beneficial to juvenile offenders. Such sanctions are appropriate for non-violent offenders. They can also be utilised as an alternative to monetary payment of fines. Violent juvenile offenders should be housed in secure-care facilities or juvenile prisons, where skills training programmes and educational programmes can also be implemented to make their lives useful.

7 CONCLUSION

It is undesirable that all juvenile offenders be treated as criminals. Many of them can be reclaimed and be made useful citizens if they are properly treated and cared

⁸⁸ Van der Laan PH "Dutch penal law and policy — alternative sanctions for juveniles in the Netherlands" 1993 *Dutch Penal Law and Policy* 2.

⁸⁹ *Ibid.*

for, and not permitted to mingle with mature and perhaps hardened criminals.⁹⁰ In formulating a reform agenda for the future, we should consider the above sentiments. We must prevent as many victims of tomorrow as we can because our youth represent our future leaders. We must inculcate in them a basic understanding of and respect for the law and the rights of our fellow human beings. We must ensure that the troubled child develops into a promising, confident and law-abiding adult.

It is apparent that crime is becoming more and more a young man's profession. The percentage of young people engaging in criminal activities is alarming. Shocking statistics in juvenile crime have been released in the Western Cape and Gauteng.⁹¹ Police have expressed concern about the alarming figures and the large numbers of juveniles absconding from insecure places of safety. Police find it difficult to address juvenile crime because many juvenile offenders were hardened criminals and escaped from places of safety. Police have also expressed concern that adults were using juveniles to perpetrate crimes. The police stress that we need to condemn crime from a very young age and to implement educational programmes in schools.⁹²

The government has made some progress in its fight against juvenile crime. The government is planning a national network of "secure-care facilities" for convicted and awaiting trial youngsters between the ages of 14 and 18. The pilot projects in KwaZulu Natal (Ekuseni Youth Development Centre) and Soweto (Walter Sisulu Centre) represent a radical departure from the way young offenders were treated in the past. The juvenile offenders are provided with life skills, education, training schools, workshops and modern sporting facilities in an environment that is

⁹⁰ Erwin TM "US v RLC: The Supreme Court applies a band-aid where major surgery is needed" 1993 *Criminal Law Bulletin* 320.

⁹¹ *Cape Times* "Juvenile violence increases" 1 May 1997; *The Saturday Star* "Gauteng has alarmingly high juvenile crime rate" 10 July 1996.

⁹² *The Saturday Star* "Gauteng has alarmingly high juvenile crime rate" 10 July 1996.

conducive to their transformation and successful reintegration into society. Another noteworthy programme is the President's Award Youth Empowerment Programme which is used in prisons to assist young prisoners (see *supra*). This programme and the Twilight Project aim at giving both convicted young offenders and street children, respectively, the opportunity to become useful citizens. This new vision of secure youth singles out children and youth as treasured assets who "can be reclaimed and made useful citizens if they are properly treated and cared for".⁹³

A new juvenile justice system should be implemented which aims at deterring youngsters from embarking on a life of crime. The recommendations and reports of the various organisations, such as NICRO, the South African Law Commission, the Nedcor Report on Crime, Violence and Investment, should be considered. The draft proposals of the Western Cape Community Centre should also be considered. Implementing these recommendations will go a long way towards addressing juvenile crime in South Africa. I recommend the following steps that the criminal justice system should take to reduce juvenile crime:

- (1) Violent and serious juvenile offenders should be detained in separate secure-care institutions or juvenile prisons. They should be dealt with strictly and receive just punishments for their crimes. However, long periods of incarceration should be discouraged. Skills training programmes, educational programmes, counselling programmes and sporting activities should be implemented in these institutions. The focus should be on rehabilitation and successful re-integration into society.
- (2) There are many alternative sentencing options which can be utilised for non-violent first-time offenders and repeat offenders. The range of options includes detention in secure-care facilities (for repeat offenders who should be housed separately from violent juvenile offenders), community service,

⁹³ See footnote 90 *supra*.

mediation, restitution, diversion programmes, boot camps, zero tolerance policing and restorative cautioning for minor offenders. The aim should be to make youth more accountable and responsible and help their successful re-integration into society.

- (3) Qualified personnel, such as educators, counsellors, social workers and psychologists, should be employed in the new and existing institutions. The care and supervision of the young offenders should receive the highest priority by staff.
- (4) A broader social agenda should be implemented which would include education of children, provide children with adequate housing and health care, reduce youth employment, respond to child abuse and neglect, provide adequate child care, strengthen families, prevent drug and alcohol abuse and eradicate poverty.

The government should also design programmes to deal with situations that lead to crime and delinquency. These programmes should be available in urban and rural areas. The government and the business sector can pool their resources to help, educate and treat poor and neglected children. However, the community, family, educationists and welfare organisations also have a pivotal role to play. There is an urgent need to inculcate proper values in the family. The family should also be held accountable for their children's actions (see the British proposals in this respect). Religious and youth leaders can also play a positive role in raising children by implementing community-based programmes and recreational activities. After-school programmes focusing on education and recreational activities can also be introduced. Such programmes will provide the youth with an alternative to being on the street. Thus a combined and concerted effort is needed to address juvenile crime. However, we must not lose sight of the constitutional rights of children (see s28 of the Constitution of Republic of South Africa, 1996), which must be complied with at all times. Programmes should be implemented which are

"humane, just and principled".⁹⁴ We must ensure the development of a coherent and effective juvenile justice system so that "for the vast majority of juvenile offenders, their first brush with the law is their last".⁹⁵

8 BIBLIOGRAPHY

BOOKS

Cachalia A *et al* *Fundamental Rights in the New Constitution* Cape Town:Juta 1994.

