

CHAPTER 1

INTRODUCTION AND METHODOLOGICAL FOUNDATION

1.1 Introduction

In this research a forensic criminological perspective on the adjudication of children in South Africa will be discussed.

There were recently various developments on international level regarding the rights of children in conflict with the law. In South Africa there were also huge amendments with regard to the rights of children in general and specifically with regard to children in the criminal justice system.

With this research the relevant International Instruments, focusing on the rights of children in conflict with the law will be discussed, the current position of children in the criminal justice system in South Africa will be described and the proposals for changes in the Child Justice Bill, 2002 (as it was introduced into Parliament in August 2002) will be highlighted. The importance for a forensic criminologist (a criminologist who has had special training to appear as an expert witness in court) to be familiar with the provisions of the Criminal Procedure Act, 1977 and Court procedures will be highlighted throughout the dissertation (Van der Hoven 2000:v).

In this research project the relevant provisions in the International Instruments, current legislation in South Africa and the proposed Child Justice Bill, 2002 have been quoted. The reason for this is to enable the reader to know exactly what the contents of the relevant sections are without the need to look it up in the relevant Act, Bill or International Instrument. The aim is also to enable the reader to compare the provisions and obligations of State Parties to the International Instruments with the current legislation in South Africa and the proposed provisions in the Child Justice Bill, 2002.

Furthermore, a forensic criminologist must be aware of the general and exact provisions in the Criminal Procedure Act, 1977 and the Court proceedings being

followed in the different Courts. Although a forensic criminologist's active involvement in the criminal proceedings only starts after conviction of the accused, he/she has to take *inter alia* the criminal proceedings into account when compiling a pre-sentence report. Since the forensic criminologist is usually appointed after conviction, it is advisable that a transcribed copy of the Court record and the charge sheet be obtained. This will enable the forensic criminologist to see what transpired during the hearing and what findings the Court made. These factors should be mentioned in the report and taken into account when making a recommendation on an appropriate sentence. It might happen for example that an accused person does not inform the forensic criminologist of all the facts in the matter or stick to his/her original account of the crime whilst the Court has disregarded this account or made a finding with regard to the reliability of the accused. The forensic criminologist will have a much clearer picture of the case if he/she is familiar with the procedures in Court and the relevant provisions of the Criminal Procedure Act, 1977. He/she will also be at ease in Court whilst presenting his/her report and will know what to expect while under cross-examination by either the defence attorney or prosecutor. Therefore the legal provisions have been quoted verbatim and were not 'translated' into non-legal language.

1.2 Methodological Foundation

1.2.1 Purpose of the Research Project

The purpose of this study is to describe how child offenders are being treated in the criminal justice system, and whether the present sentence options available to the Court for juveniles are sufficient. The attitude of the presiding magistrates of Gauteng Province regarding the Child Justice Bill, 2002 were obtained. The study also attempted to identify any shortcomings in the proposed Child Justice Bill, 2002 and to make recommendations to eliminate these shortcomings, if any.

Throughout the research project the international perspective regarding a specific topic was provided, the current position in the South African law was highlighted and the proposed provisions in the Child Justice Bill, 2002 were furnished. These three

positions will be used to find and highlight the role that the forensic criminologist can and should play in the juvenile justice system in the future and the importance of such involvement will be furnished, where applicable.

1.2.2 Rationale

During a workshop hosted by the Human Sciences Research Council in 1994 on preventing juvenile offending in South Africa, Skelton (1994:103–108) on behalf of Lawyers for Human Rights gave a presentation on the development of a comprehensive juvenile justice system in South Africa. Skelton emphasized the need for creating a new juvenile justice system because thousands of children have suffered and are still suffering at the hands of our criminal justice system. Skelton (1994:104) proposed that a Juvenile Justice Act or a separate chapter in the Children's Act be developed for this purpose. According to her such an Act or chapter should attempt to achieve:

- It should provide mechanisms to keep children out of prison and other institutions as far as possible, both in the pre-trial phase and in sentencing.
- It should differentiate between first offenders and children showing a pattern of recidivism, and between children charged with petty offences and those charged with serious crimes.
- It should offer opportunities for diverting children from the criminal justice system.
- It should emphasize the notion of restorative justice, and encourage young offenders to take responsibility for their actions.
- It should provide for speedy and fair trial procedures, and legal representation for those children going to trial.
- It should provide flexible and creative sentencing options to keep children in their communities.

- It should provide good educational facilities for those children who do have to spend time in prison.
- Finally, it should encourage the mobilization of families and communities towards finding solutions and working for a reduction in juvenile offending.

Skelton also referred to problems being experienced after the arrest of a juvenile. These included that the guardians are not contacted, no assessment of the child is made and few attempts are made to divert the child from the criminal justice system. She proposed a limited length of time a child can be held in custody with certain requirements, for example a signed authorization from a magistrate to hold the youth in custody.

The issue of increasing the age of criminal capacity is also discussed and with reference to certain International systems the proposal was made to increase the age of criminal capacity to 14 years. According to Skelton provision should also be made for youths committing serious crimes and these crimes should be listed.

Skelton discussed the issue of legal representation to ensure that children are afforded a fair trial and this would be achieved by affording them with free legal representation. The need to train magistrates and prosecutors specializing in juvenile Courts was also emphasized.

The question of sentencing was also investigated. Rules relating to prison conditions, particularly providing for education and job skills training during incarceration are important.

Skelton is of the opinion that the recidivism among juvenile offenders in South Africa is due, at least in part, to the corrupting and damaging effect of the system itself and she indicated that the creation of a comprehensive juvenile system will in itself contribute to the prevention of juvenile offending.

The Child Justice Bill, 2002, which is in the process of going through Parliament, has been developed to cater for juvenile offenders. In the pre-ample of the Bill the aim of

the Bill is defined as follows: “To establish a criminal justice process for children accused of committing offences which aims to protect the rights of children entrenched in the Constitution and provided for in International Instruments ...”

The Child Justice Bill, 2002 consists of 13 chapters, and important issues like age, criminal capacity and age determination, methods of securing attends of a child at the preliminary inquiry, detention of children and release from detention, assessment, diversion, preliminary inquiry, child justice Court, sentencing, legal presentation, review procedures and monitoring of child justice, amongst others, are being provided for. All these elements need to be analysed from the perspective of the forensic criminologist, and the opinions of presiding officers who have to apply these provisions, are of equal criminological importance and also underscores the rationale for the research.

The child justice system provided for in the Child Justice Bill, 2002 aims to ensure that children accused of less serious offences will be afforded the opportunity to pay their debt to society without obtaining a criminal record through diversion. The Child Justice Bill, 2002 envisages a cohesive child justice system, which strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions by means of various diversion options and programmes. These options and programmes embody restorative justice principles, which focus on reconciliation and restitution rather than on retribution and punishment. The Child Justice Bill, 2002 further aims to encourage a degree of specialization in child justice practice. With this research project the role of the forensic criminologist in the juvenile justice process will be emphasized and explained and how their expert services can contribute to the benefit of youth offenders, will be indicated. To describe and analyse these provisions, is another reason for the research.

The Child Justice Bill, 2002 also provides various sentence options available to Court, depending on the offence committed. There are various sentences with compulsory residential requirements, including imprisonment.

During the above-mentioned workshop hosted by the HSRC, Ndlovu (1994:97–101) from the Department of Education and Training did a representation on the role of

residential facilities in juvenile corrections. Ndlovu gave an overview of how juvenile offenders are cared for in these institutions. The special procedures followed by industry and reform schools were discussed as well as the phases and components of residential care and compensatory education programmes in these schools.

The rationale for the research is also linked to the need to train Magistrates and prosecutors to deal with juveniles and the fact that they should be sensitised to the background of most of the children was pointed out during the said workshop in the presentation on How Courts should work by Said and Eksteen (1994:79–82) from the University of the Western Cape.

According to the South African Law Commission (2000:x) the draft Bill encapsulated a new system for children accused of crimes by providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing. With this research project the aim is to promote the fact that criminologists, especially the forensic criminologist, have an active and important role to play throughout the whole process of juvenile justice.

In a recent article “Children who molest Children” (2002:40), the problem of the growing number of child criminals who are too young to go to Court and to dangerous to go to foster homes is addressed. The various programmes being developed by Child Line were also discussed, as imprisonment is not only inappropriate but may aggravate the problem. These contributions underscore the rationale for the research.

1.2.3 Hypothesis

A hypothesis is a statement that asserts a relationship between two concepts (Dixon, Bouma & Atkinson 1987:39). Because a hypothesis indicates a relationship between two variables, it is usually expressed in the format that X causes Y or X is related to Y. Because academics are sceptics, hypotheses are also stated in the negative first – suggesting there is no relationship between the concepts, followed by the positive statement about the same variables. It is also important to note that the level of

significance between the two variables should also be stated. Therefore, the Ho (nil hypothesis) will be stated first, followed by the Ha (alternative hypothesis). For the purposes of this research the 0,05 level of statistical significance have been accepted. This means that one in every 20 findings could be wrong (Bloom 1986:178).

For the purposes of this research five hypotheses were stated, namely:

Hypothesis 1

Ho Male and female respondents will not hold different opinions about diversion.

Ha Male and female respondents will hold different opinions about diversion.

Hypothesis 2

Ho Presiding officers with longer years of service do not deal mainly with criminal cases.

Ha Presiding officers with longer years of service mainly deal with criminal cases.

Hypothesis 3

Ho Those presiding officers who deal mainly with criminal cases would not have looked at the proposed Child Justice Bill, 2002.

Ha Those presiding officers who deal mainly with criminal cases would have looked at the proposed Child Justice Bill, 2002.

Hypothesis 4

Ho Presiding officers who have looked at the Child Justice Bill, 2002 will not hold different opinions regarding the best method to ensure that juvenile offenders will attend the court hearing.

Ha Presiding officers who have looked at the Child Justice Bill, 2002 will hold different opinions regarding the best method to ensure that juvenile offenders will attend the court hearing.

Hypothesis 5

Ho Presiding officers who looked at Child Justice Bill, 2002 will not agree that pre-sentence reports are needed in cases where juvenile offenders have to be sentenced to imprisonment.

Ha Magistrates who looked at the Child Justice Bill, 2002 will agree that pre-sentence reports are needed in cases where juvenile offenders have to be sentenced to imprisonment.

1.2.4 Delimitation

Regarding literature, the focus was exclusively on the Criminal Procedure Act, 1977 (Act 51 of 1977); Child Care Act, 1983 (Act 74 of 1983); Correctional Services Act, 1959 (Act 8 of 1959); Child Justice Bill, 2002 (Bill 49 of 2002); International Legal Instruments; Constitution of South Africa, 1996 (Act 108 of 1996); Probation Services Act, 1991 (Act 116 of 1991).

All the above and other relevant and applicable research articles and books available on the research topic are listed in the bibliography.

Regarding the geographical delimitation of the empirical research, all presiding Magistrates (307) in Gauteng Province who were employed full time at the time of the research, were selected. No sample was taken. A total of 97 (31,59 percent)

responded. Only those Magistrates, who presided in Courts in Gauteng Province during February 2003 to March 2003, were included as the population. A little more than one half of the respondents, namely 50 (51,5 percent) preferred Afrikaans, 35 (36,1 percent) preferred English as language. There were 5 (5,1 percent) preferring to speak isiXhosa, 3 (3,1 percent) preferred Setswana, 2 (2,1 percent) preferred Sepedi as language. Only 1 (1,0 percent) each preferred isiXhosa and isiZulu. Regarding the experience of these participating presiding Magistrates, 23 (23,7 percent) indicated that they had 11-15 years experience on the bench, 14 (14,4 percent) had 6-10 years experience and 9 (9,3 percent) each had 16-20 years and 21 years and more, alternatively. Interestingly, it was found that the magistrates with more experience were less involved with criminal cases (Chi-square 21,827; Df 8; Prob. 0,005). The reason for this could be that magistrates usually start working in the criminal courts and after a few years decide to gain experience in the civil court. The majority of the respondents 57 (58,8 percent) deal with 1-10 juvenile offenders on a weekly basis.

1.2.5 The Respondents

The biographical particulars of the respondents, who willingly participate, were as follows:

The male respondents were 52 (53,6 percent) and the female respondents were 45 (46,4 percent). The majority of them were between the ages of 31 to 50 years, namely 80 (82,5 percent). Only 11 (11,3 percent) were above 51 years of age and only 4 (4,1%) were 26-30 years of age.

1.2.6 Research Method

The first stage of the research consisted of literature research. The literature research was used to systematize the research report into chapters and to compile the questionnaire. The questionnaire consisted of 21 questions. The first four were of biographical nature. The rest followed the cues of the literature relating to criminal capacity and age, detention of children, legal representation, diversion, sentencing and the pre-sentence report.

Permission to conduct the study has been obtained from the Secretariat of the Magistrates Commission.

The empirical data was collected as follows:

The questionnaires were posted to the relevant Magistrate's offices on 12 February 2003. They responded well and by 13 March 2003 60 questionnaires have been received. The outstanding questionnaires were followed up and a total of 97 were collected on 8 April 2003.

The data was analysed by means of SPSS 11.5.

1.2.7 Compilation of the Report

To secure a logical train of thought, this research report is compiled as follows: Chapter 2 describes and analyses the legal instruments, both internationally and locally, available to protect the rights of children. Chapter 3 highlights the developmental stages of children, criminal capacity and age follows this. In Chapter 4 the focus is on detention of children and the limitations are also pointed out. Chapter 5 deals with the issue of legal representation and parental assistance to juvenile offenders. In the following Chapter 6 diversion is discussed, the different diversion options available at the moment are pointed out and proposed provisions of the Child Justice Bill, 2002 are furnished. Chapter 7 provides an overview of the available sentence options in the current system and furnished the proposed sentence options in the Child Justice Bill, 2002. The pre-sentence report is the focus point of Chapter 8. In Chapter 9 special justice courts and the confidentiality of children's court hearings are discussed and Chapter 10 contains the findings, conclusions and recommendations of this report.

1.3 Summary

In this chapter the reader was introduced to the research topic and the methodological foundation. Therefore attention was given to the goal, rationale, and delimitation of the research.

To set the scene for the rest of the research report, Chapter 2 focuses on the various legal instruments the forensic criminologist should be informed about, both internationally and locally, available to protect the rights of children.

CHAPTER 2

PROTECTING THE RIGHTS OF CHILDREN

2.1 Introduction

Children's rights have not always been adequately protected in the past, both on international level and in our country. In recent years various International Instruments have been implemented to eliminate this problem. Even in South Africa there have been numerous amendments to legislation to address this problem, the most important being the interim Constitution of the Republic of South Africa, 1994. These provisions were also taken up in the South African Constitution, 1996.

In this chapter the various articles, rules and sections in these International Instruments, the South African Constitution, 1996 and the aim of the Child Justice Bill, 2002 will be highlighted. Because of the importance of these instruments for the forensic criminologist, the legal language will be consistently adhered to.

2.2 United Nations Convention on the Rights of the Child

The most recently developed International Instrument protecting the rights of children is the United Nations Convention on the Rights of the Child (1989). This is a treaty and according to international law it is binding upon all parties to it and must be performed by them in good faith.

The rights of children in the criminal justice systems of State Parties are entrenched in Articles 37 and 40 specifically.

Article 37 provides as follows:

“State Parties shall ensure that:

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

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

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

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge to legality of the deprivation of his or her liberty before a Court or other competent, independent and impartial authority, and to a prompt decision of any such action.”

Article 40 provides as follows:

“1. State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promotion and child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of International Instruments, State Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings;

3. State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of disposition, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

South Africa ratified the United Nations Convention on the Rights of the Child (1989) on 16 June 1995.

According to Van Bueren (1995:45) underpinning the United Nations Convention of the Rights of the Child, there are two new principles of interpretation in international law: the best interests of the child, and the evolving capacities of the child. The Convention does not refer to their best rights but to their best interests, interests are arguably a broader concept and a precondition of rights.

The concept of the evolving capacities of the child, which reflects children’s different rates of development, is incorporated in article 5 of the Convention.

2.3 African Charter

Apart from the United Nations Convention on the Rights of the Child, there are other International Instruments relevant to juvenile justice like the African Charter on the

Rights and Welfare of the Child (1990). Article 17 deals specifically with the rights of children in the criminal justice and provides as follows:

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

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of its liberty is subjected to torture, inhuman, degrading treatment or punishment.

(b) ensure that children are separated from adults in their place of detention or imprisonment.

(c) ensure that every child accused or infringing the penal law:

(i) shall be presumed innocent until proven guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty be entitled to an appeal by a higher tribunal;

(v) shall prohibit the press and the public from trial;

(vi) shall have the assistance of an interpreter if the child cannot understand the language used;

(vii) shall not be compelled to give testimony or confess guilt.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be its reformation, reintegration into its family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”

South Africa ratified the African Charter on the Rights and Welfare of the Child on 18 November 1999.

Although the African Charter does not differ significantly in content from the United Nations Convention on issues relating to juvenile justice, South Africans sometimes favour it because of its emphasis on responsibilities corresponding with rights. The United Nations Convention promote a highly individualised approach to the rights of the child, while the African Charter takes a more collective approach, blending children’s rights with respect for family and the community.

2.4 Beijing Rules

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules provide a framework within which a national juvenile justice system should operate and a model for States of a fair and humane response to juveniles who may find themselves in conflict with the law. Although the Beijing Rules are not a treaty, some of the Rules have become binding on States Parties by being incorporated into the United Nations Convention on the Rights of the Child.

2.5 The South African Constitution, 1996

The rights of children in the criminal justice system are entrenched in Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and specifically in sections 12, 28 and 35.

Section 12 provides as follows:

“Section 12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right –

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.”

Section 28 provides as follows:

“Section 28 Children

(1) Every child has the right –

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that

–

(i) are inappropriate for a person of that child’s age; or

(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years;

and

(ii) treated in a manner, and kept in conditions, that takes account of the child’s age;

(h) to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years."

Section 35 provides as follows:

"Section 35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly –

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against the person;

(d) to be brought before a Court as soon as reasonably possible, but not later than –

(i) 48 hours after the arrest; or

(ii) the end of the first Court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary Court hours or on a day which is not an ordinary Court day;

(e) at the first Court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right –

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a Court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's –

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary Court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher Court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

2.6 Changes

Two of the most significant changes with regard to children’s rights in the criminal justice system since the implementation of the interim Constitution (Act 200 of 1993) in 1994 were firstly the cessation of juvenile whipping as a sentence option to the Courts in cases where juveniles were involved and secondly the legislative prohibition of pre-trial detention of juveniles in prisons or police cells (Skelton 1996:12-22).

In the case S v Williams 1995(3)SA632(CC) the Constitutional Court declared juvenile whipping to be unconstitutional.

At midnight on 8 May 1995, the Correctional Services Amendment Act, 1994 (Act 17 of 1994) came into operation, prohibiting the detention of juveniles in prisons or police cells.

Sloth-Nielsen (1996:6) points out that South Africa has included a clause enshrining children's rights in the Constitution. According to her the children's rights provision in the Constitution is a unique aspect of the protection and entrenchment of fundamental rights in South Africa.

South Africa does not have a separate juvenile justice system at the moment. There are limited provisions providing specifically for dealing with juveniles in the criminal justice system. These provisions are spread throughout the Criminal Procedure Act, 1977 (Act 51 of 1977); the Probation Service Act, 1991 (Act 116 of 1991); the Child Care Act, 1983 (Act 74 of 1983) and the Correctional Services Act, 1959 (Act 8 of 1959).

2.7 Child Justice Bill, 49 of 2002

By ratifying the United Nations Convention on the Right of the Child, South Africa is now obliged in terms of article 40(3) thereof, to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. The Child Justice Bill, 2002, has since been drafted by the South African Law Commission to give effect to the Convention. With the Child Justice Bill, 2002 the aim is to establish a criminal justice system for children accused of committing offences, to protect the rights of children entrenched in the Constitution, and provided for in International Instruments.

In terms of section 2 of the Child Justice Bill, 2002 the objectives of the Act are to:

“(a) protect the rights of children as contemplated in section 28(1)(g) of the Constitution;

(b) promote ubuntu in child justice system through –

- (i) fostering of children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response;
and
 - (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children; and
- (c) promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system."

The South African Law Commission (2000:xii) indicates that the Child Justice Bill, 2002 is progressive because it creates new processes, which enables a dynamic involvement of professionals and families in solving the problems of children who come into conflict with the law. The aim is that a clash with the law, which is not serious or violent, will bring children into contact with people and programmes who can really help them to change their lives. The system, which has been developed, can be described as a justice-orientated system and the Commission is of the view that facing up to responsibility for crime is a stronger change agent than is the treatment of crime as a social ill.

The participating magistrates were asked whether or not they had an opportunity to look at the proposed provisions of the Child Justice Bill, 2002. This is how they have responded:

Table 1 Looked at the proposed Child Justice Bill, 2002

Option	Frequency	Percent
Yes	36	37.1
No	61	62.9
Total	97	100.0

This table clearly indicates that the majority of the participating magistrates, that is 61 (62,9 percent) did not look at the proposed provisions of the Child Justice Bill, 2002. It should also be noted that the research found statistical significant differences regarding those magistrates who looked at the proposed Child Justice Bill, 2002 and those who did not. Interestingly enough it was found that the majority of them that is 47, who mainly deal with criminal cases, did not look at the proposed Child Justice Bill, 2002 (Chi-square 6,177; Df. 2; Prob. 0,046). The reason for this could be that these presiding officers were waiting for the proposed Bill to be passed by Parliament before looking at it. In this regard respondent 044 commented as follows: “The Child Justice Bill has good ideas. The problems, like with most other Bills, are that the infrastructure is still, and will for many years, be lacking. Although the detention of juveniles are prohibited by the Constitution and detention of juveniles not authorised in section 29 of Act 8/1959, since 1998, in a police cell after appearance in court, this still occurs frequently in rural areas where the nearest place of safety or prison is hundreds of kilometres away from the court. The current system is mostly undermined due to a lack of infrastructure.”

2.8 Forensic Application

Knowledge of the contents of the above-mentioned International Instruments, the Constitution of South Africa and the proposed Child Justice Bill, 2002 with respect to child offenders are important to the forensic criminologist. He/she must be aware of the specific provisions, limitations and prohibitions regarding, for example sentence, when dealing with children in conflict with the law. The forensic criminologist must be aware of the fact that, for instance, persons under the age of 18 years shall not be sentenced to life imprisonment without the possibility of release or to capital

punishment. In South Africa, as indicated above, juvenile whipping is also prohibited. This knowledge will enable the forensic criminologist to be in a better position to make an appropriate recommendation to the Court with regard to sentence.

2.9 Conclusion

From the above it is clear that various measures have been put in place to protect the rights of children, especially with regard to the rights of child offenders. In the South African context the proposed Child Justice Bill, 2002 will even further ensure that the rights of juvenile offenders are adequately protected. The presiding magistrates who participated in the research indicated that the majority of them did not have a look at the proposed Child Justice Bill, 2002, and those who deal mainly with criminal cases against juveniles were also in the majority of those who did not look at the Child Justice Bill, 2002.

International law incorporates a number of basic principles upon which a juvenile justice system should be based. The first purpose is the encouragement of the well-being of children, and the second goal is that children should be dealt with in a manner proportionate both to their circumstances and to the offence. Both the Convention on the Rights of the Child and the Beijing Rules emphasize the well being of the child in the administration of juvenile justice (Van Bueren 1995:172).

In Chapter 3 the different developmental stages of children, criminal capacity and age will be discussed.

CHAPTER 3

CHILD DEVELOPMENT, CRIMINAL CAPACITY AND AGE

3.1 Introduction

Criminal responsibility in this chapter relates to a child's ability to distinguish between right and wrong and his/her ability to act in accordance with this insight. The problem that exists with regard to criminal capacity is that there are different ages whereupon different nations accept that a child has criminal responsibility.

In this chapter the different developmental stages will be described and reference will be made to Kohlberg's theory on the development of morality.

The general guidelines for the establishment of a minimum age for criminal capacity, as provided for in the International Instruments, will be highlighted. The current perspective in this regard in South Africa will be discussed with reference to the relevant provisions in the Criminal Procedure Act, 1977 and the common law. Case law wherein the Courts have dealt with the issue of criminal capacity involving juvenile offenders and various authors' views will be provided.

Finally the provisions in the proposed Child Justice Bill, 2002 will be furnished, highlighting the manner in which the common law will be amended once the Child Justice Bill, 2002 is implemented.

3.2 Grounding

Before a person can be said to have acted with culpability, he must have had criminal capacity – an expression often abbreviated simply to "capacity". A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill (the "insane") and very young children cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which normal

adult people have. The mental abilities which a person must have in order to have criminal capacity, as this concept is understood in criminal law, are first the ability to appreciate the wrongfulness of his conduct, and secondly the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct. If a person lacks one of these abilities, he lacks criminal capacity and cannot be held criminally liable for an unlawful act or omissions carried out by him while lacking one of these abilities.

The general concept of criminal capacity as set out above was unknown in Roman and Roman-Dutch law. Although these legal systems recognised that certain categories of people such as mentally ill and young children (*infantes*) could not be convicted of crimes, this lack of liability was not explained in terms of a general concept of capacity.

The concept of criminal capacity is likewise unknown in Anglo-American legal systems. In South Africa the concept is usually described as “capacity” or “criminal capacity”, although terms such as “criminal accountability”, “criminal responsibility”, and “imputability” have also been used. The concept of “capacity” hails from the European continent, mainly from German criminal-law theory.

Before 1970 this concept was largely unknown in South African criminal law, but it has subsequently gradually gained acceptance. One of the most important reasons for its growing recognition was undoubtedly the appearance of the influential Rumpff Report (the Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters) in 1967. This report resulted directly in the formulation of the biological-psychological criterion for the determination of the incapacity of mentally ill persons in section 78(1) of the Criminal Procedure Act, 1997 (Act 51 of 1977).

Until about 1981 it was widely assumed that incapacity, that is the inability to appreciate the wrongfulness of one’s conduct or to conduct oneself in accordance with such an appreciation, could be a defence only if the inability was the result of “biological” factors, namely mental illness (“insanity”) or immature age. Up until that time the criterion applied in practice for determining incapacity consisted of two legs,

namely first a “biological” leg (that is, either mental illness or immature age) and secondly a “psychological” leg (that is, the inability mentioned above to appreciate the wrongfulness of the conduct or to conduct oneself according to such an appreciation). In 1981 in S v Chretien 1981(1)(SA)1097(A) the appellate division held that a person could lack capacity and accordingly escape liability not only if the (psychological) inability was the result of mental illness or immature age, but also if it was caused by intoxication. Thus the so-called biological factors (first leg of the test) were expanded to include intoxication.

After 1981 the important question arose whether there was any reason for limiting the biological leg of the test to the three factors mentioned above, namely mental illness, immature age and intoxication. The question was whether these factors should not be expanded to include, for example, anger resulting from provocation, or factors such as emotional exhaustion, fear, shock or stress. The feasibility of limiting the defence of incapacity to situations in which the (psychological) mental incapacities were the result of only certain circumscribed biological factors was increasingly doubted.

The position in our law at the moment is as follows: if a person commits an act which accords with the definition of the proscription of the crime and which is also unlawful, but at the time of the commission lacks the ability (a) to appreciate the wrongfulness of his act or (b) to conduct himself in accordance with his appreciation of the wrongfulness of his act, he is not criminally liable for such an act, irrespective of the cause of the inability. Because of his lack of capacity he must be found not guilty of the crime. Thus the test to determine the capacity has become purely psychological; the (psychological) inability mentioned in the test is no longer linked, as it was in the past, to a closed number of biological (or, as it is sometimes put, pathological) factors.

From what has just been said, it follows that the capacity of mentally ill and of very young persons is determined not merely with the aid of the general criterion for capacity, but also by the use of certain additional rules, which apply only to these two groups of persons.

Before any person can be said to have acted culpably, it must be clear that at the time of the act such a person was endowed with criminal capacity. The adherents of both the normative and the psychological theories of culpability admit this. The description of the precise relationship between capacity and culpability depends upon whether one adopts the normative or the psychological theory of culpability. Those who adhere to the psychological theory tend to separate capacity from culpability, and to view the former as merely a prerequisite of the latter. The followers of the normative theory of culpability, on the other hand, always adopt an integrative approach and regard capacity as one of the indispensable components of the culpability concept. It is submitted that this approach is the correct one. To say that a person acted culpably, means that there are grounds upon which, in the eyes of the law, he may be blamed for his unlawful conduct. One of the reasons why he can be blamed is the fact that at the time of the conduct he had criminal capacity. Thus, contrary to what is sometimes alleged, capacity is not an element of criminal liability, which is separate from culpability. It forms part of the culpability requirement (Snyman 1995:145–149).

Against this background the stages of moral development – especially of the child – is important to highlight in some detail.

3.3 Kohlberg's Exposition of the Six Moral Stages

3.3.1 The Place of Moral Judgment in the Total Personality

To understand moral stage, it is helpful to locate it in a sequence of development of personality. We know that individuals pass through the moral stages one step at a time as they progress from the bottom (Stage 1) toward the top (Stage 6). After the child learns to speak, there are three major developmental stages of reasoning: the intuitive, the concrete operational, and the formal operational. At around age 7, children enter the stage of concrete logical thought; they can then make logical inferences, classify things and handle quantitative relations about concrete things. In adolescence, many but not all individuals enter the stage of formal operations, at which level they can reason abstractly. Formal operational thinking can consider all

possibilities, consider the relations between elements in a system, form hypotheses, deduce implications from the hypotheses, and test them against reality. Many adolescents and adults only partially attain the stage of formal operations; they consider all the actual relations of one thing to another at the same time, but do not consider all possibilities and do not form abstract hypotheses.

In general, almost no adolescents and adults will still be entirely at the stage of concrete operations, many will be at the stage of partial formal operations, and most will be at the highest stage of formal operations. Since moral reasoning clearly is reasoning, advanced moral reasoning depends upon advanced logical reasoning. There is a parallelism between an individual's logical stage and his or her moral stage. A person whose logical stage is only concrete operational is limited to the pre-conventional moral stages, Stages 1 and 2. A person whose logical stage is only "low" formal operational is limited to the conventional moral stages, Stages 3 and 4. While logical development is a necessary condition for moral development, it is not sufficient.

In summary, moral stage is related to cognitive advance and to moral behaviour, but our identification of moral stage must be based on moral reasoning alone (Kohlberg 1984:170–172).

3.3.2 Theoretical Description of the Moral Stages

The six moral stages are grouped into three major levels: pre-conventional level (Stages 1 and 2), conventional level (Stages 3 and 4), and post-conventional level (Stages 5 and 6).

To understand the stages, it is best to start by understanding the three moral levels. The pre-conventional moral level is the level of most children under 9, some adolescents, and many adolescent and adult criminal offenders. The conventional level is the level of most adolescents and adults in our society and in other societies. The post-conventional level is reached by a minority of adults and is usually reached only after the age of 20. The term "conventional" means conforming to and upholding the rules and expectations and conventions of society or authority just because they

are society's rules, expectations, or conventions. The individual at the preconventional level has not yet come to really understand and uphold conventional or societal rules and expectations. Someone at the postconventional level understands and basically accepts society's rules, but acceptance of society's rules is based on formulating and accepting the general moral principles that underlie these rules. These principles in some cases come into conflict with society's rules, in which case the postconventional individual judges by principle rather than by convention (Kohlberg 1984:172–173).

The stages and levels of moral development can be tabularised as follows:

3.3.3 The Six Moral Stages

Content of Stage			
Level and Stage	What is Right	Reasons for Doing Right	Social Perspective of Stage
Level I: Preconventional Stage 1 – Heteronomous Morality	To avoid breaking rules backed by punishment, obedience for its own sake, and avoiding physical damage to persons and property.	Avoidance of punishment, and the superior power of authorities.	Egocentric point of view. Doesn't consider the interests of others or recognize that they differ from the actor's: doesn't relate two points of view. Actions are considered physically rather than in terms of psychological interests of others. Confusion of authority's perspective with one's own.
Stage 2 – Individualism, Instrumental Purpose, and Exchange	Following rules only when it is to someone's immediate interest; acting to meet one's own interests and needs and letting others do the same. Right is also what's fair, what's an equal exchange, a deal, an agreement.	To serve one's own needs or interests in a world where you have to recognize that other people have their interests, too.	Concrete individualistic perspective. Aware that everybody has his own interests to pursue and these conflict, so that right is relative (in the concrete individualistic sense).
Level II: Conventional Stage 3 – Mutual Interpersonal Expectations, Relationships, and Interpersonal Conformity	Living up to what is expected by people close to you or what people generally expect of people in your role as son, brother, friend, etc. "Being good" is important and means having good motives, showing concern about others. It also means keeping mutual relationships, such as trust, loyalty, respect, and gratitude.	The need to be a good person in your own eyes and those of others. Your caring for others. Belief in the Golden Rule. Desire to maintain rules and authority which support stereotypical good behaviour.	Perspective of the individual in relationships with other individuals. Aware of shared feelings, agreements, and expectations which take primacy over individual interests. Relates points of view through the concrete Golden Rule, putting yourself in the other person's shoes. Does not yet consider generalized system perspective.

Content of Stage			
Level and Stage	What is Right	Reasons for Doing Right	Social Perspective of Stage
Stage 4 – Social System and Conscience	Fulfilling the actual duties to which you have agreed. Laws are to be upheld except in extreme cases where they conflict with other fixed social duties. Right is also contributing to society, the group, or institution.	To keep the institution going as a whole, to avoid the breakdown in the system “if everyone did it”, or the imperative of conscience to meet one’s defined obligations. (Easily confused with Stage 3 belief in rules and authority.)	Differentiates societal point of view from interpersonal agreement or motives. Takes the point of view of the system that defines roles and rules. Considers individual relations in terms of place in the system.
Level III: Postconventional, or Principled Stage 5 – Social Contract or Utility and Individual Rights	Being aware that people hold a variety of values and opinions, that most values and rules are relative to your group. These relative rules should usually be upheld, however, in the interest of impartiality and because they are the social contract. Some nonrelative values and rights like life and liberty, however, must be upheld in any society and regardless of majority opinion.	A sense of obligation to law because of one’s social contract to make and abide by laws for the welfare of all and for the protection of all people’s rights. A feeling of contractual commitment, freely entered upon, to family, friendship, trust, and work obligations. Concern that laws and duties be based on rational calculation of overall utility, “the greatest good for the greatest number.”	Prior-to-society perspective. Perspective of a rational individual aware of values and rights prior to social attachments and contracts. Integrates perspectives by formal mechanisms of agreement, contract, objective impartiality, and due process. Considers moral and legal points of view; recognizes that they sometimes conflict and finds it difficult to integrate them.
Stage 6 – Universal Ethical Principles	Following self-chosen ethical principles. Particular laws or social agreements are usually valid because they rest on such principles. When laws violate these principles, one acts in accordance with the principle. Principles are universal principles of justice: the equality of human rights and respect for the dignity of human beings as individual persons.	The belief as a rational person in the validity of universal moral principles, and a sense of personal commitment to them.	Perspective of a moral point of view from which social arrangements derive. Perspective is that of any rational individual recognizing the nature of morality or the fact that persons are ends in themselves and must be treated as such.

3.4 Child Development

It is important that each role-player in the criminal justice system understands and assesses the different development levels of children. Important aspects of child development include the following: physical development of the child, cognitive development, emotional development, language development, social development, sexual development and moral development.

Van Niekerk (2001) wrote a comprehensive overview for prosecutors regarding the development of a child. Her overview was judged to suffice for the purposes of this research. Van Niekerk (2001:A3-2 – A3-9) gives the following overview of child development:

3.4.1 Physical Development

The child's physical appearance is important to observe, but it is essential not to conclude that the physically developed and mature child is developed and mature intellectually or emotionally.

Adults with whom the child interacts often treat the child who is precocious in physical development in an adult way. This has obvious dangers when one is interacting with a child within the criminal justice system. As puberty and growth are occurring earlier and earlier in each successive generation – due (in theory) to improved nutritional and medical care – one must be very careful not to assume that the child is adult in every other way. Particularly with girls, physical maturity precedes maturity in other aspects of development.

Sometimes the physically smaller children come across in Court as more vulnerable and appealing. This may be to the advantage of the case as visual impressions have great impact both on our conscious and subconscious minds.

The physical vulnerability of a small child should not be exploited by the prosecution in a way that may compromise the psychological well being of the child. Sometimes a decision not to use the intermediary system may be made

in order to capitalise on the visual impact of the small child witness on the Court. The best interests of the child should be the first consideration of the prosecutor.

3.4.2 Cognitive Development

Cognitive development in all children, as with other aspects of development, follows through certain stages that are generally associated with chronological ages. As mentioned above, elements of the child's physical and emotional environment can affect development of all aspects of a child's growth, including cognitive development.

Children from birth to 7 years

It is important to be aware that, generally speaking, children under the age of 6 or 8 are very concrete in their thinking. Although they may use words that refer to abstract concepts, their understanding of these concepts may be limited and not clearly interpreted by the children themselves.

The ability to think on an abstract level is a function that develops from about the age of 6 and children of this age will make very simple cause/effect connections that to adults may appear incongruous or inappropriate. Often, events in a child's life are interpreted by the child in an egocentric and erroneous way, for example, a child who loses a parent at this stage of development may believe that the loss is directly related to something said or done by the child itself.

The concept of cause and effect of events in the lives of children of this age is not understood by them in the same way as it is by adults or by older children. Children of this age, for example, may not understand the permanence of death.

Children of this age also have an underdeveloped ability to link logic and reasoning to issues, other than to those that are tangible and concrete.

Children from 7 to 12 years

From about the age of 7 years, children begin to develop a more mature understanding of events in their lives and their ability to think on an abstract level starts to become more complex. Their ability to link cause and effect to less tangible issues increases. At this age, thinking becomes more abstract and children begin to develop the ability to manage more complex cause-effect thinking.

Children from 13 years to early adulthood

The ability of children at this age to think abstractly becomes more advanced and they are more often able to manage complex thinking processes.

The process of cognitive development that all children go through has implications for how children will interact with and interpret their experience of the criminal justice system. It is important to remember that children will probably understand very little about the legal process, the role-players, the procedures and the long-term implications of some of the possible outcomes. This may contribute to increased anxiety in the child and underlines the importance of simple education programmes for children who undergo investigations (police and medical) and attend Court.

Issues relating to memory

Research indicates that the ability of children to recall events and experiences in their own lives is as reliable as that of adult ability to recall childhood events – perhaps more so, as children’s life experiences are more limited and therefore memory may not be as distorted or overlaid by connections to other life experiences. However, there are some very important factors to remember when trying to access a child’s memory of events.

(i) The more anxious the child, the less able the child will be to access information in memory. The more relaxed the child in the situation of recall, the more likely it is that the child will be able to retrieve the required

information from memory. It is thus essential that the interview/questioning environment be relaxed, the interviewer be relaxed, and some time be spent in developing rapport with the child. It may also be important for a support person to be present to reduce anxiety.

(ii) The cues that enable a child to access memory and produce information about an event need to have meaning for that child. It is therefore essential to use language that the child understands.

(iii) Young children – like adults – are vulnerable to distortions created by suggestion.

(iv) Memories of young children may be susceptible to fading. However, fading may be reduced if the child has superior knowledge of the subject matter, if the event has significance for the child, and if actions are central and familiar to the child.

(v) Memory may be affected by trauma. Sometimes an event may be so overwhelming to the child's psyche that the child may actively or subconsciously suppress, repress or distort memory to facilitate coping.

(vi) Factors that affect recall in children (and adults) include: delay; stress; the interviewing technique; the interviewing environment; the presence or absence of a support person; the status of the interviewer as perceived by the child; and visual cues or questions used to help the process of recall.

A good interviewing environment in which recall of an event is required should not be cluttered or distracting but warm and comfortable. It should not be a play environment although limited play material may be present to help the child relax.

Research indicates that both adults' and children's memories weaken over time, but that children's memories appear to become more incomplete over time compared to adults in relation to peripheral events, rather than to central

or salient events. This underlines the importance of ensuring speedy resolution of the legal process for children.

Concentration

It is important to be aware that the ability to concentrate is affected by the child's level of cognitive development and also by the child's physiological development. Emotional distress and trauma may significantly affect concentration.

Concentration time periods need to be assessed when working with children and periods of focused questioning need to be linked to the ability of the child to attend and concentrate. Generally, concentration and attention spans increase with age and developmental progress but, for some children, concentration fails to develop.

3.4.3 Emotional Development

Although emotions are experienced at all ages, the ability to describe and manage feelings may differ across age groups. They may be related to other developmental factors; and they may also be linked to cultural issues.

It is important to note that the child's demeanour (appearance) and/or ability to describe feelings may not be congruent with what the child may have experienced.

Children from birth to 5 years

Until the age of 5 years feelings are, by adult standards, diffuse, although these feelings can be very intense. However, children of this age are rarely able to describe feelings in abstract language and are therefore unable to label them. A child might be clearly angry or sad or happy but emotions at this stage are picked up from behavioural cues. As labels are offered to the child, so the child learns to label and describe feelings verbally and in the abstract. Behavioural cues can also be confusing. A child's hitting out in an

aggressive way is usually an expression of fear or insecurity. The family's or community's rules and culture may also influence the behavioural manifestations of emotion.

However, even at this age, feelings can be suppressed and/or repressed.

Adults interacting with children who may have been sexually abused may anticipate emotional responses from the child that are congruent with an adult's understanding of abuse. However, because the child does not understand the meaning of sexual behaviour, emotional responses to the abuse may be absent or inappropriate by adult definition.

Children from 5 to 12 years

From the age of 5 to 12 years, children learn to label the emotions they are experiencing, and events are responded to with more appropriate emotional responsiveness (by adult definition).

Suppression may often be a successful defence against uncomfortable emotion. Children of this age are also aware that they should have some level of control over their feelings, that they are capable of appropriate and even strong feelings of guilt, and that they may actually fear the loss of control of emotion.

3.4.4 Language Development

Language development is very clearly linked to the language to which the child is exposed in the home, the school and the learning environment, and also through the media.

Children from birth to 5 years

Children under the age of 5 can use and understand simple words and simple sentence construction. It is essential for good communication with the preschool child to present ideas and question in simple, single phrase

sentences. It is not unusual for children of this age to use words that they do not fully comprehend, but that they have heard others use.

Children from 6 to 12 years

From 6 to 12 years, vocabulary becomes more extensive and the ability to deal with complex sentence construction expands. However, children of this age may still use words out of context and without full understanding of meaning.

Children from 13 years to early adulthood

Children over the age of 12 are usually able to manage complex vocabulary and language constructs, depending on their exposure to the use of language as well as to their level of education. However, even at this age there may be misunderstandings about words relating to information that is taboo for discussion in the home or that is restricted to adult-only environments.

It is essential, therefore, when dealing with children of any age group that the specific meaning a child attaches to words and expressions is understood by both the child and the adult in question. A child's use of language may be very idiosyncratic, and may also be affected by trauma.

3.4.5 Social Development

The social group, particularly the family, is essential to the holistic development of children.

Children from birth to 3 years

Children from birth to 3 years of age are entirely dependent on their social connections for survival and development in every aspect. However, very young children are very egocentric and demanding of immediate gratification of every need. Their ability to understand the world is limited entirely by gratification of their immediate needs and how and who gratifies these.

Toward the end of this phase of development there is a developing desire to please those who control the child's access to resources and who are the source of gratification for the child. Children early on in this phase may experience strong separation anxiety and cannot always anticipate the return of a caretaker when separation does occur. However, children at this stage are often very spontaneous with affection.

Children from 3 to 12 years

Children from 3 to 12 years of age have a stronger desire to please, and during this phase, learn to share and to give and take. Peer relationships take on an important value and friendships outside the immediate family take on great importance. However, the immediate family is experienced as the "secure base" from which to explore the world and to which one returns for support and resources.

Children from 13 years to early adulthood

Children over the age of 12 are acutely aware of peer relationships and usually attach great importance to belonging to and having an identity with a peer group. Peer group pressure is therefore a powerful force and the need to be seen as "grown up" is strong and often gives a sense of status to the teenager. This age group may also experience a return to egocentric preoccupation with the self, particularly with physical body image. Separation from close family and the need for independence may begin during this phase, and power struggles between caretakers on one hand and children in this stage of development on the other are a normal part of the struggle for independence and autonomy.

3.4.6 Sexual Development

This is an area of child development around which there are many myths. One of the most pervasive is the myth that children are asexual beings who will experience any form of sexual touching as bad and/or traumatic.

Children from birth to 5 years

Children are capable to genital response when still within the uterus.

All children are capable of experiencing pleasure from gentle genital stimulation unless this form of touching has become associated with some negative consequence or experience.

It is normal and healthy for preschool children to actively explore their own genitals and to persist in this activity because of the pleasurable feelings associated with it. Children of this age are capable of orgasm, although obviously this is not accompanied by ejaculation at this age in the male child. Interest in other children's (and adults') genitals is very normal – and this often extends beyond looking. This is the age when, as in many matters, like picking one's nose, children have to learn the rules about appropriate social-sexual behaviour and when caregivers should, without creating anxiety around pleasurable genital sensations, be teaching children to contain sexual feelings.

It is also not unusual for children of this age to persistently self-stimulate, even in the presence of others, or to seek out opportunities to involve others in sexual activities, and this behaviour may be particularly evident if a child is feeling insecure emotionally. Children deprived of gentle, non-sexual loving touch may be particularly sexual in their behaviour.

Children from 5 to 12 years

Children from the age of 5 to 12 years have usually learned the rules about touching themselves sexually, and if this behaviour persists during this phase of development, it is usually very secret.