Geldenhuis T and Joubert JJ *Criminal procedure handbook* Cape Town:Juta 1996.

MONOGRAPHS

Bilchik S "Final comprehensive programme plan for fiscal year 1995" (1995) *Office of Juvenile Justice and Delinquency Prevention*.

Bilchik S "Curfew: an answer to juvenile delinquency and victimization?" (1996) *OJJDP Juvenile Justice Bulletin*.

Bourque BB *et al* "Boot camps for juvenile offenders: an implementation evaluation of three demonstration programmes" (1996) *NIJ Research Report*.

JOURNAL ARTICLES

Charles MT "Electronic monitoring for juveniles" (1989) *Journal of Crime and Justice* 147.

De Angelo AJ "Diversion programmes in the juvenile justice system: an alternative method of treatment for juvenile offenders" (1988) *Juvenile and Family Court Journal* 21.

Erwin TM "*US v R.L.C*: The Supreme Court applies a band-aid where major surgery is needed" (1993) *Criminal Law Bulletin* 317.

⁹⁴ Wilkie M "Crime (Serious and Repeat Offenders) Sentencing Act 1992: a human rights perspective" 1992 *University of Western Australia Law Review* 196.

⁹⁵ See footnote 90 *supra* at 353.

Hinshaw SA "Juvenile diversion: an alternative to juvenile court" (1993) *Journal of Dispute Resolution* 305.

McConnell M "Mediation — an alternative approach for the New Jersey juvenile justice system?" (1996) *Seton Hall Legislative Journal* 433.

Pinnock D *et al* "New juvenile justice legislation for South Africa: giving children a chance" (1994) *SACJ* 338.

Reno TL "The rebuttable presumption for serious juvenile offenders: an alternative to determinate sentencing in Texas" (1995) *Texas Tech Law Review* 1421.

Sarkin J "Problems and challenges facing South Africa's Constitutional Court: an evaluation of its decisions on capital and corporal punishment" (1996) *SALJ* 71.

Scheffer JP "Serious and habitual juvenile offender statutes: reconciling punishment and rehabilitation within the juvenile justice system" (1995) *Vanderbilt Law Review* 479.

Silberman S "Community Service as an alternative sentence for juveniles" (1986) *New England Journal on Criminal and Civil Confinement* 123.

Sloth-Nielsen J "Juvenile Justice Review 1994-1995" (1995) *SACJ* 331.

Sloth-Nielsen J "Pre-trial detention of children revisited: amending s29 of the Correctional Services Act" (1996) *SACJ* 60.

Van der Laan PH "Alternative sanctions for juveniles in the Netherlands" (1993) *Dutch Penal Law and Policy* 1.

Wilkie M "Crime (Serious and Repeat Offenders) Sentencing Act 1992: a human rights perspective" (1992) *University of Western Australia Law Review* 187.

NEWSPAPER ARTICLES

Cape Argus "Spare the child, blame the parent" 6 March 1997.

Cape Times "US cities tackle petty offenders and bring bigger crimes down" 30 August 1996.

Cape Times "President's programme is freeing young prisoners from their pasts" 10 October 1996.

Cape Times "Victims 'sentence' offenders" 11 October 1996.

Cape Times "Juvenile violence increases" 1 May 1997.

Cape Times "Compensation by offenders proposed" 20 May 1997.

Eastern Province Herald "Shock for Mhlaba and Faku" 12 January 1996: 2.

Sunday Times "Still no justice for juveniles" 11 May 1997.

The Saturday Star "Gauteng has alarmingly high juvenile crime rate" 10 July 1996.

The Saturday Star "Changes in secure care for youth when new centre opens" 28 January 1997.

The Saturday Star "Kids who kill" 21 June 1997:11.

The Star "Self-defeating violence of wasted youth" 31 May 1996:13.

The Star "Child prisoners putting strain on SA's correctional facilities" 31 May 1996:7.

The Star "Nearly 15 000 Gauteng children arrested in 1995" 14 July 1996.

The Star "Home never like this, says reformatory boy" 29 April 1997:6.

LEGISLATION

Correctional Services Act 8 of 1959.

Criminal Procedure Act 51 of 1977.

Constitution of Republic of South Africa Act 200 of 1993.

Correctional Services Amendment Act 17 of 1994.

Correctional Services Amendment Act 14 of 1996.

Constitution of Republic of South Africa Act 108 of 1996.

COMMISSION REPORTS

South Africa Law Commission: Issue Paper 9 Juvenile Justice (March, 1997).

CASE LAW

S v V 1989 (1) SA 532 (A).

S v A Juvenile 1990 (4) SA 151 (ZSC).

S v Jacobs 1994 (1) SACR 402 (C).

S v Williams and Others 1995 (3) SA 632 (CC).