Children in puberty

Girls may reach puberty from anywhere between 9 and 13 years of age and boys from 10 to 14 years. Hormonal changes in male and female adolescents

contribute to an increased interest in sexual activity. This increased interest may not coincide with a young person's access to further information on sexuality and how to cope with sexual impulses, or indeed, every human being's need for closeness and intimacy.

It is important to note that children under the ages of 12 to 14, whether they are victims or perpetrators of sexual abuse, rarely have a full adult understanding of the implications and possible consequences of the sexual behaviour they have been involved in, especially where there are strong taboos in discussion of sexual issues between adults and children.

3.4.7 Moral Development

Young children have little sense of the moral code of their family and culture. Preschool children may conform to the moral teaching of their family and/or significant others, not because they understand the issue of morality, but because they experience the consequences of their own behaviour.

As the child matures and thought processes become more sophisticated, it can be said that the child's "A conscience" (or "A superego") develops. This means that the child's control over its own behaviour becomes more internally rather than externally based: that is, the child begins to self-approve or self-disapprove, and is no longer entirely dependent on the cues and responses of significant others. Internal controls, however, do not develop without the presence and consistent use of external feedback – positive, negative or neutral – on the child's behaviour.

A young child may thus have a "limited" sense of the wrongfulness of an act – but not necessarily the understanding of the morality of the act. Furthermore, young children may not necessarily have the behavioural controls and/or the prerequisite ability to act in accordance with society's view on a particular behaviour.

Note on Social and Moral Development

It is important to note that although environment and formal teaching influence and support a child's social and moral development, formal education is not the only way in which this can be achieved. For example, in the areas of moral and social development, the rural child may be inducted at a fairly young age into taking responsibility for caring for the resources of the extended family (herding cattle and goats) and may have an advanced sense of morality and social responsibility in this area of functioning despite the lack of formal schooling.

3.4.8 Forensic Application

From a forensic criminologist point of view, knowledge of the different developmental stages of children is of the utmost importance. These different stages should be taken into account throughout the whole assessment process, starting with the initial interview, establishment of rapport, discussion of the crime, compiling of the report and ending in a recommendation for sentence. The Court should be made aware of the stage of development of a specific juvenile offender to enable the Court to pass an appropriate sentence. The forensic criminologist should emphasize these factors in his/her report and use it to make an appropriate and applicable recommendation on sentencing.

3.5 International Perspective

3.5.1 Criminal Capacity

One of the basic principles enshrined in international law is that the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions. Article 3(a) of the Convention on the Rights of the Child places a duty on States Parties to seek to promote the establishment of a minimum age below which children should be presumed not to have the capacity to infringe the penal law. Inevitably,

when establishing minimum ages the Beijing Rules endeavour to provide guidance for States when exercising their discretion, in linking the minimum age for criminal responsibility to the child's development and maturity. Rule 4 of the Beijing Rules recommends that when States establish an age of criminal responsibility, the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity.

The question of establishing a minimum age for criminal responsibility differs widely owing to history and culture, but as the Commentary to the Beijing Rules points out, if the age of criminal responsibility were too low or nonexistent then the concept of responsibility would become meaningless. At present there is wide disparity in age, not only globally, but even within the same Continent. Within Europe, criminal responsibility begins at 7 in Ireland, at 14 in the Ukraine, and at 15 in Sweden. Such a range raises the question whether children mature at such different paces even within the same Continent (Van Bueren 1995:173). In the USA different States have adopted different ages for criminal responsibility, with the lowest reportedly being 10 years. According to Burchell and Milton (1991:200) in England children under 10 years of age are not criminally responsible and in Germany the limit is 14 years of age. In certain countries, for example the Netherlands and Belgium, there is no fixed age below which children are criminally unaccountable.

The problem of age determination is not discussed in International Instruments. The current position in South African law will now be highlighted.

3.6 Current Position in South Africa

3.6.1 Criminal Capacity

The provisions of sections 77 and 78 of the Criminal Procedure Act, 1977, although dealing with Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility, are equally opposite when having to deal with the question whether to institute a prosecution with reference to child offenders.

Section 77 provides that the accused must be capable of understanding the proceedings so as to make a proper defence.

Section 78 provides that the accused person must be capable of appreciating the wrongfulness of his act and he must be capable to act in accordance with such appreciation.

In terms of the common law presumptions all children under the age of 7 years are irrebuttably presumed to be *doli incapax* and can thus never be prosecuted. Children between the ages of 7 years and 14 years are rebuttably presumed to be *doli incapax* and if any such child is to be prosecuted, the prosecution must prove that the accused had the required criminal capacity at the time of committing the offence (Meintjies 2001:A3–1).

Snyman (1995:150) discusses criminal capacity as follows:

“X’s capacity is determined with the aid of two psychological factors, namely first his ability to distinguish between right and wrong, and secondly his ability to conduct himself in accordance with this insight into rights and wrong ...”

Snyman (1995:166) deals with the criminal capacity of children as follows:

“The test ought to be whether such a child, in spite of his age, is nevertheless capable of appreciating the nature and consequences of his conduct and that it is wrong ... and further whether he is capable of acting in accordance with that appreciation... The fact that the Courts recognize that a child should have the power to resist temptation before he can be considered to have criminal capacity, is evident from the large number of decisions in which the Courts have refused to convict children between the age of seven and fourteen years who have committed crimes under the influence of older persons...”

Snyman (1995:166) points out that in practice a short cut is usually taken by asking whether a child was aware that what he was doing was wrong. Such a formulation of the test is unacceptable for the following reasons: Firstly, the formulation confuses two completely distinct requirements for liability, namely criminal capacity and awareness of unlawfulness. Secondly, the traditional

test employed by the Courts involves only one aspect of the accused's knowledge, namely his knowledge of the wrongfulness of the act. His knowledge of the factual nature and consequences of his deed is equally important. Thirdly, the traditional formulation contains no reference to the accused's ability to act in accordance with his appreciation of right and wrong. The presumption is not rebutted merely by proof that the accused could distinguish between right and wrong. It must be clear that the accused knew that what he was doing was wrong within the context of the facts of the particular case. All the circumstances of the case, such as the nature of the crime and the conduct of the child, must be taken into account in determining whether the State has rebutted the presumption.

Burchell and Hunt (1997:153,160) indicate that persons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt, that at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities for insight and for self control. The authors warned that the Court should be careful not to place an old head on young shoulders and it must take into consideration the age, knowledge, experience and, what is most important, the judgment of the child in the specific circumstances facing the child at the time of commission of the prohibited act. It is important to acknowledge that children often do act irrationally and sometimes forget what they have been told.

According to the Meintjies (2001:B3–2 & 3) the following factors should be considered when prosecutors are confronted with the decision of whether to prosecute a child between ages of 7 to 14 years:

(i) the child's age (a prosecution will rarely be considered when the child is of tender age (\pm 10 and younger);

(ii) the nature of the crime (the more heinous, the less weight will be given to the age factor, if having acted under the influence of others, the extent of this influence must be considered);

(iii) the possible benefits of diversion should the child be prepared to plead guilty (it is preferable that the child be made to take responsibility for his/her actions);

(iv) the possible benefits of prosecution (what sentence would probably be suggested/imposed);

(v) the views and concerns of the complainant;

(vi) the interest of the community (is the child a trouble maker, are there previous transgressions?);

(vii) the result of any assessment of the child (level of maturity, personal circumstances, etc);

(viii) balancing relevant considerations (the relevant children's rights instruments need to be taken into account, the child's best interests to be of paramount importance).

In many cases the facts of the case itself will prove criminal capacity and the child's capacity to follow the proceedings will soon become apparent or, if represented, some objection will be raised by the defence counsel. Although the *onus* rests on the prosecution to prove criminal capacity, there is no legal obligation to prove this prior to putting charges or at any specific stage of the proceedings. It is simply one of the elements necessary to be proved and needs only be proved prior to closure of the State case. It is, therefore, possible to rely on the evidence presented on the merits for purposes of arguing that this element has, if fact, been proved (Meintjies 2001:B3–3).

Skelton (1996:180) indicates that in South African law, only children below the age of 7 years are irrebuttably presumed to lack criminal capacity. This represents one of the lowest ages of criminal capacity in the world. Children between the ages of 7 and 14 years are rebuttably presumed to lack criminal capacity. Although this presumption is designed to protect children under 14, it is too easily rebutted in our Courts. Skelton is of the opinion that a balanced

approach should be adopted in determining an appropriate minimum age for criminal capacity. It is submitted that the minimum age of 7 years, is unacceptably low. Furthermore, should South Africa wish to retain the *doli incapax* presumption, then better safeguards should be adopted so that the presumption will be more difficult to rebut. This might include a requirement that the State lead expert testimony in order to achieve rebuttal.

The South African Law Commission (2000:22) indicates that the presumption with regard to the criminal capacity of children between the ages of 7 and 14 years was designed to protect children but that it is too easily rebutted and that it does not in fact present an impediment to the prosecution and conviction of young people. For instance, mothers of children are asked to indicate whether their children understand the difference between right and wrong. An answer in the affirmative is often considered sufficient grounds to rebut the presumption of *doli incapax*.

Excerpts from case law where criminal capacity of children where dealt with by the Courts:

(i) In the case S v Van Dyk and Others 1969(1)SA601(CPD) an eleven-year-old child was charged with housebreaking with the intent to commit a crime unknown to the State. The Court stressed the fact that before convicting a child under the age of 14 years on a charge of housebreaking, to which he has pleaded guilty, the presumption should be rebutted before convicting the child on his plea of guilty.

(ii) In R v Tsutso 1962(2)SA666SRS a boy of 10 years pleaded guilty to a charge of culpable homicide and was convicted after he killed the deceased, who had a fight with his father. The conviction and sentence were set aside because the State failed to prove beyond all reasonable doubt that the accused's mind was sufficiently mature to understand and that he did understand the wrongful character of his conduct.

(iii) In S v F 1989(1)SA460(ZHC) the Court strongly censured the acting Attorney-General of Zimbabwe for charging a 10 year old boy with indecent

assault and the Magistrate for convicting and sentencing him to four cuts. The Court also found that the presumption of incapacity had not been rebutted.

(iv) The test of criminal capacity has been laid down in Weber v Santam Versekeringsmaatskappy Bpk 1983(1)SA381(A). This case involved the alleged contributory negligence of a child just over the age of 7 years. Although the criminal Courts have in the past not clearly distinguished between the capacity and the fault required of the child; it is now clear that the criminal liability of children between 7 and 14 years of age involves a two-stage enquiry: did the child possess criminal capacity and if so, did the child possess the fault required for a conviction of the crime for which the child is charged? The preliminary investigation into capacity precedes the inquiry into fault, whether the fault required is intention or negligence.

(v) In S v S 1977(3)SA305OPA the accused was 13 years of age when he committed the crime of sodomy. The Court decided that a male under the age of 14 years can be convicted on attempt to commit sodomy and the Court found that the State has successfully rebutted the presumption of *doli incapax*. The judge held that the child knew what he was doing.

(vi) In R v K 1956(3)SA353(A) at 375H the Court decided that the State must show affirmatively that the child knew what the reasonable and probable consequences of his act would be. In this matter a child of 13 years of age was charged with murder. The conviction was set aside because it was not proved that the child knew his act was unlawful and that his action exceeded the bounds of self-defence.

(vii) In R v Mahwahwa and Another 1956(1)SA250(SR) the two 13-year-old accused were convicted of lighting a fire in a forest without authority. The fire had spread and caused damage. The Court indicated that it is undesirable that youths of about 13 years of age should be prosecuted for statutory offences, which might often be no more than boyish pranks. The conviction was set aside because there was no evidence to rebut the presumption that the accused were *doli incapaces*.

3.6.2 Determination of Age

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

In terms of section 337 of the Children Procedure Act, 1977 the presiding judicial officer may estimate the age of a person if in any criminal proceedings the age of that person is a relevant fact of which no or insufficient evidence is available. The finding of the presiding officer may not be simply based on observation. There should be a proper attempt at finding evidence. The following can be used:

- (i) birth certificate
- (ii) evidence of the parents
- (iii) evidence of family or other persons knowing of the birth of the accused
- (iv) expert evidence
- (v) estimation of age

Section 337 of the Criminal Procedure Act, 1977 reads as follows:

“Estimating age of person –

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless –

- (a) it is subsequently proved that the said estimate was incorrect; and

(b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.”

An estimation of age may only be made once it is established that no or insufficient evidence is available. The recent changes in the law concerning pre-trial detention put the question of age determination firmly on the agenda. In the past there were few benefits to be had by false declarations of youthfulness. This changed dramatically with the introduction of section 29 of the Correctional Services Act, 1959 (Act 8 of 1959) (as amended) with its twin cut-off points of 14 years and 18 years. It was for juveniles and adults, all the more tempting to deceive about age, since release from custody was more or less guaranteed. A related problem reflects the converse: it also became more tempting for officials to record ages of arrestees on warrants as being 14 or over, since only then was the option of detention after first appearance in Court possible.

Excerpts from cases where the Courts dealt with age determination of accused:

(i) In S v Ngoma 1984(3)SA666(A) the Court indicated that the general rule is that the best admissible evidence must be used to determine a juvenile accused's age.

(ii) In S v Swartz 1970(2)SA240(NC) the Court stated that seldom ought there be no evidence available in a magistrate's Court as the help of the district surgeon or any other doctor can be invoked.

(iii) In S v Sibisi 1976(2)SA162(N) James JP stated: "... it is not only desirable but essential that, in all cases in which the age of the accused become relevant... the magistrate should ... record what his finding is in regard to the age of the accused; and ... he should further record briefly his grounds for (his) finding..."

(iv) In S v Swato 1977(3)SA992(O) the Court held that the section could only be applied when it had been established that no or insufficient evidence is available and that it could not be invoked merely to avoid inconveniencing the district surgeon.

(v) In S v Khumalo 1991(2)SACR694(W) the Court stated that in all cases where the age of an accused was of material importance, either in respect of conviction or in regard to sentence, magistrates should properly record everything so that the method by which the accused's age was determined appeared adequately from the record.

3.7 Child Justice Bill, 49 of 2002

3.7.1 Age and Criminal Responsibility

The South African Law Commission (2000:xii) indicates that the Child Justice Bill, 2002 amends the common law with regard to the rebuttable presumption of *doli incapax* of children below the age of 14 years. The minimum age of criminal capacity is raised from 7 to 10 years. The rebuttable presumption of *doli incapax* with regard to children who are at least 10 but not yet 14 years of age is codified. The Child Justice Bill, 2002 provides that:

(i) a child who, at the time of the commission of an alleged offence is below the age of 10 years, cannot be prosecuted;

(ii) a child who, at the time of the commission of an alleged offence, is at least 10 years, but not yet 14 years of age is presumed to not to have had the capacity to appreciate the difference between right and wrong and act accordingly, but this presumption may be rebutted if it is subsequently proved beyond a reasonable doubt that he or she did have capacity at that time.

A child who has reached 10 years, but is not yet 14 years of age may not be prosecuted unless the Director of Public Prosecutions issues a certificate confirming an intention to proceed with the prosecution of such child. This

approach is intended to encourage the diversion of children in this age group in the majority of cases, whilst still preserving the discretion of the prosecutor with regard to the prosecution of such children.

Section 5 of the Child Justice Bill, 2002 deals with age and criminal responsibility and provides as follows:

“5.(1) A child who commits an offence while under the age of 10 years cannot be prosecuted for that offence.

(2) A child who commits an offence while under the age of 14 years is presumed not to have had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation, unless the criminal capacity of the child is proved in accordance with section 56.

(3) If the Director of Public Prosecutions intends charging a child contemplated in subsection (2) with an offence, the Director or his or her delegate must issue a certificate confirming an intention to prosecute.

(4) If the certificate contemplated in subsection (3) is not issued within 14 days after the preliminary inquiry, the Director of Public Prosecutions must be regarded as having declined to institute prosecution.

(5) In issuing a certificate contemplated in subsection (3) the Director of Public Prosecutions may have regard to any relevant information, but must have regard to -

(a) the appropriateness of diversion;

(b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;

(c) the nature and gravity of the alleged offence;

(d) the impact of the alleged offence upon any victim of such offence; and

(e) a probation officer's assessment report.

(6) The common law pertaining to the criminal capacity is hereby amended to the extent set out in this section.”

Skelton (1994:103) indicates that by increasing the age of criminal capacity, the number of children who can be brought before the Courts are immediately reduced and will therefore provide better protection to all younger children. Skelton is of the opinion that we could extend the age of criminal capacity to 14 years, so that all children of 13 years and younger who commit acts which would be considered criminal if they were adults, would not be dealt with by the criminal process.

3.7.2 Forensic Application

As indicated above, the Director of Public Prosecutions has to issue a certificate if he/she intends to prosecute a child under the age of 14 years at the time of the commitment of the offence. When making this decision, the Director of Public Prosecutions must take certain factors into account. These factors relate to *inter alia* the appropriateness of diversion, educational level, cognitive ability of the child, domestic and environmental circumstances, the nature and gravity of the offence, the impact of the alleged offence upon any victim of such offence and the probation officer's assessment report. The expertise of a forensic criminologist falls directly into this ambit and these experts will be in a position to play an important role in assisting the Director of Public Prosecutions in making his/her decision in this regard. This will create an ideal situation. If the Director of Public Prosecutions decides to proceed with the prosecution, after consideration of a report, as contemplated in section 5 of the Child Justice Bill, 2002 by the forensic criminologist, the latter will be in a position to prepare a pre-sentence report much quicker than in normal circumstances. This will be possible because most of the background information will have been obtained and investigated and the new

facts pertaining to the criminal case can only be added and the report amended to focus on sentencing.

With regard to the establishment of criminal capacity, section 56 provides as follows:

“Establishment of criminal capacity

56.(1) The criminal capacity of a child over the age of 10 years but under the age of 14 years must be proved by the State beyond a reasonable doubt.

(2) The prosecutor or the child’s legal representative may request the child justice Court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the child justice Court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice Court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the child justice Court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 191 of the Criminal Procedure Act.

Separation and joinder of trials involving children and adults

57.(1) Where a child and a person other than a child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials.

(2) An application for such joinder must be directed to the child justice Court in which the child is to appear after notice to the child, such person and their legal representatives.

(3) If the child justice Court grants an application for joinder of trials, the matter must be transferred to the Court in which such person is to appear.

(4) The Court to which the matter has been transferred must afford the child concerned all such benefits conferred upon such child by this Act.”

The presiding magistrates were asked about their views on the minimum age for criminal capacity. They responded as follows:

Table 2 Minimum age for criminal responsibility

Options	Frequency	Percent
7 Years of age	12	12.4
10 Years of age	25	25.8
14 Years of age	46	47.4
15 Years and older	14	14.4
Total	97	100.0

Table 2 indicates that 46 (47,4 percent) of the magistrates thought that criminal capacity should only be considered at the age of 14 years. Another group of 25 (25,8 percent) were convinced children should be held criminally responsible at the age of 10. There were even 12 (12,4 percent) who were of the opinion that children at the age of 7 years could be held responsible for criminal actions. Although most of the respondents (46) indicated 14 years as their preference for activating criminal capacity, from this finding it is clear that the magistrates are unsure where to draw the line. No clear majority was registered. This could be due to the fact that magistrates are not familiar with the different stages of the moral development of children and when children are able to take responsibility for their actions. It is however clear from the above table that most of the participating magistrates are of the opinion that 7 years are too young to hold a child criminally responsible for his/her actions.

With regard to the issue of criminal capacity respondent 083 made the following comment: “The age for criminal responsibility these days should be at the 12/13-year-old mark.”

3.7.3 Age Determination

Many children accused of crimes in South Africa do not know their exact ages. The Child Justice Bill, 2002 proposes a solution to this problem by providing that where a child’s age is uncertain or is in dispute –

(i) the probation officer should gather available information and make an estimation of the age of the child and should submit such information on a prescribed form. The legislation provides a list of documents or other forms of information relevant to the estimation of age;

(ii) the magistrate presiding at a preliminary inquiry should make a determination of age based on all available evidence, and the age so determined should be considered to be the child’s age until contrary evidence is placed before a Court;

(iii) the child may be taken to a medical practitioner for estimation of age by the probation officer.

Sections 24, 31 and 82 deal with the various procedures to be followed by the probation officer, inquiry magistrate and presiding officer in a criminal Court when determining the age of an accused:

“Estimation of child’s age by probation officer

24.(1) If the age of a child who must be assessed is uncertain, the probation officer must make an estimation of the child’s age and must complete the prescribed form.

(2) In making the estimation, the probation officer must consider any available information in the following order of cogency, subject to subsection (3):

(a) A previous determination of age by a magistrate under this Act or under the Criminal Procedure Act or an estimation of age in terms of the Child Care Act, 1983 (Act No 74 of 1983);

(b) statements made by a parent, the legal guardian or any other person likely to have direct knowledge of the age of the child or a statement made by the child himself or herself;

(c) a baptismal certificate, school registration form or school report, or other information of a similar nature; or

(d) an estimation of age by a medical practitioner.

(3) If the probation officer is unable to make an estimation by virtue of information contemplated in subsection (2)(a), (b) or (c), the probation officer must refer the child in the prescribed manner to a medical practitioner for an estimation of the child's age.

(4) The probation officer must submit the estimation on the prescribed form together with any relevant documentation to the inquiry magistrate before the child's appearance at a preliminary inquiry.

Age to be determined by inquiry magistrate

31.(1) If the age of a child is uncertain, the inquiry magistrate must determine the age of the child after considering the form and any documentation submitted by the probation officer in terms of section 24(4).

(2) (a) For the purposes of a determination –

(i) an inquiry magistrate may require any relevant documentation, information or statement from any person;

(ii) an inquiry magistrate may subpoena any person to produce the documentation, information or statements contemplated in subparagraph (i); and

(iii) section 24(2) applies with the changes required by the context.

(b) Chapter 23 of the Criminal Procedure Act applies with the changes required by the context to the issue of a subpoena contemplated in paragraph (a)(ii).

(3) The inquiry magistrate must enter the age determined in terms of subsection (1) into the record as the age of the child, which age must be regarded as the correct age of the child until the contrary is proved on a balance of probabilities.

(4) If the inquiry magistrate determines that the person was over the age of 18 years at the time of the alleged commission of the offence, he or she must close the preliminary inquiry and postpone the proceedings as contemplated in section 50(6) of the Criminal Procedure Act.

(5) If the inquiry magistrate makes a determination of age that is not supported by a valid birth certificate, identity document or passport, a copy of the record of the determination must be forwarded to the Department of Home Affairs for the issue of an identification document to the person concerned.

Age assessment of person claiming to be child

82.(1) If a person who is charged with an offence in a Court at any time before the imposition of sentence alleges that he or she was under the age of 18 years at the time of the alleged commission of the offence, the presiding officer must refer the person to a probation officer in the prescribed manner.

(2) The presiding officer of a Court contemplated in subsection (1) may at any time before the imposition of sentence of his or her own accord refer a person charged with an offence in that Court to a probation officer if it appears to the presiding officer that the person is under the age of 18 years.

(3) The probation officer must make an estimation of the age of the person in accordance with section 24 and submit the prescribed form and any relevant documentation contemplated in that section to the presiding officer concerned.

(4) The presiding officer must determine the age of the person, and for that purpose section 31 applies with the changes required by the context.

(5) If the age of the person is determined to be under the age of 18 years and the trial has -

(a) not yet commenced, the presiding officer must transfer the matter to an inquiry magistrate having jurisdiction; or

(b) already commenced, the proceedings must continue before the presiding officer, but the remainder of the proceedings must be conducted in terms of this Act and the Court must be regarded as a child justice Court.”

3.8 Conclusion

It is clear that the issues of criminal capacity and age determination are rather vague in the criminal justice system of South Africa at present. With the promulgation of the Child Justice Bill, 2002 these issues will be more controlled and clear.

Skelton (1994:103) indicates that the increase of the age of criminal capacity will immediately reduce the number of children brought before criminal Courts. By rising the age of criminal responsibility of children to the age of 10 years, the South African law is brought into line with international law. The

provisions of section 5 of the Child Justice Bill, 2002 will ensure that each case involving a child below the age of 14 will enjoy careful consideration before prosecution is instituted.

At present cases relating to criminal capacity of children in South Africa can be linked to the pre-conventional moral development of a child as described by Kohlberg. The role of the forensic criminologist in matters concerning the age of children should be included in pre-sentencing assessments. The majority of the magistrates thought 7 or 10 years are too young to consider criminal capacity. In Chapter 4 detention of children will be discussed.

CHAPTER 4

DETENTION OF CHILDREN

4.1 Introduction

The question on whether children should be detained before, during or after criminal proceedings is a difficult issue both internationally and in our country.

The International Instruments, referred to in chapter 2, provide certain guidelines to State Parties in this regard.

In this chapter these guidelines will be discussed, the current position in South Africa will be provided and the proposed amendments to this position in the Child Justice Bill, 2002 will be highlighted.

4.2 International Perspective

4.2.1 Limitations on Detention of Children

International law does not establish a minimum age below which States are prohibited from depriving children of their liberty *per se*, but there are limitations. Because State Parties to the Convention on the Rights of the Child are under duty to seek to establish a minimum age below which a child lacks the capacity to infringe the penal law, it is implicit in the Convention on the Rights of the Child that any minimum age established by the national law relating to criminal capacity will also be the same minimum age below which children could not be deprived of their liberty for breaches of the penal law. In seeking to place, however weakly, a duty on States Parties to establish a minimum age for penal capacity, the Convention and the Beijing Rules contribute to the growing trend in international law limiting the scope of States' discretion in depriving children of their liberty.

Article 37(b) of the Convention on the Rights of the Child provides that arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort. States Parties to the Convention on the Rights of the Child are therefore under a duty only to impose arrest, imprisonment and detention as a measure of last resort rather than all forms of deprivation of liberty. However, implicit in this duty is a prohibition on using penal institutions as a substitute for inadequate social assistance facilities.

The Rules for the Protection of Juveniles Deprived of their Liberty (JDL) also seek to minimize the deprivation of liberty by recommending to States the establishment of small open detention facilities with no or minimal security measures, to avoid the additional negative effects of deprivations of liberty. Some aspects of the JDL's have been incorporated into the Convention on the Rights of the Child and these aspects are therefore now legally binding (Van Bueren 1995:208-227).

The duty on States to use detention pending trial for children only as a measure of last resort is also incorporated expressly in Rule 13(1) of the Beijing Rules and Rule 17 of the JDL. The latter recommends that detention before trial should be avoided to the extent possible and limited to exceptional circumstances. Where preventive detention is used the highest priority should be given to the most expeditious processing of such cases to ensure the shortest possible duration of detention.

States Parties to the Convention on the Rights of the Child are under a duty to develop alternatives to detention by the use of social services which can assist the State in reducing pre-trial detention by helping to supervise, where possible, the release of children into some form of family environment.

The duty of State Parties to impose arrest, detention and imprisonment of children for the shortest appropriate period of time applies to both pre- and post-trial detention (Van Bueren 1995:208-227).

4.2.2 The Rights of Children Deprived of their Liberty

In terms of article 37(c) of the Convention on the Rights of the Child all children who are deprived of their liberty are entitled, throughout their period of deprivation of liberty, to be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of their age. The Convention expressly highlights two aspects of respect of the child's humanity and dignity: the separation of child detainees from adult detainees, unless it is not in the best interest of the child, and the right of the child to maintain contact with his or her family. It achieves this by linking all three concepts, dignity, family, and separation in the same article. State Parties is under a duty to provide to the parents, or where appropriate to other family members, essential information on the place where the child is in custody or detained. Article 9(4) contains an exception in this regard and provides that the whereabouts of the child can be withheld when it is contrary to the best interest of the child (Van Bueren 1995:208-227).

From the above-mentioned position it is clear that the Convention on the Rights of the Child and the JDL signify or change in direction for children deprived of their liberty. They seek to establish minimum entitlements for all children regardless of the reason for the deprivation of liberty.

Skelton (1996:191) states that these International Instruments give us a clear picture of what we should be including in a future South African juvenile justice system.

4.3 Current Position in South Africa

The present South African position is regulated by the Constitution, 1996, the Criminal Procedure Act, 1977, the Correctional Services Act, 1959 (as amended), and to a lesser extent, the Child Care Act, 1983.

4.3.1 The Constitution, 1996

In terms of section 35 of the Constitution, 1996 all the due process rights applicable to arrested, detained and accused persons also apply to children. Additional rights granted to children in section 28 are the right not to be detained except as a measure of last resort and for the shortest appropriate period of time; the right, when detained, to be kept separately from persons over the age of 18; and the right, when detained, to be treated in a manner and kept in conditions that take account of the child's age.

4.3.2 The Criminal Procedure Act, 1977

The Criminal Procedure Act, 1977 includes several mechanisms designed to facilitate pre-trial release once a child has been arrested. These include:

- (i) A written notice to appear in Court which can be issued at the police station where minor offences are involved (section 56);
- (ii) Bail, which can be granted either before the first appearance in Court at the police station where certain minor offences are involved (section 59) or by a judicial officer after appearance in Court (section 60). In many cases bail amounts currently being set are such that children (or their parents) cannot pay, thereby necessitating the child remaining in detention.
- (iii) Release on warning by a judicial officer after the first appearance in Court (section 72). This section provides that in the instance of a juvenile under the age of 18 years, the accused can be released in the custody of the person in whose custody he or she is, and that person would then be warned to return with the accused to Court on a specified day.

In terms of section 50(5) of the Criminal Procedure Act, 1977 the police have to notify a probation officer when a child is arrested. In the absence of a probation officer, an available correctional officer must be notified of the arrest of any juvenile. In terms of section 50(4) of the Criminal Procedure Act, 1977,

the police must also notify the parents or guardians about the fact that the child has been arrested.

4.3.3 Correctional Services Act, 1959

On 10 May 1996 the new section 29 of the Correctional Services Act, 1959 was published and came into operation from the date of publication.

Skelton (1997:163) points out that the aim of the new section 29 is to provide for the holding of children over 14 years and under 18 years charged with serious offences in prisons during the awaiting trial period.

The position of children under the age of 14 years was not altered by the 1996 amendment. They can only be held in prison or police cells for a maximum of 24 hours before being released into the care of the parent or guardian or other suitable person, or transferred to a place of safety.

Young persons over 14 years of age charged with certain serious offences, however, may be held in prison to await trial if the magistrate has reason to believe that his or her detention is necessary for the administration of justice and the safety of the community and there is no secure place of safety within a reasonable distance from the Court.

The magistrate must apply certain objective criteria in determining whether the administration of justice and the safety of the community necessitate the detention of a young person. Firstly, the risk of abscondment; secondly, the risk of harm to other young persons in the place of safety; and thirdly, the disposition (tendency or likelihood) of the accused to commit offences. Someone must be called to give verbal evidence to the Court on these factors.

The changed law creates a new schedule which lists the following offences: murder, rape, armed robbery and robbery of a motor vehicle, serious assault, assault of a sexual nature, kidnapping, illicit conveyance or supply of drugs and any conspiracy, incitement or attempt to commit any of these offences. It

is young persons (over 14 years and under 18 years) charged with these offences who can be held in prison awaiting trial.

However, a problematic loophole in the section is that the possibility of being detained is not confined to cases involving these scheduled offences. There is a catch all phrase which permits the magistrate to detain a young person over 14 years if he or she has committed an offence referred to in the schedule or any other offence in circumstances of such a serious nature as to warrant the detention. This phrase probably refers to those cases where a young person is charged with several counts of a less serious nature, such as housebreaking. However, it is open to broad interpretation by magistrates (Skelton 1997:163).

4.4 Interim National Protocol for the Management of Children Awaiting Trial

The Departments of Justice and Constitutional Development, Safety and Security, Social Development, Correctional Services and the National Director of Public Prosecutions developed the Interim National Protocol for the management of children awaiting trial. The implementation of this protocol by all relevant sectors of Government will promote South Africa's international and constitutional obligations towards children accused of crimes.

4.4.1 The Objectives of the Interim Protocol

The objectives of the interim protocol are to ensure:

- (i) Effective inter-sectoral management of children who are charged with offences and who may need to be placed in a residential facility to await trial.
- (ii) Appropriate placement of each child based on an individual assessment
- (iii) Correct use of the different residential options available

- (iv) The flow of information between the residential facilities and the Courts
- (v) That managers of facilities are assisted to keep the numbers of facilities manageable
- (vi) That communities are made safer through appropriate placement of children, effective management of facilities and minimization of abscondment
- (vii) That the situation of children in custody is effectively monitored
- (viii) That appropriate procedures are established to facilitate the implementation of the proposed new legislation, once it has been passed by Parliament.

4.4.2 Arrest

When a child is arrested every effort must be made by the police, as soon as possible, to:

- (i) notify parents or guardians about the fact that the child has been arrested (section 50(4) of the Criminal Procedure Act, 1977)
- (ii) notify parents about the time, place and date at which the child will appear in Court (section 74(2) of the Criminal Procedure Act, 1977)
- (iii) consider the release of a child to parents or guardians on “police bail” where this is suitable (section 59(1)(a) of the Criminal Procedure Act, 1977)
- (iv) consider the release of the child into the care of the person in whose custody he is and the issuing of a written notice to appear in Court in cases where the child could be released on police bail (section 72(1)(b) of the Criminal Procedure Act, 1977)

(v) notify a probation officer that a child has been arrested (section 50(5) of the Criminal Procedure Act, 1977)

(vi) take a child directly to a probation officer for assessment if there is a probation officer on duty

(vii) obtain confirmation of the age of the child when notifying parents of the arrest.

The Provincial Department of Social Development must make available to all police stations in the area of service:

(i) the times that probation services are available

(ii) venues where children are to be brought for assessment

(iii) relevant names and contact details of probation officers

(iv) assistance the Department can offer with family finding

It should be noted by all role-players that the Criminal Procedure Act does not define guardian and the Courts have been left to interpret this. They have generally given it a broad interpretation, allowing family members, such as aunts or uncles, grandparents and older siblings to stand as guardians for children. This facilitates the release of children, and is a positive practice provided that the person into whose care the child is released is 18 years or older, and has a pre-existing relationship with the child, although this need not necessarily be a blood relationship. For children in boarding school or residential care, the teacher or care-worker may stand in as a guardian.

4.4.3 Assessment

The Provincial Department of Social Development will ensure that:

(i) every arrested child is assessed by a probation officer as soon as possible and not later than 48 hours of the arrest having taken place

(ii) a sufficient number of trained staff are made available in the area of service to undertake such assessments

(iii) probation services liaise between the residential care facilities (run or subsidized by the Department of Social Development) and the Court, ensuring that the Courts are informed about the various facilities, and the availability of places in each facility on an ongoing basis.

The assessment will be recorded on an assessment form. It will include the following relevant information:

- (i) name
- (ii) address
- (iii) age (source included)
- (iv) CAS number, police station and investigating officer's name
- (v) availability of parents/guardians and attempts to contact them
- (vi) relevant background information

It will also contain recommendations regarding:

- (i) diversion
- (ii) release into care of parents/guardians
- (iii) placement (and availability of places in recommended facility)
- (iv) age estimation

The Department of Justice and Constitutional Development will assist the Provincial Department of Social Development by:

(i) Ensuring that probation officers have easy access to all children appearing in the Courts, including those appearing in the ordinary (not "juvenile") district Courts

(ii) Designating one Court within a district to deal with all juvenile matters, as far as is reasonably possible

(iii) Challenging of Regional Court cases involving juveniles through one Regional Court where reasonably possible

(iv) Allowing adequate time for assessments to take place on the morning of the first appearance, if such assessments have not already been completed

(v) Notifying Probation Services if a child is due to appear in Court and has not been assessed, and make such child available for assessment

4.4.4 After Assessment, Prior to Appearance in Court

(i) The Probation Officer will hand over the completed assessment form to the prosecutor, and, where possible, should discuss or explain the recommendations

(ii) The Prosecutor will peruse the completed assessment form, together with the docket and will make a decision regarding whether or not to prosecute

(iii) If the matter is to be remanded for further investigation or for trial, the issue of placement will also need to be considered

(iv) The Probation Officer will inform the Prosecutor as to availability of places at the various facilities. If further information is required regarding placement, the Prosecutor can ask for such information to be provided by the Probation Officer

(v) If it appears likely that the child can be released into the care of the parent or guardian but such persons are not present at the Court, the matter should stand down, and the Prosecutor must request the Probation Officer and Investigation Officer to make all reasonable efforts to ensure that the parents or guardians come to Court. If they do not come to Court on that day the remand date to be recommended by the Prosecutor should be for a matter of a few days.

4.4.5 First Appearance in Court

At the first appearance in Court, consideration will be given to the completed assessment form and the recommendation of the Probation Officer regarding release or suitable placement, including availability of places in the recommended facility. If the magistrate does not agree with the Probation Officer's recommendation, the Probation Officer should, where possible, be called to give reasons to support his or her recommendation.

The options for placement to be considered are set out below hierarchically. The least restrictive options should be considered first:

- (i) Release of children into the care of parents/guardians. If it seems likely that the child could be released to parents or guardians but that all efforts to get such person(s) to Court on that day have failed, the child should be remanded to a suitable placement, based on the recommendation of the Probation Officer, for a short period of time;
- (ii) The placement of the child into the care of the parent/guardian, with additional conditions such as regular reporting to the police or to the Probation Officer. This option would be suitable where the family is willing and able to take the child into their custody but the Court has some concerns about abscondment;
- (iii) The placement of the child in a place of safety;
- (iv) The placement of the child in a secure care facility;
- (v) The suitability of setting bail in an affordable amount; and
- (vi) Detention in prison as a last resort and for the shortest possible period of time

4.4.6 Remands

According to the current law, children awaiting trial in prison must be remanded for periods of no longer than 14 days. The idea of bringing children back to Court regularly was aimed at giving children an opportunity to raise problems or concerns with the magistrate regarding his or her placement, and thus attempted to serve as a monitoring system for children in detention. It is recognized that the practical application of these regular remands tends to place an additional burden on the Courts and even adds to the possibility of delays in the case, thus ultimately having a negative result for the child in some instances. For these reasons the draft Child Justice Bill published by the SA Law Commission extends this 14 days remand period to 30 days. However, until such time as the new law has been passed, the 14 days remand rule should be observed.

The Department of Social Development can use remands as an opportunity to suggest a new placement for the child if, for example, it has become apparent that the child has been inappropriately placed, or if a vacancy has become available in a more suitable placement option. The social workers at the residential facilities should contact the Probation Officer at the Court or the Prosecutor and arrange to have a new recommendation made to the Court. Police must transport children awaiting trial in facilities run by the Department of Social Development to and from Court for remand and trial appearances.

Dockets regarding child accused must be read very carefully at each remand, and the Prosecutor should assess the progress of the investigation and the prospects of a successful prosecution. If the prospects of a successful prosecution appear to be dwindling, consideration should be given to the release of the child, even if the matter is to remain on the roll.

In order to streamline the process of very regular remands of children, Courts may consider clustering the remands for certain days of the week, for example, on Tuesdays and Fridays, thus providing days which are clear of remands on which trials can be heard. In areas where the prisons have been designated as places of sitting (Pretoria and Port Elizabeth) consideration can

be given to clustering the remands and doing them on two days every week in the prison. If this is done, due regard must be had to enable their families to attend such remands where this is possible.

It should be noted that the 14 days remand rule also places pressure on parents, guardians or other family members who are required to attend each hearing. Whilst the presence of such persons to support children should always be encouraged, Court personnel should be sensitive to the fact that working parents may not be able to be absent from work every two weeks for long periods of time. It is possible to release them from this responsibility, provided that measures are taken to ensure that they are present on the date of trial, either by being warned by the Court, or through the assistance of the police to appear on the trial date.

4.4.7 Requisitions

Where, in the opinion of a manager of a residential facility, a child has been placed inappropriately and a more appropriate placement option is available, the child can be requisitioned to Court for a change of the order to be considered.

If a child has been placed in a residential facility because his or her parent or guardian was not at Court on the first appearance, but the parent or guardian is now available and is willing to take the child in their custody, the child can be requisitioned to Court so that the order can be reconsidered.

The social worker at the facility should notify the Probation Officer if a requisition is required, and the Probation Officer will make the necessary arrangements with the Clerk of the Court. Information regarding the specific Court, the child's name and the case number, as well as the next date of appearance will be required for these arrangements to be made. It is the responsibility of the police to do the transporting from the facility to Court for these requisitions. They will need to be notified about this responsibility in good time.

4.4.8 Age Assessment

Where the age of a child is uncertain, and there is reason to believe that he or she may be over the age of 18 years, the Magistrate may make an estimation of the age in terms of section 337 of the Criminal Procedure Act, 1977. Information obtained by the Probation Officer during the assessment process will assist the Court in this regard. It is not necessary to resort to obtaining the assistance of the district surgeon or district medical officer to determine age, but this may be done if it is considered that it will be of value to the Court in making a determination of age.

If it emerges as a clear matter of fact, after a child has been placed in one of the residential facilities, that he or she is 18 years old or older, the social worker at the facility may ask the Probation Officer or the Prosecutor to bring this to the attention of the Court on the date of next appearance. If the matter appears urgent, for example because the young person poses a threat to children in the facility, the social worker may ask the Probation Officer or Prosecutor to make arrangements for the child to be requisitioned to Court. The social worker or a child care worker from the facility should make himself or herself available to give evidence regarding age where this is necessary or appropriate, and the Court should hear and take note of evidence in this regard.

4.4.9 Monitoring

The situation of children should be monitored within each district. This can be achieved through an inter-sectoral meeting, which should take place preferably on a monthly basis but not less than four times per year. Many of the larger towns and cities already have such structures.

The meetings should be attended by representatives of:

- (i) the Department of Justice and Constitutional Development
- (ii) the Office of the DPP

- (iii) the Department of Social Development (preferably probation services and a representative from the residential care services)
- (iv) the Department of Correctional Services
- (v) the SAPS
- (vi) the Department of Education
- (vii) relevant NGOs, especially those providing services such as diversion programmes.

At these meetings cognisance should be taken of the number of children in custody, both prisons and Social Development facilities, the number of children diverted, the number of cases where children have been in custody for a period of more than three months, and more than six months. The purpose of keeping and examining these figures is to give attention to problems and ensure that priority attention is given to cases where children have been in custody for long periods of time. The meetings should provide an opportunity for the partners to raise issues and improve inter-sectoral management systems to make the system operate more efficiently. Crisis issues such as injuries or deaths of children during arrest or whilst in custody, over-crowding in facilities and escapes from facilities should be dealt with on an urgent basis, perhaps through sub-committees appointed by the meeting. Relevant national departments should be notified about these crisis issues. In the proposed new system such local inter-sectoral structures will become the core structure of a new monitoring system.

4.5 General Comments on Current Position

From the above protocol, the Constitution, 1996 and the amendments to several of the Acts, it is clear that the Government is serious in its vision to protect the children in South Africa. Sloth-Nielsen and Muntingh (1999:73) however points out that by October 1998 there were 1 440 children awaiting trial in prisons, the highest since September 1996. Redpath (2002:9) indicates that there were a total of 6705 children in prison in 2000. The increase in the number of children awaiting trial in prisons is in all likelihood the result of the

increasing period of time it takes to finalise cases as well as the limited availability of alternative places of safety.

According to Skelton (1994:103) in our current system, much goes wrong in the short period shortly after arrest. The guardians are not contacted, no assessment of the child is made, and few attempts are made to divert the children from the criminal justice system.

The establishment of a special centre to which every arrested child could be brought upon arrest, could provide a suitable first stop for the child. Once brought in by the arresting officer immediately after the arrest, the child could be dealt with by a social worker who would assess each child and decide whether the child is suitable for diversion, or whether the child should go before a children's Court inquiry, and so on.

There may be some cases where, because of the seriousness of the crime, coupled with the risk of abscondment and danger to the community, a child may need to be held in a secure lock-up facility until he or she can be brought before a magistrate for a formal custody hearing.

There are possible problems with the type of centre that have been described. The centres would have to be open 24 hours a day, and would therefore need to have sufficient staff to work on a shift system.

While this type of centre can easily be envisaged in urban areas, the situation in rural areas would be very different.

For this reason a safety net has to be established in order to protect all children from being held in custody unnecessarily. This can be achieved by severely limiting the length of time a child can be held in custody.

Zaal and Skelton (1998:548) further points out that a matter of particular concern in South Africa is the situation of children awaiting trial in state custody. From the moment that a child is deprived of his or her liberty pending a trial, there is a need for the child to be provided with supportive

professional assistance. Lawyers who represent children in our current system should aim to have children released into the care of their parents or guardians. However, children who no longer live at home or whose parents are unable or unwilling to take them into their care may pose some difficulties. In these cases, if no community placement can be found, referral to a place of safety or a secure care facility will often be appropriate. Legal representatives should be no less zealous, however, when a child is in an alternative facility, as all deprivation of liberty presents risks.

The setting of bail is fairly common in cases where children are facing more serious charges. Although there is nothing in law to preclude the setting of bail for children accused of crime, legal representatives can and should argue instead for the possibility of the child being released into the care of parent or guardian without monetary bail having to be paid. Extra conditions might be agreed upon to secure the release of the child, such as reporting to a police station or compulsory school attendance.

South Africa has never had a separate system for dealing with persons under the age of 18 charged with criminal offences. The justice system has generally treated juveniles as smaller versions of adult offenders. So in devising a juvenile justice system we are in a sense starting from the beginning (Skelton 1996:180).

4.6 The Child Justice Bill, 49 of 2002

4.6.1 The Provisions in the Child Justice Bill, 2002 regarding Securing Attendance at the Preliminary Inquiry:

“Methods of securing attendance of child at preliminary inquiry

6.(1) The methods of securing the attendance of a child at a preliminary inquiry are–

- (a) arrest;

- (b) summons; or
- (c) a written warning.

(2) Before a police official uses any of the methods contemplated in subsection (1), he or she may open docket for the purposes of consideration by the Director of Public Prosecutions or a prosecutor designated thereto by the Director as to whether or not the matter should be set down for the holding of a preliminary inquiry.

Arrest

7.(1) Unless there are compelling reasons justifying an arrest, a child may not be arrested for an offence contemplated in Schedule 1.

(2) (a) A warrant of arrest issued under section 43 of the Criminal Procedure Act in respect of a child must direct that the child be brought to appear at a preliminary inquiry.

(b) Where a warrant of arrest has been executed outside normal Court hours, the police official concerned must take into account the principles set out in section 3(2).

(3) (a) The police official effecting the arrest of a child must -

(i) inform the child of the nature of the allegation against him or her;

(ii) inform the child of his or her rights in the prescribed manner; and;

(iii) explain to the child the immediate procedure to be followed in terms of this Act; and

(iv) notify the child's parents or an appropriate adult of the arrest.

(b) The National Commissioner of the South African Police Service must issue a national instruction with regard to the procedure to be followed when notifying a child's parent or an appropriate adult of the arrest.

(4) A police official, or where possible the police official who has arrested a child; must not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested of such arrest in the prescribed manner.

(5) (a) Any child who has been arrested must, whether an assessment of the child has been effected or not, be taken by a police official to appear at a preliminary inquiry within 48 hours after arrest or, if the 48 hours expired outside Court hours or on a day which is not a Court day, no later than the end of the first Court day after the expiry of the 48 hours.

(b) If a police official is unable to inform a probation officer of the arrest, the police official must submit a written report to the inquiry magistrate at the preliminary inquiry furnishing reasons for the non-compliance.

(6) Where a child accused of an offence referred to in Schedule 1 has not been released from detention in police custody before appearing at a preliminary inquiry, the investigating police official must provide the inquiry magistrate with a written report in the prescribed manner giving reasons why such child could not be released from detention.

(7) A police official may not arrest a child under the age of 10 years alleged to have committed an offence, but -

(a) must inform the relevant probation officer of such particulars regarding the child as may be prescribed; and

(b) may remove the child to a place of safety in terms of section 12 of the Child Care Act, 1983 (Act 74 of 1983), if the police official has reason to believe that the child is a child referred to in section 14(4) of that Act.

Summons

8.(1) A summons issued in respect of a child in terms of section 54 of the Criminal Procedure Act must specify the place, date and time of the preliminary inquiry.

(2) A copy of the summons served on a child must be served on the child's parent or an appropriate adult.

(3) A police official must -

(a) not later than 24 hours after the service of the summons inform the probation officer concerned of the serving of such summons in the prescribed manner;

(b) as soon as it reasonably possible, but before the commencement of the preliminary inquiry, explain the rights contemplated in section 7(4) to the child concerned.

Written warning to appear at preliminary inquiry

9.(1) A police official may warn a child to appear at a preliminary inquiry at a specified time on a specified date and to remain in attendance at the proceedings relating to the offence in question.

(2) A police official who warns a child under subsection (1), must warn the child's parent or an appropriate adult to bring the child or cause the child to be brought to appear at the preliminary inquiry and to have the child remain in attendance at the proceedings relating to the offence in question.

(3) A police official who warns a child under subsection (1) must complete and hand to the child and to the child's parent or appropriate adult, as the case may be, a written notice on which must be entered the offence in respect of which the child is being warned and the date on which and the time and place at which the child must appear.

(4) The police official must -

(a) when he or she hands the written notice to the child, the child's parent or the appropriate adult, as the case may be -

(i) inform such child, parent or appropriate adult of the nature of the allegation against the child;

(ii) inform such child, parent or appropriate adult or his or her rights in the prescribed manner; and

(iii) explain to such child, parent or appropriate adult the immediate procedures to be followed in terms of this Act; and

(b) not later than 24 hours after handing the warning to the child inform the probation officer concerned accordingly in the prescribed manner.

(5) Section 55 of the Criminal Procedure Act applies with the changes required by the context to a written warning handed to a child, the child's parent or an appropriate adult under subsection (3).

Uncertainty as to child's age

10. If a police official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that the age would render that person subject to this Act, the official must treat such person as a child for the purposes of this Chapter, subject to the estimation of the person's age at the preliminary inquiry.

Release of child into care of parent or appropriate adult before preliminary inquiry

11.(1) A police official must release a child who is in detention in police custody and who is accused of an offence referred to in Schedule 1 into the care of the child's parent or an appropriate adult before the child appears at the preliminary inquiry, unless –

(a) exceptional circumstances as prescribed in this Act warrant detention;

(b) the child's parent or appropriate adult cannot be located or is not available and all reasonable efforts have been made to locate such parent or appropriate adult; or

(c) there is a substantial risk that the child may be a danger to any other person or to himself or herself.

(2) (a) A police official may, in consultation with the Director of Public Prosecutions or a designated prosecutor, release a child who –

(i) is in detention in police custody and who is accused of an offence referred to in Schedule 2; or

(ii) is accused of an offence referred to in Schedule 1 but has not been released in terms of subsection (1),

into the care of such child's parent or an appropriate adult on any one or more of the conditions referred to in paragraph (b).

(b) A child may be released in terms of paragraph (a) on condition that the child -

(i) appears at a specified place and time for assessment;

(ii) does not to interfere with a witness, tamper with evidence or associate with a person or group of specified people; and

(iii) resides at a particular address.

Director of Public Prosecutions may authorise release of children

12. The Director of Public Prosecutions or a prosecutor designated thereto by the Director may, notwithstanding the decision of a police official to the contrary, authorize the release of a child contemplated in section 11(2) from detention in police custody into the care of the child's parent or an appropriate adult upon any of the conditions referred to in that section, and if such release is authorized, the written notice referred to in section 13(1)(a) must be handed to the child and to the person into whose care the child is released.

Duty of police official and person into whose care child is released upon release of child

13. A police official who release any child from detention in accordance with section 11(1) or (2) or who releases a child upon direction of the Director of Public Prosecutions or a prosecutor designated thereto by the Director in accordance with section 12 and places such child in the care of a parent or an appropriate adult, must -

(a) at the time of the release of the child, complete and hand to the child and to the person into whose care the child is released, a written notice in the prescribed form on which must be entered the offence in respect of which the child is being accused, any conditions relating to the release of the child and the place, date and time at which the child must appear for a preliminary inquiry;

(b) warn such parent or appropriate adult to bring the child or cause the child to be brought to appear at the preliminary inquiry at a specified place, date and time and to remain in attendance and, if any conditions have been imposed, to see to it that the child complies with such conditions; and

(c) warn the child to appear at the preliminary inquiry at a specified place, date and time and to remain in attendance and, if any conditions have been imposed, to comply with such conditions.

Release of child on bail before preliminary inquiry

14.(1) Notwithstanding section 59(1)(a) of the Criminal Procedure Act, a police official may, in consultation with the police official charged with the investigation, authorize the release of a child accused of an offence referred to in Schedule 1 on bail prior to the appearance of that child at a preliminary inquiry if the release of the child into the care of such child's parent or an appropriate adult is for any reason not appropriate.

(2) The National Commissioner of the South African Police Service may, after consultation with the National Director of Public Prosecutions, issue a national instruction regarding the amounts to be set for bail in terms of subsection (1).

(3) Notwithstanding section 59A(1) of the Criminal Procedure Act, the Director of Public Prosecutions or a prosecutor authorized thereto in writing by the Director of Public Prosecutions may, in consultation with the police official charged with the investigation, authorise the release of a child accused of an offence referred to in Schedule 2 on bail prior to the appearance of that child at a preliminary inquiry subject to reasonable conditions if the release of the child into the care of such child's parent or an appropriate adult is for any reason not appropriate.

(4) The National Director of Public Prosecutions may, after consultation with the Minister of Justice and Constitutional Development, issue directives regarding the amounts that may be set for bail in terms of subsection (3).

Children accused of certain offences not to be released from detention

15. Subject to section 16, a police official may not release a child accused of an offence referred to in Schedule 3 from detention in police custody.

Detention in place of safety in lieu of detention in police custody

16. If a child cannot be released into the care of a parent or an appropriate adult or cannot be released on bail the child must, in lieu of detention in police custody, be placed in a place of safety if such place is available within reasonable distance from the place where the child has to appear for a preliminary inquiry and there is a vacancy.

Duty of police official in respect of child

17.(1) (a) Where a child in detention in police custody complains of an inquiry sustained during arrest or whilst in detention, the police official to whom such complaint is made must report the complaint to the station commissioner who must delegate a police official to take the child to a medical practitioner for examination as soon as is reasonable possible.

(b) The report by the medical practitioner must be included in the appropriate police docket.

(2) The police official responsible for a case must ensure that the child concerned is assessed before the commencement of the preliminary inquiry and may use police transport for that purpose.

Register of child in detention in police cells

18.(1) The station commissioner of each police station must keep a register in which prescribed details regarding the detention in police cells of all children must be distinctively recorded.

(2) The register may be examined by such persons as may be prescribed.”

The Child Justice Bill, 2002 sets out three methods of securing a child’s attendance at subsequent proceedings, namely, arrest, summons and a written warning. The Child Justice Bill, 2002 encourages the preferential use of alternatives to arrest.

Where a child is arrested, the arrest must be made with due regard to the dignity and well-being of such child and only if it is clear that a child cannot be arrested without the use of force, may such force as is reasonably necessary and proportional to the circumstances be used to overcome any resistance or to prevent the child from fleeing.

4.6.2 Release from Detention

“Release of child into care of parent or appropriate adult at preliminary inquiry

33.(1) The inquiry magistrate must release a child who is in detention into the care of a parent or an appropriate adult if –

(a) the case is not disposed of at the first appearance at the preliminary inquiry; and

(b) it is in the best interests of justice to so release the child.

(2) In considering whether or not it would be in the interests of justice to release a child into the care of a parent or an appropriate adult, the inquiry magistrate must have regard to the recommendation of the probation officer and all other relevant factors, including-

(a) the best interests of the child

(b) whether the child has an previous conviction;

(c) the availability of the child’s parent or an appropriate adult;

(d) the likelihood of the child returning to the preliminary inquiry for a further appearance;

(e) the period of which the child has already been in detention since arrest;

(f) the probable period of detention of the child until conclusion of the preliminary inquiry;

(g) the risk that the child may be a danger to himself or herself or to any other person;

(h) the state of health of the child;

(i) the reason for any delay in the disposal or conclusion of the preliminary inquiry and whether such delay was due to any fault on the part of the State or on the part of the child or his or her legal representative;

(j) whether detention would prejudice the child in the preparation of the defence case;

(k) the likelihood that, if the child is convicted of the offence, a sentence of substantial imprisonment will be imposed;

(l) the fact that the child is between 10 and 14 years of age and presumed to lack criminal capacity; and

(m) the receipt of a written confirmation by the Director of Public Prosecutions to the effect that he or she intends to charge the child with an offence in Schedule 3.

(3) The inquiry magistrate may, in releasing a child into the care of the child's parent or an appropriate adult, impose one or more of the following conditions, namely that the child –

(a) must appear at a specified place and time;

(b) must report periodically to a specified person or place;

(c) must attend a particular school;

- (d) must reside at a particular address;
- (e) must be placed under the supervision of the specified person; or
- (f) may not to interfere with any witness, tamper with any evidence or associate with any person or group of specified people.

(4) If the inquiry magistrate releases the child into the care of a parent or an appropriate adult, the inquiry magistrate must warn the parent or adult, as the case may be, to bring the child to appear, or ensure that the child appears, at a specified place and time and, if a condition has been imposed in terms of this section, to see to it that the child complies with such condition.

(5) Any person in whose care a child is placed and who fails to comply with subsection (4) is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.

(6) Subject to sections 69 and 71, a child who has been released into the care of a parent or an appropriate adult and who fails to comply with any condition imposed in terms of subsection (3) is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.

Release of child on own recognisance

34.(1) An inquiry magistrate may release a child on his or her own recognisance after consideration of the factors contemplated in section 33(2), with or without conditions as set out in section 33(3), and must order the child to appear at a preliminary inquiry at a specified place and time.

(2) Subject to sections 69 and 71, a child who has been released on his or her own recognisance and who fails to appear at the preliminary inquiry at the place and time contemplated in subsection (1) or to comply with any condition imposed in terms of subsection (1) is guilty of an offence and liable upon

conviction to a fine or to imprisonment for a period not exceeding three months.

Release of child on bail by inquiry magistrate

35.(1) An inquiry magistrate may, if the release of a child on his or her own recognisance or into the care of a parent or an appropriate adult is for any reason not possible, after consideration of the factors contemplated in section 33(2), release the child on bail subject to any one or more of the conditions contemplated in section 33(3).

(2) If bail has been granted previously for a child appearing at a preliminary inquiry by a police official in terms of section 14(1) or by the Director of Public Prosecutions or a prosecutor designated thereto by the Director in terms of section 14(3), the inquiry magistrate may extend the bail on the same conditions, amended conditions or additional conditions and may increase or reduce the amount of bail.

Further detention of child after first appearance

36.(1) (a) An inquiry magistrate may order the further detention of a child in a place of safety or a secure care facility if such place or facility is available within a reasonable distance from the place where the preliminary inquiry is held, if –

(i) the proceedings of a preliminary inquiry are postponed in terms of section 37 or 38; and

(ii) the release of a child on his or her own recognisance, into the care of a parent or an appropriate adult or on bail is for any reason not possible.

(b) If a place of safety or secure care facility is not available or if there is no vacancy the child may be detained in a police cell as long as the detention facilities at the police station -

- (i) are suitable for the detention of children; and
- (ii) provide for children to be detained separately from adults.

(2) An inquiry magistrate may order the further detention of a child in a place of safety or a secure care facility or, subject to subsection (4), a prison, if -

- (i) the child is to appear for plea and trial as contemplated in section 42(1); and

- (ii) the release of a child on his or her own recognisance, into the care of a parent or an appropriate adult or on bail is for any reason not possible.

(3) The inquiry magistrate must have regard to the recommendations of the probation officer when deciding on the placement of the child as contemplated in subsection (1) or (2).

(4) (a) A child of 14 years or older charged with an offence referred to in Schedule 3 may be detained in prison if –

- (i) there is no place of safety or secure care facility within a reasonable distance of the preliminary inquiry at which the child is appearing;

- (ii) there is no vacancy in the place of safety or secure care facility; or

- (iii) there is a substantial risk that the child will cause harm to other children in the place of safety or secure care facility.

(b) An inquiry magistrate who makes an order that a child be detained in prison must record the reasons for making such an order.

(5) (a) If an inquiry magistrate orders the further detention of a child in terms of subsections (2), the child must appear before the magistrate at least every 60 days if detained in a place of safety or secure care facility and at least every 30 days if detained in a prison.

(b) When the child appears before the inquiry magistrate, the magistrate must -

(i) determine whether or not the detention remains necessary;

(ii) if ordering further detention of the child, record the reasons for the detention;

(iii) consider a reduction of the amount of bail, if applicable;

(iv) inquire whether or not the child is being properly treated and kept under suitable conditions; and

(v) if not satisfied that the child is being properly treated and kept under suitable conditions, inspect and investigate the treatment and conditions and may make an appropriate remedial order.”

4.6.3 Schedules 1 – 3 of the Child Justice Bill, 2002 :

“Schedule 1

(Sections 7, 11, 14, 62 and 69)

1. Assault where grievous bodily harm has not been inflicted.
2. Malicious injury to property where the damage does not exceed R500.
3. Trespass.
4. Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed R500 in value.
5. Theft, where the value of the property involved does not exceed R500.

6. Any statutory offence where the maximum penalty determined by that statute is three months imprisonment or a fine in equivalence with the Adjustment of Fines Act, 1991 (Act 101 of 1991).
7. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2

(Sections 11 and 14)

1. Public violence.
2. Culpable homicide.
3. Assault, including assault involving the infliction of grievous bodily harm.
4. Arson.
5. Any offence referred to in section 1 of 1A of the Intimidation Act, 1982 (Act 72 of 1982).
6. Housebreaking, whether under common law or a statutory provision, with intent to commit an offence, if the amount involved in the offence does not exceed R20 000.
7. Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000.
8. Theft, where the amount involved does not exceed R20 000.
9. Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed R20 000-00 in value.
10. Forgery, uttering of fraud, where the amount concerned does not exceed R20 000.
11. Kidnapping
12. Any statutory offence where the penalty concerned does not exceed R20 000.
13. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 3

(Sections 15, 33, 36, 58 and 81)

1. Murder.
2. Rape.
3. Robbery –
 - (a) where there are aggravating circumstances; or
 - (b) involving the taking of a motor vehicle
4. Indecent assault involving the infliction of grievous bodily harm.
5. Indecent assault on a child under the age of 16 years.
6. Any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act 140 of 1992) if –
 - (a) the value of the dependence producing substance in question is more than R50 000; or
 - (b) the value of the dependence producing substance in question is more than R10 000 and that the offence was committed by a person, group of persons, syndicate or any other enterprise acting in the execution or furtherance of a common purpose or conspiracy.
7. Any offences relating to –
 - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; **or**
 - (b) the possession of a firearm, explosives or armament.
8. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft –
 - (a) involving amounts of more than R50 000; or
 - (b) involving amounts of more than R10 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
9. Any conspiracy or incitement to commit any offence referred to in this Schedule or an attempt to commit any of the offences referred to in Items 1, 2 or 3 of the Schedule.”

The presiding magistrates were requested to indicate whether juveniles should be detained at all. They responded as follows:

Table 3 Juveniles offenders should be detained

Options	Frequency	Percent
Yes	72	74.2
No	25	25.8
Total	97	100.0

Table 3 indicates that the majority of the magistrates, 72 (74,2 percent) are in favour of juveniles being detained. Only 25 (25,8 percent) of the magistrates felt that juveniles should not be detained at all. Some of the reasons for this could be because of the fact that juveniles, in some cases, do commit very serious crimes and therefore they should be detained to ensure that they attend court, to protect the community against further crime and maybe because the parents or guardians can not control them at home.

The presiding magistrates were also requested to indicate what the best method is to secure a juvenile's attendance at court. They responded as follows:

Table 4 The best method to ensure a juvenile's attendance at court

Options	Frequency	Percent
Arrest	22	22.7
Summons	2	2.1
Written warning	4	4.1
Bail	1	1.0
Parental responsibility	68	70.1
Total	97	100.0

Table 4 indicates that the majority, that is 68 (70,1 percent) of the magistrates are of the opinion that the best method to ensure that a juvenile offender attends the court hearing, is to release him/her in the custody of his/her parent or guardian. It should be noted that the research found that more magistrates, that is 39 who did not look at the Child Justice Bill, 2002 were of the opinion that parental responsibility is the best method to ensure a juvenile offender's attendance at court (Chi-square 11,715; Df. 4; Prob. 0,020). The reason for this could be because the magistrates want to ensure that the parents also

attend the court; to ensure that they are aware of the criminal matter and to limit the disruption in the juvenile's live to the minimum, especially in less serious matters. Respondent 047 made the following comment in this regard: "It should be the responsibility of the parents to bring a juvenile to court and the question of bail should be out."

The presiding magistrates were asked about their views regarding the question of the releasing of juvenile offenders on bail. They responded as follows:

Table 5 Juvenile offenders should be released on bail

Options	Frequency	Percent
Definitely agree	4	4.1
Agree	42	43.3
Disagree	33	34.0
Definitely disagree	18	18.6
Total	97	100.0

Table 5 indicates that most of the magistrates, that is 42 (43,3 percent) agree that juvenile offenders should be released on bail. The reason for this could be due to the seriousness of the crimes that juveniles often commit. Another group of 33 (34 percent) disagreed with the releasing of juveniles on bail. The reason for this could be that when the juvenile is required to pay bail, and the parents cannot afford to pay the bail, the juvenile has to stay incarcerated.

The following comments were made by the respondents with regard to detention:

Respondent 062: "Places of safety are not equipped to control minors and there are not enough places of safety."

Respondent 064: "There should be special facilities to send juvenile prisoners to which will specifically deal with rehabilitation of the juvenile and which will further educate/train the juvenile prisoner so that he will have something to fall back on after his release. Due to the hardships that many of the juveniles

endure, lack of funds for education, they may resort/revert back to a life of crime.”

Respondent 075: “Where the offence is so serious, I think a juvenile should be detained and bring a formal bail application before he/she is released.”

Respondent 083: “You cannot adopt a single universal policy in respect of juvenile offenders. It must be assessed on the basis of the individual facts and circumstances of each particular case. For example, a kid who steals a slab of chocolate from a shop could well be brought to court by way of parental responsibility (if the parents can be contacted and if available). Some kids (street children) have no parental care. Yet, a 15-year-old child who breaks into a person's home with others, robs the occupants at gunpoint and partakes in the gang rape of the female occupants of the home is obviously to be treated differently. He should be arrested and detained in custody until the matter is finalised.”

Respondent 085: “Some juveniles are hardened criminals, some are street kids and their guardians cannot manage some, so they have to be detained.

4.7 Forensic application

It is important for a forensic criminologist to be informed of the guidelines and law regarding the detention of children, since he/she will have to consult with the juvenile to be in a position to compile a report. To save time in locating the juvenile he/she will be in a better position if he/she knows where the juvenile ought to be, and where to find out if he/she cannot trace the child at the said place.

4.8 Conclusion

From the above it is clear that children should only be detained as a measure of last resort only and when detention is unavoidable. It should be for the

shortest period possible and they should be treated with humanity and their needs according to their age should be taken into account.

In terms of the Child Justice Bill, 2002, the police have limited powers regarding the arrest and detention of child offenders. The Child Justice Bill, 2002 puts more control measures in place for the detention of children and this will have a positive impact on juvenile offenders and their well being. The Child Justice Bill, 2002 also widens the scope for more active involvement by all the role-players involved in the prevention, control and monitoring of juvenile crime. The majority of the magistrates are in favour of the detention of juvenile offenders and they also indicated that the best method to ensure a juvenile's attendance at court is to release him/her in the custody of his/her parents. Most of the magistrates agreed that juvenile offenders should be released on bail.

In Chapter 5 the issue of legal representation will be highlighted.

CHAPTER 5

LEGAL REPRESENTATION

5.1 Introduction

The right to legal representation is a widely accepted fundamental right. The right of legal representation in criminal matters where children are involved are also recognised in both International Instruments and our Constitution, 1996.

In this chapter the provisions of the International Instruments will regard to legal representation for children will be highlighted. The current position in South Africa regarding legal representation for children and assistance by parents or guardians will be discussed.

The provisions of the proposed Child Justice Bill, 2002 will also be pointed out.

5.2 Grounding

The fundamental aim of the criminal trial can be described in the broadest terms as the attainment of justice, encompassing the establishment of criminal liability and the determination, if necessary, of an appropriate penalty, in a manner which is fair to all parties involved. The values and principles according to which liability and penalties are determined are shared by most Western legal systems and are called the principles of due process. The procedures, by means of which these common principles may be pursued, vary according to jurisdiction. In the Anglo-American common law jurisdiction the mode of procedure is adversarial, while on the European continent it is inquisitorial.

South Africa has inherited from England the adversary mode of procedure. The English legal profession, its rules and traditions, have also been

replicated. Because of the party-centred nature of the adversary system, lawyers for both the State and the defence play a prominent, if not dominant role in the pursuit of procedural justice. Yet legal representation is available at a price and this has meant that it has remained the privilege of few due to the indigence of most accused. As a result, the majority of accused in South Africa face a trial within the adversary system without a defence lawyer.

In a system predicated upon full participation by the parties in the pursuit of justice, the undefended accused will be severely handicapped should he lack legal knowledge and expertise. His difficulties may be exacerbated by problems such as illiteracy, language difficulties, and class or cultural differences. The problem to be confronted, then, is how a fair trial is to be achieved in the South African criminal justice system for those accused who cannot afford legal representation.

The accepted solution in Anglo-American jurisdictions has been the provision of State-funded legal aid. This, when fully implemented, would ensure equality of the parties, which is a precondition for the pursuit of a fair trial in the adversary system. This option will not be available to meet the needs of the majority of indigent accused in South Africa in the foreseeable future, due to the large number of potential candidates for legal aid, the shortage of lawyers and the lack of State-funding.

The accused's right to legal representation has been called the most pervasive right of an accused, and of fundamental character. In the context of adversary procedure it has been shown that legal representation is essential to the attainment of a fair trial. Legal services, controlled by an independent legal profession, have traditionally been a commodity available only at a price. However, once the assistance of a defence lawyer is recognized as an essential requirement for a fair trial, the doctrine of equality before the law, the cornerstone of legal systems in the Western liberal tradition, demands that all accused persons should have access to the services of a lawyer.

The response in the Anglo-American jurisdictions to the indigent, and hence undefended accused, has been the provision of free legal assistance to

certain classes of accused to ensure, by placing the accused on an equal footing with the prosecution, a fair trial.

Court-appointed counsel for indigent accused was thus justified in order, firstly, to equalize the standing of the accused *vis-à-vis* the prosecutor, and secondly, to equalize the accused *vis-à-vis* other accused who have the money to brief counsel.

The principle of equality before the law is also regarded as part of the South African common-law tradition. The Roman-Dutch authorities did not spell out the doctrine unequivocally. As a general overriding principle in our legal system, however, it has had a chequered career both in the legislatures and in the Courts.

The idea of equality before the law became an accepted principle during the course of the 19th century in the Cape colony (Steytler 1988:1-12).

5.3 International Perspective

Van Bueren (1995:176) points out that the Convention on the Rights of the Child does not substantially increase existing international procedural safeguards for children, and the rules which contain the maximum number of protection for children, the Beijing Rules, are limited in their scope and their legal enforceability. Nor does the Convention on the Rights of the Child provide an exhaustive list of the pre-trial safeguards for children. When juveniles are apprehended, the Beijing Rules recommend that their parents or guardians should be notified immediately or, if this is not possible, within the shortest possible time. The term guardians is not restricted to legal guardians, but include those who *de facto* have been responsible for the child.

Article 40(2)(b) of the Convention on the Rights of the Child, 1989 provides that the child should be informed promptly and directly of the charges against him or her and if appropriate through his or her parents or legal guardian and

to have legal or other appropriate assistance in the preparation and presentation of his or her defence.

Article 40(2)(b)(ii) of the Convention on the Rights of the Child, 1989 which deals specifically with every child accused of having infringed the penal law, make it mandatory for such a child to receive legal or other appropriate assistance in the preparation and presentation of his or her defence. According to Zaal and Skelton (1998:540) a weakness of article 12 of the Convention on the Rights of the Child, 1989 is that it allows for alternatives to legal representation. Instead of a lawyer, a non-lawyer may be used or the child may even be required to represent him/herself when appearing before a Court (Zaal & Skelton 1998:540).

Rule 15.1 of the Beijing Rules states that the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in a country.

5.4 Current Position in South Africa

In South African the provisions regarding legal representation and assistance by parents or guardians for juvenile offenders are included in the Criminal Procedure Act, 1977; the Constitution, 1996; the Correctional Service Act, 1959 (as amended) and the Child Care Act, 1983.

5.4.1 The Criminal Procedure Act, 1977

Sections 73 and 74 of the Criminal Procedure Act, 1977 provides as follows:

"73. Accused entitled to assistance after arrest and at criminal proceedings

(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(3) An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the Court, requires the assistance of another person at criminal proceedings, may, with the permission of the Court, be so assisted at such proceedings.

74. Parent or guardian of accused under eighteen years to attend proceedings

(1) Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused shall be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings.

(2) The parent or the guardian of the accused, if such parent or guardian is known to be within the magisterial district in question and can be traced without undue delay, shall, for the purposes of subsection (1), be warned to attend the proceedings in question -

(a) in any case in which the accused is arrested, by the peace officer effecting the arrest or, where the arrest is effected by a person other than a peace officer, the police official to whom the accused is handed over, and such peace officer or police official, as the case may be, shall inform the parent or guardian, as the case may be, of the place and date and time at which the accused is to appear; or

(b) in the case of a summons under section 54 or a written notice under section 56, by the person serving the summons on or handing the written notice to the accused, and such person shall serve a copy of such summons or written notice on the parent or guardian, as well as a notice warning the parent or guardian to attend the proceedings in question at the

place and on the date and at the time specified in the summons or written notice.

(3) A parent or guardian who has been warned in terms of subsection (2), may apply to any magistrate of the Court in which the accused is to appear for exemption from the obligation to attend the proceedings in question, and if such magistrate exempts such parent or guardian, he shall do so in writing.

(4) A parent or guardian who has been warned in terms of subsection (2) and who has not under subsection (3) been exempted from the obligation to attend the relevant proceedings, or a parent or guardian who is present at criminal proceedings and who is warned by the Court to remain in attendance thereat, shall remain in attendance at the relevant criminal proceedings, whether in that Court or any other Court, unless excused by the Court before which such proceedings are pending.

(5) If a parent or guardian has not been warned under subsection (2), the Court before which the relevant proceedings are pending may at any time during the proceedings direct any person to warn the parent or guardian of the accused to attend such proceedings.

(6) A parent or guardian who has been warned under subsection (2), (4) or (5) and who fails to attend the proceedings in question or, as the case may be, who fails to remain in attendance at such proceedings in accordance with the provisions of subsection (4), shall be guilty of an offence and liable to the punishment prescribed under subsection (7).

(7) The Court, if satisfied from evidence placed before it that a parent or guardian has been warned to attend the proceedings in question and that such parent or guardian has failed to attend such proceedings, or that a parent or guardian has failed to remain in attendance at such proceedings, may issue a warrant for the arrest of such parent or guardian and, when he is brought before the Court, in a summary manner enquire into his failure to attend or to remain in attendance, and, unless such parent or guardian satisfies the Court that his failure was not due to fault on his part, sentence

him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

5.4.2 The Constitution, 1996

In comparison to the Convention on the Rights of the Child, 1989, the South African Constitution, 1996 provides better protection since it does not allow for non-lawyers to substitute for lawyers in Court proceedings. Section 28(1)(h) of the Constitution, 1996 creates a right to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child and section 35(3)(g) allows similarly for all accused persons, including children to have a legal practitioner assigned by the State, at State expense in criminal matters. This right to legal representation applies only if substantial injustice would otherwise result. The right to legal representation is thus both limited in scope and dependent upon a vague, unpredictable ground - the substantial injustice test (Zaal and Skelton 1998:541).

Skelton (1997:171) states that it can be argued that in the majority of cases where a person under the age of 18 years is on trial, a substantial injustice will occur if legal representation is not provided due to the lack of maturity of the young defendant. The magistrate has a duty to explain the right to legal presentation to every accused who appears before the Court.

5.4.3 Correctional Services Act, 1959

Although children who appear as accused persons in the criminal Courts have not yet been awarded an unequivocal statutory right to legal representation, a 1996 amendment to section 29 of the Correctional Services Act, 1959 has enhanced their rights in this regard. The section applies specifically to an accused person under the age of 18 years, and requires that the young person shall as soon as possible after his or her arrest be afforded the opportunity to obtain legal representation as contemplated in section 25 of the Constitution and section 3 of the Legal Aid Act, 1989.

This provision does not confer an absolute right to legal representation because the reference to the Constitution means that the State will pay the fees of such a representative only if substantial injustice would otherwise result. However, it does direct officials to ensure that steps are taken to give young people and others who might have difficulty in conducting their own defence the opportunity to be considered as candidates for the receipt of legal representation (Zaal & Skelton 1998:542).

Skelton (1997:172) indicates that the services offered by the Legal Aid Board are explained by the magistrates to young persons appearing before them, but in most cases the undefended child accused does not make an application to the Legal Aid Board. In over 80 percent of cases accused persons under the age of 18 years appear before the Courts unrepresented. If the young person does opt to apply for legal aid, he or she will be taken to see the legal aid officer who is employed either by the Legal Aid Board or by the Department of Justice, and whose office is usually situated within the magistrate's Court building. However, there is no guarantee that legal aid will be granted.

5.4.4 Child Care Act, 1983

The Child Care Amendment Act, 1996 (Act 96 of 1996) was promulgated on 22 November 1996. In an obvious attempt to move the Child Care Act, 1983 into line with section 28 of the Constitution, 1996, a new section 8A has been created for the Child Care Act, 1983. The new section creates significant new rights for children who are the subject of children's Court proceedings. Section 8A(1) of the Child Care Act, 1983 states that a child may have legal representation at any stage of a proceeding under this Act. The ground for appointment of such a representative is very broad: the children's Court commissioner need merely find that it would be in the best interest of the child. In section 8A(3) children are further accorded a right to request representation at any stage of the proceeding if they are capable of understanding this right. And in section 8A(5) – (6), it is made clear that the costs of representation for a child in children's Court proceedings will, if necessary, be borne by the State.

5.4.5 General Remarks Regarding the Current Position of Legal Representation in South Africa

Zaal and Skelton (1998:543) emphasize that there is at present no separate Court structure for children charged with crimes. In larger urban areas where the numbers of arrested people under the age of 18 years is sufficient to warrant it, one of the Courts may be called a juvenile Court, and children charged with offences at district Court level will be channelled through this Court. However, there is no real specialization in these Courts. The prosecutors and magistrates receive no special training and there is a high turnover of staff (particularly of prosecutors).

A child facing charges in a criminal Court will not possess sufficient knowledge or skills to manage his or her own defence. The imbalance of the ability of a legally qualified prosecutor against that of a not yet fully mature accused person speaks for itself. It is therefore submitted that all children appearing before the criminal Court need legal representation.

Zaal and Skelton (1998:543) are of the opinion that in order to ensure a good overall standard of representation, there is a need for some degree of specialization amongst lawyers who represent accused children. This could be achieved in various ways. Legal Aid Clinics, which train groups of candidate attorneys, could set up child-representation projects. The existing judicare system could be improved by setting up specialized rosters of lawyers who have an interest, experience and ability in representing children. In larger urban centres, it should be possible to set up training seminars for lawyers. Completion of a course of training could thus become a requirement for being placed on the roster. In addition, ongoing education in the form of written information could be sent to lawyers on the specialized rosters.

In the South African Law Commission (1997:266-277) gives some reasons why 80 percent of accused persons under 18 appear before the Courts are unrepresented. These children:

- (i) claim that they were not informed about the possibility of free legal assistance;
- (ii) distrust what they call government lawyers;
- (iii) proclaim that they are innocent and do not need a lawyer;
- (iv) claim that lawyers on legal aid briefs delay and/or prolong cases unnecessarily;
- (v) allege that lawyers coerce them to plead guilty; and
- (vi) say that they would prefer to speak on their own behalf rather than have lawyers speak for them.

5.5 The Child Justice Bill, 49 of 2002

Chapter 9, section 73 – 79 deal with the various issues relating to legal representation for juveniles. The said sections provides as follows:

“Requirements to be complied with by legal representatives

73.(1) A legal representative representing a child must –

(a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;

(b) explain the child’s rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;

(c) promote diversion where appropriate, but may not unduly influence the child to acknowledge responsibility; and

(d) ensure that the trial is concluded without delay.

(2) A legal representative representing a child in terms of this Act must be admitted as an attorney or an advocate.

(3) An attorney referred to in subsection (2) may delegate the power to represent a child to any candidate attorney under his or her supervision.

Access to legal representation

74.(1) A child has the right to give instructions to a legal representative in the language of his or her choice, with the assistance of an interpreter where necessary.

(2) (a) The parent of a child or an appropriate adult may appoint a legal representative of his or her own choice, in which case the payment of the fees for the legal representative rests with that parent or appropriate adult, as the case may be.

(b) A legal representative appointed in terms of paragraph (a) does not have to be accredited under section 77.

Child to be provided with legal representation at State expense in certain instances

75.(1) Subject to the Legal Aid Act, 1969 (Act no 22 of 1969), a child must be provided with legal representation at State expense at the conclusion of the preliminary inquiry if no legal representation was appointed by the parent or appropriate adult and if –

(a) the child is in detention pending plea and trial in a child justice Court;

(b) the proceedings is postponed for plea and trial in a child justice Court and it is likely that a sentence involving a residential requirement may be imposed if the child is convicted of the offence in question; or

(c) the child is under the age of 14 years of age and a certificate contemplated in section 5(3) has been issued in respect of such child.

(2) The prosecutor must indicate to the child justice Court whether he or she is of the opinion that the matter is a matter contemplated in subsection (1)(b) before the child is asked to plead and if so, no plea may be taken until a legal representative has been appointed.

(3) If a child qualifies for legal representation at State expense a request for legal representation must be made to the Legal Aid Officer concerned in the prescribed manner as soon as is reasonably possible.

(4) The Legal Aid Board may designate an attorney or candidate attorney to represent a child.

(5) If the parent or guardians of a child who is granted legal representation at State expense under this Act would otherwise have been ineligible to receive legal representation at State expense due to the fact that the parent or guardian's income exceeds the means test applied by the Legal Aid Board, the Legal Aid Board may recover the costs of the legal representation from such parent or guardian.

Child may not waive legal representation in some circumstances

76.(1) A child contemplated in section 75(1) may not waive his or her right to legal representation.

(2) If a child provided with legal representation declines to give instructions to the appointed legal representative, the legal representative must bring that fact to the attention of the child justice Court, whereupon the child justice

Court must question the child to ascertain the reasons for the child's declination and must note the reasons on the record of the proceedings.

(3) If the child does not wish to have a legal representative, the child justice Court must instruct a legal representative to assist the child.

(4) A legal representative assisting a child in terms of subsection (3) -

(a) must -

(i) attend all hearings pertaining to the case;

(ii) address the child justice Court on the merits of the case;

(iii) note an appeal regarding conviction or sentence at the conclusion of the trial, if he or she considers it necessary, and

(iv) have access to the affidavits and statements filed in the police docket pertaining to the case; and

(b) may -

(i) cross-examine any State witness with the object of discrediting the evidence of such witness; and

(ii) raise reasonable doubt about the admissibility of evidence led by the State and raise objections to the introduction of evidence by the State, when appropriate.

Accreditation of legal representatives

77. A legal representative appointed by the Legal Aid Board pursuant to section 75(1) must be accredited in the prescribed manner."

5.5.1 Summary of the Above Provisions

Requirements to be complied with by legal representatives

Section 73 of the Child Justice Bill, 2002 sets out a number of requirements regarding the appropriate representation of children. The section also requires that a legal representative representing a child must be admitted as an attorney or an advocate, provided that an attorney may delegate the power to represent a child to any candidate attorney under his or her supervision.

Access to legal representation and legal representation at state expense

A child is entitled to legal representation during any procedures under the legislation, and the child or his or her parent or an appropriate adult may appoint a legal representative of own choice (section 74). In terms of section 75 a child must be provided with legal representation at state expense upon the conclusion of the preliminary inquiry if –

- (i) the child is remanded in detention pending plea and trial in a child justice Court;
- (ii) the proceedings is postponed for plea and trial in a child justice Court and it is likely that a sentence involving a residential requirement may be imposed on conviction;
- (iii) the child is at least 10 but not yet 14 years of age and a certificate has been issued by the Director of Public Prosecutions indicating an intention to prosecute such child.

Child may not waive legal representation in some circumstances

A child who is entitled to legal representation at state expense in terms of section 75 may not waive the right to legal representation. If the child indicates that he or she does not want a legal representative, the Court must appoint a legal representative to assist the child. The role of the legal

representative who assists the child under these circumstances is explained in section 76(4)(a) and (b).

The presiding magistrates requested to indicate whether or not juveniles should receive legal representation at the State's expense in all matters where his/her parents cannot afford it. They responded as follows:

Table 6 Juvenile offenders should receive legal representation at the expense of the State when parents cannot afford legal representation

Options	Frequency	Percent
Definitely agree	60	61.9
Agree	30	30.9
Disagree	5	5.2
Definitely disagree	2	2.1
Total	97	100.0

Table 6 indicates clearly that the majority of the presiding magistrates, that is 60 (61,9 percent) definitely agree that legal representation at State's expense should be provided to juvenile offenders in all matters where the parents cannot afford legal representation. Another 30 (30,9 percent) agreed to this suggestion. The reason for this could be to ensure that the child's rights are adequately protected throughout the criminal process. In this regard respondent 022 made the following comment: "Only where imprisonment or reformatory school is a possibility should legal representation at State expense be provided where parents cannot afford legal representation." Respondent 067 made the following comment: "Legal representatives should appear in all cases, they must be versed in pre-sentence reports as well as sentencing options."

The presiding magistrates were asked whether a child should be allowed to waive his/her legal representation in some circumstances. They responded as follows:

Table 7 A child should be allowed to waive his/her legal representation in some circumstances

Options	Frequency	Percent
Definitely agree	12	12.4
Agree	32	33.0
Disagree	35	36.1
Definitely disagree	18	18.6
Total	97	100.0

Table 7 indicates that slightly more magistrates, 35 (36,1 percent) disagreed with the fact that a child should be allowed to waive his/her legal representation in some circumstances. Another 32 (33 percent) agreed that a child should be allowed to do so in some circumstances. It is clear that there is no distinct indication of the opinions of magistrates in this regard. The reason for this could be because this is not something that happens often in our courts.

Presiding magistrates were asked to indicate whether or not they are of the opinion that legal representatives acting on behalf of juveniles should be specifically trained to do so. They responded as follows:

Table 8 Legal representatives for juveniles should be specifically trained

Options	Frequency	Percent
Definitely agree	30	30.9
Agree	42	43.3
Disagree	18	18.6
Definitely disagree	7	7.2
Total	97	100.0

Table 8 indicates that 42 (43,3 percent) of the magistrates agreed that legal representatives acting on behalf of juveniles should be specifically trained to do so. Another 30 (30,9) percent indicated that they definitely agreed with this statement. Both groups are of the opinion that special training is needed. The reason for this could be because there are special factors to be taken into consideration when dealing with children and this is a way to ensure that the

juvenile is adequately protected and treated fairly before and throughout the court hearing. In this regard, respondent 040 made the following comment: “Legal Aid attorneys are on average, to call it mildly, useless.”

5.6 Forensic application

The forensic criminologist should know when a legal representative has been instructed to deal with a specific matter and under which circumstances a child may or may not waive his/her legal representation. If the forensic criminologist is appointed by the Court or the prosecutor the legal representative must be made aware of this fact and he/she may want to be present during the consultations with the juvenile, his/her client.

5.7 Conclusion

The International Instruments and the Constitution of South Africa, 1996, deal with the issue of the right to legal representation of children.

The Child Justice Bill, 2002 provides better protection to juvenile offenders with regard to issues relating to legal representation. Juvenile offenders are prohibited from waiving their right to legal representation in certain instances and this definitely contributes to the protection of these offenders. The specified duties conferred upon attorneys acting on behalf of juvenile offenders will definitely have a positive impact on the quality of representation offered to juvenile offenders. The requirement that a legal representative acting on behalf of a child must be an admitted attorney or advocate will ensure that non-lawyers do not act on their behalf. The majority of magistrates are of the opinion that juveniles should receive legal representation at State expense in all matter where his/her parents cannot afford it. The magistrates were uncertain whether or not a child should be allowed to waive his/her legal representation in some circumstances.

The suggestion made by Skelton and Zaal (1998:543) regarding the training of lawyers specializing in representation of accused children is supported and should be investigated by the relevant stakeholders. The majority of magistrates indicated that a legal representative acting on behalf of a juvenile offender should be specifically trained to do so.

In Chapter 6 the focus will be on Diversion.

CHAPTER 6

DIVERSION

6.1 Introduction

In the South African legal system no provision has ever been made in legislation for diversion. The consequence of this fact is that diversion is not always considered in deserving cases and there is no uniformity in the application thereof by prosecutors.

In this chapter the provisions relating to diversion in the International Instruments will be pointed out. The current position in South Africa, specifically the policy directives issued by the National Director of Public Prosecutions will be highlighted. The question whether diversion is working will be investigated.

The proposed provisions of the Child Justice Bill, 2002, the first attempt by the Legislature to ensure that diversion enjoys consideration, will be discussed.

The value of knowledge of the different diversion options and the procedures with regard to diversion for the forensic criminologist will also be indicated.

6.2 Definition

Diversion can be defined as the channelling of *prima facie* cases away from the criminal justice system with or without conditions. Conditions can range from a simple caution, or referral to the welfare system to participation in particular programmes and/or reparation or restitution. Diversion can take place prior to arrest, charge, plea, trial or sentencing (South African Law Commission 2000:87).

6.3 Grounding

NICRO and Lawyers for Human Rights established diversion in South Africa on a fairly informal basis in the early 1990's (Muntingh 1999:8).

6.4 International Perspective

The significance of the Convention on the Rights of the Child, 1989 with regard to juvenile justice is that it has elevated diversion to a legal norm, which is binding, on South Africa since ratification. In particular article 40(3)(b) places a duty on States Parties to seek to promote, whenever appropriate and desirable, diversionary measures without reverting to formal trial, and article 40(4) places a duty on States Parties to make available a wide variety of dispositions as alternatives to institutional care (Van Bueren 1995:172).

According to Zaal and Skelton (1998:548) diversion is the cornerstone of any progressive juvenile justice system. Rule 11 of the Beijing Rules also provides for diversion of juveniles at the discretion of the police, prosecution or other agencies dealing with juvenile cases. It is however stated that any diversion involving referral to appropriate community or other services shall require the consent of the juvenile or his or her parent or guardian.

6.5 The Current Position in South Africa

6.5.1 Policy Directive on Diversion issued by the National Director of Public Prosecutions

The National Director of Public Prosecutions (Collopy *et al* 2001:B12) has issued a policy directive on diversion, which provides as follows:

"1. By diversion is understood the election – in suitable and deserving cases – of a manner of disposal of a criminal case other than through normal

Court proceedings. It usually implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programmes and/or make reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions.

2. Although diversion is primarily employed in the case of juvenile offenders, there are also other diversion programmes in operation. These include victim-offender mediation programmes and performance of community service as alternatives to prosecution.

3. Diversion is inappropriate where the charge is one of murder, robbery with aggravating circumstances, rape or a similarly serious offence. Offenders with a criminal record and persons to whom the opportunity has been granted previously should only be included in exceptional circumstances.

4. The following selection criteria are not hard-and-fast rules, and should serve as a guide to the prosecutor in exercising his or her discretion to determine whether or not an offender qualifies for the programme. The accused should -

- (a) have a fixed address;
- (b) acknowledge liability for the offence;
- (c) be prepared to participate in the diversion programme; and
- (d) in the case of juvenile offender –
 - (i) be between the ages of 12 – 18 years; and
 - (ii) have a parent or guardian who is prepared to take responsibility for his or her attendance and to be present at Court.

5. Once the prosecutor has identified a candidate, a probation officer must screen such a candidate and thereafter advise the prosecutor on the suitability of the candidate for the programme.
6. The prosecutor makes the final decision and is not bound by the recommendations of the probation officer.
7. If the prosecutor is satisfied that an offender is suitable for a diversion programme, the offender (and, in the case of juvenile offenders, his or her parents or guardian) must be made aware of the possibility of diversion. They should be advised that participation is voluntary and that, should the offender not meet all the requirements, the case will not be withdrawn.
8. Whilst the establishment of diversion programmes is primarily the responsibility of the Department of Welfare, prosecutors should take some initiative in this regard. Non-governmental organizations, such as NICRO (the National Institute for Crime and Rehabilitation of Offenders) may be of assistance.
9. After the offender has completed the diversion programmes the social worker submits a report to the prosecutor. If it is clear that the offender has cooperated and benefited from the programme, the matter is withdrawn. If not, the prosecution is to proceed.
10. If, at the sentencing stage of his or her trial, the situation arises where an accused appears to be a suitable candidate for a programme, the same procedure applies, with the necessary changes. The Court can then consider imposing a suspended sentence with participation in the programme as one of the conditions of suspension. If the offender does not successfully complete the programme, the prosecutor must apply in the normal manner for the suspended sentence to be put into operation.
11. A register must be kept regarding all offenders screened for the diversion programme. The reason for the decision to divert or not must be recorded, as well as the way in which the matter was eventually disposed of.”

6.5.2 The Aims and Purposes of Diversion:

According to the Muttingh (2001:B6–7) the aims and purposes of diversion are:

“(i) to encourage the child to be accountable for the harm caused by his or her acts;

(ii) to promote an individualised response to the harm caused, which is appropriate to the child’s circumstances and proportionate to the circumstances surrounding the harm caused;

(iii) to promote the re-integration of the child into the family and the community;

(iv) to provide an opportunity for reparation;

(v) to provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such crime;

(vi) to identify underlying problems motivating offending behaviour;

(vii) to prevent less serious offenders from receiving a criminal record and being labelled as criminals, as this may become a self-fulfilling prophecy;

(viii) to provide educational and rehabilitative programmes to the benefit of all parties concerned;

(ix) to lessen the case-load of the formal justice system; and

(x) to prevent the stigmatisation of a child, which may occur through exposure to the rigours of the criminal justice system.”

6.5.3 Diversion Programmes available in South Africa

The following outlines the formal diversion programmes available in South Africa (Muttingh 2001:B6-12):

Youth Empowerment Scheme (YES)

This is an eight-part life skills programme spread over eight weeks, one afternoon per week. The programme normally involves 15 to 25 participants. The parents or guardians participate in the first and last sessions. A number of issues are addressed such as conflict resolution, crime and the law, parent-child relationship and responsible decision-making. The programme can be used as a pre-trial diversion or as part of a postponed or deferred sentence.

Pre-Trial Community Service (PTCS)

In lieu of prosecution, the offender has to perform a number of hours of community service at a non-profit organisation. The number of hours is determined by NICRO in consultation with the public prosecutor. NICRO also monitors the performance of the client and reports to the prosecutor. On average, these clients have to perform between 20 and 120 hours of community service.

Victim Offender Mediation (VOM)

This programme creates the opportunity for the victim and offender to meet and work out a mutually acceptable agreement with the assistance of a mediator (from NICRO) with the aim of restoring the balance. Once an agreement is reached, this is reported to the prosecutor and the contract is then monitored by NICRO.

Family Group Conference (FGC)

FGCs are in certain regards very similar to VOM except that they involve the families of the victim and the offender in the mediation process. The aim is

also to work out an agreement with the assistance of a mediator or facilitator. Preventing recidivism is an important component of FGCs and all FGCs have to put in place plans that will prevent further offending. The involvement of significant others is central to the process.

The Journey

The Journey programme is aimed at high-risk child offenders. The programme can last between three and twelve months, depending on the needs of the client group. The programme is usually structured around a group of 10 to 15 participants. The participants are usually school dropouts with one or more previous convictions. The programme involves life-skills training, adventure education and vocational-skills training.

6.5.4 Consequences for Non-Compliance with Diversion

Mutting (2001:B6-14) makes the following remark with regard to non-compliance with diversion:

“Most diversions are made conditionally, meaning that a counter-performance on the part of the offender is required for the case to be finalised. The conditions of the diversion should clearly spell out what exactly is required from the child and his/her parents/guardians. It is vitally important that everyone concerned have a clear understanding of what is required and what will happen should there not be compliance with the conditions of the diversion.

If there are problems with compliance, the ultimate sanction that the prosecutor can apply is to re-institute the prosecution and continue with the case through trial. Experience has shown, however, that children and their families often experience legitimate practical problems that may be interpreted as non-compliance. It is therefore important to explain the rules clearly to the child and parent/guardian. (For example, they should know that absence from a programme will only be permitted on health grounds and a medical certificate should be obtained and presented to the programme facilitators.)

For the programme facilitators, it will be of great help if the parent/guardian can phone in and inform them that the child will be absent and what the reasons are. If the programme facilitators are aware of what the situation is, contingency planning can be made so that the child does not miss any part of the programme.

Before charges against a child are reinstated, it is important to verify the facts of the non-compliance. A report, preferably in the form of an affidavit from the programme facilitators, will be of assistance. If it is clear that the child wilfully neglected to comply with the conditions of the diversion, prosecution remains as the last resort. However, experience has shown that a stern talk from the prosecutor often has the desired effect in getting the child back onto the programme.”

6.5.5 General Remarks on the Current Position of Diversion in South Africa

Zaal and Skelton (1998:548) indicate that in South Africa diversion is currently used to a limited extent at a number of the major urban magisterial Court centres. There is no legislation which relates to this practice, and it therefore takes place in an *ad hoc* manner at the discretion of the prosecutor. In cases where the child informally acknowledges responsibility, the prosecutor may withdraw a matter on condition that the young person successfully completes the requirements of a diversion programme such as pre-trial community service, youth empowerment sessions, victim-offender mediation or family group conferencing. These diversion programmes are run by NICRO.

Diversion entails two distinct aspects. The first is the selection of cases for diversion, and the second is the actual programme itself. The first part of the process, namely, the selection of the case for diversion, is sometimes said to raise due process risks for the child. This is due to the fact that, to be considered for diversion, the child must acknowledge responsibility for his or her actions. It might be argued that this runs contrary to the presumption of innocence and the right to remain silent. Despite this apparent risk to due process, many juvenile justice systems in the world use diversion as an

important alternative to criminal prosecutions. Availability of a legal representative at the time of the option of diversion being offered to the child can significantly lessen the risk of a threat to the child's due process rights.

The reason for the widespread reliance on diversion in many systems is the significant advantages it can offer the child. Diversion is conceptualised as an alternative to the adversarial model of a contest between the prosecution and the defence. It focuses on keeping children out of the criminal justice system, and uses the family and community as a resource. This gives children a chance to escape the stigmatisation and possible brutalisation of the criminal justice system, while at the same time teaching them about accountability for their actions. So, although there may be inherent risks in the process of offering diversion, these risks must be weighed against the probable positive outcomes for the child.

The possible alternative of diversion for children charged with crimes presents lawyers with both an opportunity and a dilemma not usually encountered in the defence of an adult client. Defence lawyers are trained to operate within the adversarial model of criminal justice. For this reason, their first advice to a client often is that the client should not make any admissions. This approach is not unethical, but can be counterproductive in cases where diversion is a possibility, because an acknowledgement of responsibility for the offence is a prerequisite to being considered for diversion. Where the child has committed the offence charged, his or her representative may need to engage in the task of persuading the prosecutor that the case should be diverted and this must be done prior to the plea being taken. However, where a child regards him- or herself as not guilty, the possibility of diversion creates a risk that the child may feel tempted into wrongly acknowledging responsibility purely in order to avoid the stress and stigma of a trial. The legal representative needs to guard against this, and can play an important role in ensuring that the choice of diversion is made freely by the young client from an informed position. The advantages that the child derives from diversion are many, but the risk to due process should always be kept in mind. A lawyer who has built up a relationship of trust and free communication can be of invaluable assistance in

helping the child to base his or her decision on sound considerations (Zaal & Skelton 1998:548).

Skelton (1996:189) submits that diversion should be the central principle of any future juvenile system. The possibility of diversion should be considered in every case, and only rejected in cases where the interest or the safety of the community demand that the case be taken through the criminal justice system.

Sloth-Nielsen and Muntingh (1999:65) provide the following statistics on diversion for the period September 1997 to August 1998 wherein 6 601 cases were dealt with. The period under review shows a 76 percent increase between September 1997 and August 1998. Of the five diversion programmes offered, 72 percent were referred to the Youth Empowerment Scheme. As indicated above, the programme is a six-part life-skills course run over six weeks and the parent(s) or guardian(s) attend the first and last sessions. Other programmes are pre-trial community service, victim-offender mediation, the Journey and family group conferencing.

Although the children referred for diversion are charged with a wide variety of offences, the majority (85 percent) are charged with property offences and specifically theft and shoplifting. Very limited promotions of housebreaking cases are referred. The overall impression is that diversion is used primarily for minor property offences.

A follow-up survey, by the authors, of 468 NICRO juvenile diversion clients countrywide found that only 6,7 percent re-offended in the first 12 months after attending a diversion programme. Where children did re-offend, the average time lapse from attending the programme to re-offending was 7,2 months. The research was also able to create a fairly detailed profile of diversion programme participants and the typical client is male, aged between 15 and 17 years, a first offender charged with a property offence, who resides with his parents and is in his 2nd and 3rd year of secondary schooling. The majority of clients (83,4 percent) were originally referred for property offences such as shoplifting, theft and malicious damage to property. The compliance

rate with the conditions of the diversion, including attendance and completion of the programme, is also very high, varying between 74 and 90 percent.

The study also collected feed-back on programme content and found that nearly all participants interviewed had a favourable opinion of the programme they attended and regarded it as a memorable experience. Experiential and adventure education techniques appear to have had a lasting impression on the programme participants. The majority of participants indicated that they experienced a positive personal change after attending the diversion programme, with the emphasis on more responsible decision-making.

6.5.6 Case-law where reference were made to the issues regarding Diversion

In M v The Senior Public Prosecutor, Randburg (Case3284/00WLD, unreported) an application for review was brought by the guardian of a minor girl (M), who had been convicted of shoplifting in the magistrate's Court. The argument was launched on the basis that another girl (T, the co-culprit), who had also been arrested for shoplifting, had been granted diversion by the prosecution. Both participated in the same theft. This application, therefore, challenged the exercise of prosecutorial discretion in deciding to prosecute M. The imputation, the Court explained, was that the prosecutor in M's case did not consider diversion. As the prosecutor did not respond to the papers filed for the review, whether he actually considered diversion is unknown. Also, the Court mentions that if the prosecutor had responded with an affidavit to explain what he did, and indicating that he did consider diversion, the outcome of this application may have been different. But, in the absence of any such explanation, the inference had to be drawn that on facts which require that the question of diversion should at least come into the equation, diversion was not considered. This, the High Court held, implied that there was not a proper exercise of discretion, and, in the absence of any explanation or reasons for proceeding with the charge, the implication was that the prosecutor did not apply himself properly and fully to the content of what was before him. It was concluded that this gave reason to set the conviction aside, and to refer the

matter back to the stage where the prosecutor does bring the prospects of and the possibility of diversion into the consideration before him.

The decision turned, in other words, on the High Court's inherent power to review administrative decisions, and to overturn them where the person who exercised the power displayed bad faith, or failed to apply his or her mind to the matter. M v Senior Public Prosecutor, Sandburg does not establish a right to be considered for diversion in every case, but proceeding from the principle that like cases should be treated alike, there is scope to argue that within a broad margin of discretion, diversion (and prosecution) must be applied relatively within a jurisdiction. The judgment provides a basis for future challenges when obvious candidates for diversion are taken, instead, through the criminal process.

In S v Z 1999(10)SACR427(E) the Court quoted with seeming approval (at 437b–438i) the full content of a circular entitled “Juvenile Offenders: Diversion Programmes” sent out by the Director of Public Prosecutions (Eastern Cape). Some of the guidelines for referral to NICRO's youth offenders school contained in this circular, as reproduced in the judgment, include the following: the juvenile must admit to his (sic) part in the crime for which he is indicted and must be prepared to undergo the programme; the parent or guardian must agree to the implementation of the programme and must be prepared to co-operate; the juvenile should preferably be a first offender, but juvenile offenders with previous convictions may be considered for this referral if the previous convictions are not of such a nature as to result in the conversion of the proceedings to a children's Court inquiry (with the view to referring the juvenile to an industrial school), or the referral of the juvenile to a rehabilitation centre or a reformatory, or the imposition of a sentence of imprisonment and the juvenile has not already had the benefit of diversion; the crime should be of a less serious nature (and specific reference is made in the circular to the offences of shoplifting, common assault and malicious injury to property); the juvenile must have a fixed address; finally, if there is a co-accused in a case, and he or she does not qualify for diversion, the juvenile himself cannot escape prosecution although a referral to the relevant programmes may be an option for the sentencing officer to consider.

Erasmus, J was further of the view that the Court should, where appropriate, promote the placement of the juvenile in a diversion programme prior to the commencement of the trial.

6.5.7 Is Diversion Working

In a study conducted for NICRO by Muntingh (1999:8) in 1998, 640 children who had participated in five different diversion programmes the following were found:

- (i) the typical diversion programme participant is a 15 – 17 year old male first offender, charged with a property crime, residing with his parents and in his second to third year of secondary schooling;
- (ii) the compliance rate for all the programmes was above 75 percent and this indicates the commitment of the participants to completion of the programme;
- (iii) in the first twelve months after participating in the diversion programme, only 6,7 percent of the sample re-offended; and
- (iv) participants expressed a positive personal change after the programme, the highlight being acceptance of responsibility for their actions (Muntingh 1999:8).

From the above findings the reference can be drawn that diversion programmes are working in South Africa.

6.6 The Child Justice Bill, 49 of 2002

As indicated above diversion is one of the issues that have never been provided for in legislation. The inclusion of diversion in the Child Justice Bill, 2002 is a huge step taken by the Government in its efforts to comply with its

obligation in this regard after the ratification of the United Nations Convention on the Rights of the Child, 1989.

The various provisions applicable to diversion are provided for in sections 43 to 49 of the Child Justice Bill, 2002 and provides as follows:

“Purposes of diversion

43. The purposes of diversion are to -

- (a) encourage the child to be accountable for the harm caused;
- (b) meet the particular needs of the individual child;
- (c) promote the reintegration of the child into the family and community;
- (d) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (e) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (f) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (g) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
- (h) prevent the child from having a criminal record.

Child to be considered for diversion under certain circumstances

44. A child must be considered for diversion if -

- (a) the child voluntarily acknowledges responsibility for the offence;
- (b) the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility;
- (c) there is sufficient evidence to prosecute; and
- (d) the child and his or her parent, or an appropriate adult, consent to diversion and the diversion option.

Minimum standards applicable to diversion and diversion options

45.(1) No child may be excluded from a diversion programme due to an inability to pay any fee required for such programme.

(2) A child may be required to perform community service as an element of diversion, with due consideration to the child's age and development.

(3) Diversion options –

(a) Must promote the dignity and well-being of a child, and the development of his or her sense of self-worth and ability to contribute to society;

(b) may not be exploitative, harmful or hazardous to a child's physical or mental health;

(c) must be appropriate to the age and maturity of a child; and

(d) may not interfere with a child's schooling.

(4) Diversion options must, where reasonably possible –

(a) impart useful skills;

(b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;

(c) include an element which seeks to ensure that the child understands the impact of his her behaviour on others, including the victims of the offence, and may include compensation or restitution; and

(d) be presented in a location reasonably accessible to the child, and a child who cannot afford transport in order to attend a selected diversion programme should, as far as is reasonably possible, be provided with the means to do so.

(5) Any diversion option presented by a government department or a non-governmental organisation, which has a predetermined content and duration and which involves a service to groups of children or offers a service to individual children on a regular basis, but be registered as prescribed.

Availability of diversion options and keeping of records

46.(1) The Cabinet member responsible for social development must –

(a) develop suitable diversion options as contemplated in this Chapter; and

(b) keep a register or cause a register to be kept of children who have been subject to diversion in terms of this Act.

(2) Subsection (1) does not preclude any government department or non-governmental organisation from developing suitable diversion options for children who are alleged to have committed offences.

Diversion options

47.(1) For the purposes of this section –

(a) diversion options are set out in three levels with level one comprising the least onerous and level three the most onerous options;

(b) “a compulsory school attendance order” means an order requiring a child to attend school every day for a specified period of time, which attendance is to be monitored by a specified person;

(c) “a family time order” means an order requiring a child to spend a specified number of hours with his or her family;

(d) “a good behaviour order” means an order requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour;

(e) “a positive peer association order” means an order requiring a child to associate with persons who can contribute to the child’s positive behaviour;

(f) “a reporting order” means an order requiring a child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child’s behaviour; and

(g) “a supervision and guidance order” means an order placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child’s behaviour.

(2) In selecting a specific diversion option for a particular child at a preliminary inquiry, consideration must be given to -

(a) the selection of a diversion from an appropriate level in terms of this section;

(b) a child’s cultural, religious and linguistic background;

(c) the child's educational level, cognitive ability, domestic and environmental circumstances;

(d) the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence and the interests of society; and

(e) the child's age and developmental needs.

(3) Level one diversion options include -

(a) an oral or written apology to a specified person or persons or institution;

(b) a formal caution in the prescribed manner with or without conditions;

(c) placement under supervision and guidance order in the prescribed manner for a period not exceeding three months;

(d) placement under a reporting order in the prescribed manner;

(e) the issue of a compulsory school attendance order in the prescribed manner for a period not exceeding three months;

(f) the issue of a family time order in the prescribed manner for a period not exceeding three months;

(g) the issue of a positive peer association order in the prescribed manner in respect of a specified person or persons or a specified place for a period not exceeding three months;

(h) the issue of a good behaviour order in the prescribed manner;

(i) the issue of an order prohibiting the child from visiting, frequenting or appearing at a specified place in the prescribed manner;

(j) referral to counselling or therapy for a period not exceeding three months;

(k) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding five hours each week, for a maximum of three months;

(l) symbolic restitution to a specified person, persons, group or institution; and

(m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored.

(4) Level two diversion options include -

(a) the options referred to in subsection (3) but the maximum periods contemplated in that subsection must for the purposes of this subsection be construed as six months;

(b) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding eight hours each week, for a maximum of six months;

(c) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by the probation officer effecting the assessment for a maximum period of 50 hours, and to be completed within a maximum period of six months;

(d) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;

(e) payment of compensation to a maximum of R500 to a specified person, persons, group or institution where the child or his or her family is able to afford this;

(f) where there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of compensation to a community organisation, charity or welfare organisation;

(g) referral to appear at a family group conference or a victim-offender mediation at a specified place and time; and

(h) any two of the options listed used in combination.

(5) Level three diversion options apply to children over the age of 14 years in cases where a Court upon conviction of the child for the offence in question is likely to impose a sentence of imprisonment for a period not exceeding six months, and include -

(a) referral to a programme which does not exceed six months and which has a residential element that does not exceed 35 days in total and 21 consecutive days during the operation of the programme;

(b) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group, identified by the probation officer and for a period not exceeding 250 hours which must be completed within 12 months of the commencement of the service;

(c) where a child is over the age of compulsory school attendance as contemplated in the South African Schools Act, 1996 (Act No 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding six months and no more than 25 hours per week; and

(d) referral to counselling or therapeutic intervention in conjunction with any of the options listed in this subsection.

(6) (a) Upon the selection of a diversion option, the inquiry magistrate or Court must identify a probation officer or other suitable person to monitor the child's compliance of the selected diversion option.

(b) If the event of a child failing to comply with any condition of the selected diversion option, the officer or person identified in terms of paragraph (a) must notify the inquiry magistrate in writing of such failure.

Family group conference

48.(1) If a child has been referred to appear at a family group conference, a probation officer appointed by the inquiry magistrate must within 14 days, but not later than 21 days, after such referral convene the conference by –

(a) setting the time and place of the conference; and

(b) taking steps to ensure that all persons who may attend the conference are timeously notified of the time and place of the conference.

(2) The following persons may attend a family group conference -

(a) The child and his or her parent or an appropriate adult;

(b) any person requested by the child;

(c) the probation officer;

(d) the prosecutor;

(e) any police official;

(f) the victim of the alleged offence and, if such victim is under the age of 18 years, his or her parent or an appropriate adult;

(g) the legal representative of the child;

(h) a member of the community in which the child normally resides;
and

(i) any person authorised by the probation officer to attend the conference.

(3) If a family group conference fails to take place at the time and place set for the conference, the probation officer must convene another conference as contemplated in this section.

(4) Participants in a family group conference must follow the procedure agreed upon by them and may agree to such plan in respect of the child as they deem fit.

(5) A plan contemplated in subsection (3) -

(a) may include -

(i) the application of any option contained in section 47(3) or (4); or

(ii) any other plan appropriate to the child, his or her family and local circumstances which is consistent with the principles contained in this Act; and

(b) must -

(i) specify the objectives for the child and the period within which they are to be achieved;

(ii) contain details of the services and assistance to be provided for the child and for a parent or an appropriate adult;

(iii) specify the persons or organisations to provide such service and assistance;

(iv) state the responsibilities of the child and of the child's parent or an appropriate adult;

(v) state personal objectives for the child and for the child's parent or an appropriate adult; and

(vi) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant.

(6) (a) The probation officer must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the officer or person contemplated in section 47(6)(a).

(b) In the event of the child failing to comply with any condition of the plan agreed to at the family group conference, the officer or person must notify the inquiry magistrate in writing of such failure, in which case section 40 applies.

(7) If the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the inquiry magistrate for consideration of another diversion option.

(8) The proceedings at a family group conference are confidential and no statement made by any participant in the conference may be used as evidence in any subsequent Court proceedings.

Victim-offender mediation

49.(1) If a child has been referred to appear at a victim-offender mediation, subsection (1), (5), (6), (7) and (8) of section 48 apply with the changes as the context requires.

(2) A probation officer appointed by the inquiry magistrate must convene the victim-offender mediation and may regulate the procedure to be followed at the mediation.”

6.6.1 Diversion Options

The Child Justice Bill, 2002 sets out (in section 47) a list of diversion options in three levels. Level one comprises the least onerous and level three the most onerous options.

(i) Level one diversions include simple plans or agreements, which can take the form of an order. These orders, many of which are to be set out on forms, which will be included in regulations to the proposed legislation, include requirements such as supervision and guidance, compulsory school-attendance or refraining from frequenting a particular place. Apology and restitution of items to a victim are also options included in level one. The options in level one generally have a duration of no more than three months.

(ii) Level two diversion include the options in level one, but at this level the duration of the options may not exceed six months. This level also includes payment of compensation to victims or charities and community service. Restorative justice options, such as referral to a family group conference or a victim-offender mediation are also included in level two.

(iii) Level three diversion options may only be applied in respect of children who are 14 years of age or older, and only in cases where there are reasons to believe that if the child were to be convicted, he or she would be likely to receive a sentence involving deprivation of liberty for longer than six months. The options include referral to programmes, which have a limited or periodic

residential requirement (such as camps or a specialised centre) and community service for a period of up to 12 months. Where a child is no longer attending school, he or she may be referred to a full-time vocational or educational programme for a period of six months.

The Child Justice Bill, 2002 sets out special procedures for the holding of family group conference and victim-offender mediation.

The participating magistrates were requested to furnish their opinions on the question whether diversion is working. They responded as follows:

Table 9 Diversion is working

Options	Frequency	Percent
Definitely agree	7	7.2
Agree	63	64.9
Disagree	25	25.8
Definitely disagree	2	2.1
Total	97	100.0

Table 9 indicates that the majority of the magistrates, that is 63 (64,9 percent agrees) and 7 (7,2 percent definitely agree) are of the opinion that diversion is working. It should also be noted that a statistical significant finding was registered between gender and the statement that diversion is working. More male than female magistrates are of the opinion that diversion is working (Chi-square 11,078; Df. 3; Prob. 0.011).

The presiding magistrates were furthermore requested to indicate whether or not prosecutors consider diversion in all deserving cases. This is how they responded:

Table 10 Prosecutors consider diversion in all deserving cases

Options	Frequency	Percent
Yes	51	52.6
No	46	47.4
Total	97	100.0

Table 10 indicates that the majority of magistrates, 51 (52,6 percent) are of the opinion that diversion is being considered in all deserving cases. The reason for this could be because all the facts are presented to the presiding officer during the trial, and he/she is then in a position to conclude whether or not diversion should have been considered before the trial started.

The presiding magistrates were asked whether or not diversion should be considered in all cases involving juveniles. They responded as follows:

Table 11 Diversion should be considered in all cases involving juveniles

Options	Frequency	Percent
Yes	27	27.8
No	70	72.2
Total	97	100.0

Table 11 indicates that the majority of magistrates, 63 (64,9 percent) are of the opinion that diversion should not be considered in all cases involving juveniles. The reason for this might be that diversion is not included in any legislation in the current criminal justice system and magistrates might feel that it is the discretion of the prosecutor to divert or not and they do not want to interfere with this discretion. Another reason might be that due to the factors that have to be taken into account when considering diversion, for example that the juvenile should take responsibility for his/her crime, not all cases qualify for diversion. The nature of the crime also plays an important role in this regard and therefore not all cases can be considered for diversion.

Respondent 002 made the following comment in this regard: "Some cases are more serious thus diversion is not to be considered."

Respondent 057 furnished the following comment: "Although it may seem that I am lenient towards juveniles, I am adamant that they should be kept out of the criminal justice system as far as is reasonably possible."

Respondent 081 commented as follows: "Diversion is working in the sense that if juvenile offenders are trained to do certain jobs that can earn them

money they can stop committing offences like theft. Most juveniles commit offences because of poverty.”

6.7 Forensic Application

It is important for the forensic criminologist to be aware of the procedures and requirements when a juvenile offender is considered for diversion. Knowledge of the different diversion options and what they entail are also important because if the juvenile offender fails to comply with the conditions of diversion, the prosecutor may decide to proceed with prosecution. If the child offender is convicted, this factor should be taken into account when the forensic criminologist compiles the pre-sentence report. The reasons for the failure to comply and the juvenile's attitude towards his offence are very important factors, which must be considered when making a recommendation towards sentence.

6.8 Conclusion

With the ratification of the United Nations Convention on the Rights of the Child, 1989 South Africa, as a State Party became obliged to make provision for diversion in legislation.

The provisions set out in the Child Justice Bill, 2002 are important, as this is the first time that legislation provides for diversion options in South Africa. Section 44 implies that juvenile offenders must be considered for diversion if certain requirements are met. Diversion should play an important role in the juvenile justice system of any country to ensure that youths are offered a second chance in life and avoid being branded as criminals after one mistake. The inclusion of diversion in the Child Justice Bill, 2002 will ensure close monitoring of diversion processes and will also ensure that all deserving cases are considered for diversion. Parents and guardians should be made aware of the benefits of diversion and their full co-operation should be ensured to make this option work for both the juvenile offender and the

community. The majority of the magistrates are of the opinion that diversion is working and of those the majority is male. The magistrates are furthermore of the opinion that prosecutors do consider diversion in all the deserving cases and the majority is of the opinion that diversion should not be considered in all matters involving juveniles.

In Chapter 7 the issues regarding sentencing will be discussed.

CHAPTER 7

SENTENCING

7.1 Introduction

In matters where diversion has been considered but the juvenile offender failed to comply with the conditions, the prosecutor may decide to proceed with prosecution. In these instances sentencing may follow.

Sentencing is therefore linked to diversion as well as to the principles and values underlying a juvenile justice system. These include restorative justice (as sentence option), proportionality (taking into account the crime, the circumstances of the offender and the interests of the community) and limitation on the restriction of liberty (indicating the circumstances under which a sentence of imprisonment may be imposed on a juvenile).

When people have been accused of committing a crime, considerable attention is paid to determining their guilt or innocence. Hiemstra (1967:407) makes the point that, while the criminal procedure is usually a formal, in-depth and thorough process, the decision about the future of accused, once they have been found guilty, is usually a quick and informal one. He describes sentencing as a haphazard process. This situation has improved little since Hiemstra made this assertion.

In this chapter the international guidelines in the International Instruments will be pointed out, the current sentence options available to the Courts for juveniles will be highlighted, pre-sentence reports and their value will be discussed and the proposed sentencing options in the Child Justice Bill, 2002 will be provided.

7.2 International Perspective

The Convention on the Rights of the Child establishes as the aim of juvenile justice the entitlement of children to be treated in a manner consistent with their age and the desirability of promoting the child's re-integration and the child's assuming a constructive role in society. The twin principles of proportionality and the duty on a State to take into consideration the child's well-being underline much of the detail found in international law concerning the aims, restrictions and prohibitions on the sentencing of children. International law requires that any reaction to the juvenile offenders should always be in proportion to the circumstances of both the offenders and the offence.

The principle of proportionality implies that the circumstances of the individual child should influence the manner and the form of the reaction and to ensure that an Authority is acquainted with all the circumstances of the child. Rule 16 of the Beijing Rules recommends in all, except minor cases, that the juvenile's background and circumstances should be made known to the competent Authority through social inquiry reports or pre-sentence reports. The Beijing Rules recommend that the report should be considered in the final disposition.

Another fundamental principle of sentencing, as discussed in Chapter 4 above, is that deprivation of liberty, if used at all, should only be used as a measure of last resort and for the shortest appropriate period of time (Article 37 of the Convention on the Rights of the Child – Van Bueren 1995:183-184).

In addition to the restrictions which international law places on States Parties imposing deprivation of liberty on children, international law also views institutionalisation as the least favoured alternative. International law deprioritises institutionalisation because of the results of criminological research, which demonstrate the many adverse effects of institutionalisation, which are not always undone by treatment. According to the research, the children are particularly vulnerable to negative influences because the combined effect of a loss of liberty and separation from their accustomed daily social life has a more acute negative effect. By aiming for the re-integration of

children, international law seeks to assist them in beginning to believe that they are valued members of the community; the effect is the opposite of institutionalisation, which risks alienating them.

Article 40(4) of the Convention on the Rights of the Child, 1989 contains a non-exhaustive list:

“A variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

The key phrase is and other alternatives to institutional care, implying that the State Party is under a duty to seek to promote a variety of dispositions which operate as alternatives to institutionalisation. States which are not parties to the Convention on the Rights of the Child, 1989 are also recommended to limit institutionalisation in both quantity and time.

The place of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

In the Convention's and the Beijing Rules' approach to institutionalisation, international law is attempting to avoid the danger of states widening the net of formal social control over juveniles.

An additional reason for incorporating a presumption against institutionalisation is that both the Convention on the Rights of the Child, 1989 and the Beijing Rules are based upon the principle that it is generally in the best interests of the child that children and parents should not be separated. The Beijing Rules recommend that even where the offence is serious juveniles should not be institutionalised unless there is no other appropriate response. This implies that the alternatives set out in Rule 18 have been considered and have been found to be inappropriate. It is not that the Convention on the Rights of the Child, 1989 or the Beijing Rules adopts a

policy of non-intervention by the State; it is rather that the State is only under a duty to intervene where its intervention is constructive and not destructive.

Apart from the restrictions which international law places on States in depriving children of their liberty, international law also prohibits specific forms of punishment from being imposed on children. These include the administering of corporal punishment and the imposition of the death penalty.

The imposition of corporal punishment in the administration of juvenile justice is prohibited. The European Court of Human Rights has held it to be a form of degrading treatment and punishment. The prohibition on such treatment and punishment is found in all the principal global and regional human rights treaties, including article 37(a) of the Convention on the Rights of the Child, 1989 and article 7 of the International Covenant on Civil and Political Rights. Its purpose is to protect the integrity and dignity of the individual (Van Bueren 1995:184).

7.3 The Current Position in South Africa

The present position in South Africa is that the Constitutional Court has removed two sentencing options that had been available to Courts. In S v Makwanyane and another 1994(3)SA868(A) the death penalty was considered to be unconstitutional and in S v Williams 1995(2)SALR251(CC) whipping met the same fate. This has lessened the number of sentencing options open to Courts, especially with regard to murder (at one end of the spectrum) and to juveniles (at the other end of the spectrum).

7.3.1 Sentencing Options for Juvenile Offenders available to the Courts in terms of the Criminal Procedure Act, 1977:

There are a number of sentences which are available and suitable for young persons convicted of offences in South African Courts. While there are sufficient legislated options, there is generally a lack of creativity on the part of those responsible for recommending and prescribing sentences.

The Criminal Procedure Act, 1977 provides for the following sentencing options:

”(i) Caution and discharge in terms of section 297(1)(c). This is a suitable option for less serious offences and first offenders.

(ii) Postponement of passing of sentence in terms of section 297(1)(a). Although not specifically designed as a sentence for young persons only, this is a sentence which is commonly used by magistrates when dealing with children and young persons. The postponement of passing of sentence may be conditional or unconditional. In the case of unconditional postponement, the Court does not pass any sentence, but warns that the offender may have to appear again before the Court within the period of postponement if called upon to do so. In the case of conditional postponement, the Court may set one or more of the conditions laid down in section 297(1)(a). The possible conditions are: compensation, rendering of some benefit or service to the aggrieved person, performance of community service, submission to instruction or treatment, submission to supervision (for example, that of a probation officer), compulsory attendance at a centre for a specified purpose, good conduct, and any other matter. These provisions have the advantage of being very flexible, and allow for creative sentencing. The Act only allows for the conditions of community service where the child is 15 years or older, which is an unfortunate limitation.

(iii) A suspended prison sentence in terms of section 297(1)(b). This sentence can be linked to conditions such as those listed above, and is a suitable option for more serious offences but where the Court is of the opinion that the young person does not pose a serious risk to the community.

(iv) A fine in terms of section 287. The setting of fines for people under the age of 18 years is generally not a very useful sentence unless the young person is earning a salary. In many cases where fines are set they are paid by the parents. A worrying factor is that where the fine is set with an alternative of imprisonment it is possible that poverty could cause a young

person to be imprisoned in circumstances where he or she poses no risk to the community.

(v) Placement under the supervision of a probation officer in terms of section 290(1). The young person can also be placed under the supervision of a probation officer, correctional official or any suitable person designated by the Court. This is a potentially useful option which allows for community involvement, but it is unfortunately under-utilized.

(vi) Reform school in terms of section 290(1)(d). the Court can order that a young person be sent to a reform school. This option is useful in that it can be used to avoid the young person from being sent to prison in serious offences, but a 1996 Cabinet investigation by the Inter-Ministerial Committee on Young persons at Risk revealed that young persons in South African reform schools are at risk of serious human rights abuses.

(vii) Correctional supervision in terms of section 276(A). Section 276(A) of the Criminal Procedure Act provides for an offender to be placed under correctional supervision which takes the form of house arrest, combined with a set period of community service and attendance at a specially designed course.

Correctional supervision is not designed particularly for young persons. It is an effective method for avoiding imprisonment if there are no other options available, but house arrest is a very demanding sentence for a young person, and should be reserved for serious offences.

(viii) Imprisonment. In terms of section 28(1)(g) of the Constitution of the Republic of South Africa Act, 108 of 1996, imprisonment should be used only as a measure of last resort. Unfortunately, the Court tends to over-use short periods of imprisonment, a practice which serves only to brutalise young persons who do not pose a serious threat to society. (Skelton 1997:174–175)”

7.3.2 Criteria for a Balanced Sentence and the Aim of Punishment as Criterion of Sentencing:

In the case of S v Zinn 1995(1)SALR334(c) the Court laid down the following criterion for a balanced sentence: “What has to be considered is the triad consisting of the crime, the offender and the interests of society.”

An alternative criterion is the so-called aims of punishment, which received approval from the Appellate Division in the case of R v Swanepoel 1969(2)SA537AD where the Court summed up the ends (aims or purposes) of punishment as follows:

“The ends of punishment are four in number, and in respect of the purposes to be served by it, punishment may be distinguished as (1) deterrent, (2) preventative, (3) reformative, (4) retributive. Of these aspects the first is the essential and all important one, the others being merely accessory.”

These four aims have been confirmed by the Appellate Division in S v Whitehead 1984(3)SA327(A).

7.3.3 Pre-Sentence Reports

Requests for pre-sentence investigations usually come from the presiding officers in particular cases. However, prosecutors or the accused themselves can request a pre-sentence investigation. Usually clients' legal representatives will request criminologists to compile pre-sentence evaluation reports. Section 274(1) of the Criminal Procedure Act, 1977 makes provision for all judicial officers to solicit pre-sentence information from any source, including a psychologist, a social worker in private practice or a criminologist in private practice.

Not only do South African judges and magistrates receive very little training in the art of sentencing, they also receive little, if any, training in the social sciences. As sentencing is a human process, with implicit predictions about outcomes of sentences (in terms of the objective of punishment), it requires

knowledge of human dynamics. That is, in order to pass a sentence that is likely to protect the community, render the offender less violent or less devious, deter offenders and potential offenders and bring about positive changes in the offender's attitudes and behavioural patterns, judicial officers have to have a knowledge of human social dynamics. To that end they also require knowledge of relevant aspects of certain social science – particularly criminology.

Social sciences, particularly criminology, deal with such relevant aspects as human motivation, the aetiology of crime and delinquency, crime prevention, rehabilitation strategies and theories of punishment. These aspects are seldom, if ever, covered in the legal studies curricula. Consequently, in order to pass rational and effective sentences (i.e., that will achieve the main objectives of punishment and benefit community, victim and offender), judges and magistrates, whose training in South Africa generally does not include criminology, psychology or sociology, require the assistance of persons who have undergone such training.

Once an accused has been found guilty, the judicial officer is confronted with the most difficult and morally most demanding task, namely to formulate the most appropriate and most effective sentence.

As indicated sentencing is a human process, which, in order to be effective in terms of its anticipated outcomes, requires a knowledge of human behaviour with all its complexity. Criminologist, by virtue of their training in the social science, possess such knowledge. They can play an important role in changing sentencing from an intuitive and largely subjective act into a rational and objective one.

As expert witnesses in the criminal Court, it is their role to assist the Court in gaining a more complete picture of the offenders as persons, including their developmental history, social environment and social functioning, the social and psychological dynamics of the crime (especially possible causative factors), their motivation for and attitude towards the crime, their potential for positive change, and appropriate resources in the community.

While the legal profession – the prosecutor, the magistrate and the attorney – focus mainly on the crimes themselves and legal principles, criminologists focus more on the offenders as persons thus enabling the Court to adopt a more rational and balanced approach in sentencing. That is, an approach which does not merely focus on the offenders as law-breakers (criminals), but sees them as human beings with personalities, feelings, needs, problems and potential for change and growth. It is important for the expert witness (criminologist) to be mindful of and cope with the fact that there are fundamental differences in the general philosophy and thus mindset of the legal profession on the one hand and the social sciences on the other. The legal profession (i.e. the magistrate, the prosecutor and the defence counsel) focus more on the crimes themselves and legal principles. Social scientists (in this case, criminologists or forensic criminologists), on the other hand, are more concerned with the offenders as persons. While the former seek to establish guilt (or innocence), the latter focus more on meeting the needs of the person. The two approaches are, as it were, tuned into a different wavelength. This fundamental difference in approaches and mindset leads to an underlying tension and, occasionally, to misunderstandings and conflict (Gräser 2000:8).

Terblanche (1999:23–24) indicates that experts in the fields of penology and criminology also have an important role to play during the sentencing process, mainly in drawing up pre-sentence reports. They can assist the Court in attempting to explain the criminal conduct, to predict the likelihood of repeated crime, and so on.

Valuable information regarding the accused has often been forthcoming from these experts when they have gone to the trouble of properly assessing the person of the accused. A good example is S v Kotze 1994(2)SACR214(O), where a consultant criminologist and a clinical psychologist gave evidence based on the reports which they had compiled. The Court found that the magistrate had no reason to question their work as they had done it properly (*deeglik*), they had motivated their options properly (*behoorlik en bevredigend*), and the work proved to be objectively professional.

The requirements of pre-sentence reports, the factors to be taken into account as well as a draft format of a pre-sentence report, focusing on juvenile offenders will be provided in the next chapter.

7.3.4 Various Case Law regarding Sentencing

Factors in Sentencing and Sentencing Principles

(i) The accused in S v X 1996(2)SACR288(W) had participated in an illegal scheme. He had pleaded guilty to, and was found guilty of, an offence arising out of such participation. The accused was willing to attempt to infiltrate a new scheme, which was somewhat similar to the scheme, in which he had participated, so as to act as a police informer, with a view to securing the arrest and prosecution of those involved in the new scheme. Counsel for the accused submitted that the interests of society in seeing those who break the law is adequately punished pale into insignificance when compared to the interest of society, which would be served, were the accused to remain available to the police. The Court was accordingly urged by the accused's counsel not to impose imprisonment or correctional supervision (the submission being, in regard to the latter option, that it would interfere with the activities which the police may require the accused to perform).

The state submitted that although the Court could have regard to the public interests that would be served were the accused to be permitted to work as an informer by not being imprisoned, this was but one factor relevant to the exercise of the Court's discretion as to a proper sentence.

In dismissing the accused's counsel's submission the Court held that it could not take into account the interests of the community not relevant to the well-defined purposes of judicial punishment – namely, the imposition of a proper sentence. The Court further stated that it was not the Court's responsibility to protect or advance those interests in performing this function. The accused was sentenced to a term of imprisonment with a portion suspended.

(ii) S v Z 1999(1)SACR427(E) can be regarded as an influential judgment in the articulation of juvenile sentencing policy. The case concerned a review of several cases involving the imposition of suspended prison sentences upon children below the age of 18 years. In an unusually activist manner, the Court investigated the conditions under which children in that province actually service sentences of imprisonment, on the supposition that a suspended sentence may well be put into operation at a later stage. Onsite inspection of local prisons revealed that children were not necessarily separated from adult persons, not all children were attending school, and many prisoners occupied themselves in the cells doing nothing at all. It was a point of concern that 18 children were found to have been held in prison awaiting designation of a reform school, some having been in prison for more than 16 months.

As a starting point, the Court stated the principle that imprisonment for youthful offenders should be avoided altogether where possible. Three further subsidiary rules were articulated in this case that, in the opinion of the Court, should guide the exercise of judicial discretion to impose a sentence of imprisonment. First, the younger the child, the more inappropriate the use of imprisonment. Second, imprisonment is especially inappropriate where the child is a first offender, and, third, short-term imprisonment is seldom appropriate in cases involving juveniles (at 441d-g). Further, the Court held that if direct imprisonment would not be an appropriate sentence in a particular instance, neither would a suspended prison sentence be a suitable punishment (435f-g). Thus the correct approach would be first to determine a suitable sentence, and then only to consider the possibility of suspension.

In his judgment, Erasmus J stressed the importance of what he called “monitoring and follow up” (at 438j) in relation to the choice of sentence for juveniles. For this reason, a sentence (such as a fully suspended sentence) which effectively came to an end when the convicted juvenile walked out of the doors of the Court would seldom be regarded as suitable, in the view of the Court. Further, it was held that sentences should be tailored to the personal circumstances of each individual juvenile, and a suspended sentence should include some component relating to care or supervision. For this reason, it was suggested that sentencing officers should act dynamically

to obtain full particulars of the juvenile accused and his or her personal circumstances, and to obtain pre-sentence reports from probation officers. The Court was of the view that even a suspended sentence of imprisonment should not be imposed without such report having been prepared.

(iii) In S v Kwalase 2000(2)SACR135(c) the influence of international law upon sentencing of children was expressly referred to, after reference had been made to the ratification by South Africa of the United Nations Convention on the Rights of the Child, 1989. The Court alluded to the importance of considering the principles contained in the Beijing Rules for the Administration of Juvenile Justice (1985), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the Riyadh Guidelines on the Prevention of Juvenile Delinquency (1990), as well as to the fact that the United Nations Committee on the Rights of the Child has stated categorically that the provisions of the UN Convention on the Rights of the Child, 1989 relating to juvenile justice have to be considered in conjunction with the other relevant International Instruments (at 138g–139b). Thus, the Court held that “[p]roportionality in sentencing juvenile offenders (indeed, all offenders), as also the limited use of deprivation of liberty particularly as regards juvenile offenders, are clearly required by the South African Constitution ... [and with] due regard to the provisions of ... International Instruments relating to juvenile justice. *The judicial approach towards the sentencing of juvenile offenders must therefore be reappraised and developed in order to promote an individualized response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the judicial officer must structure the punishment in such a way as to promote the reintegration of the juvenile concerned into his or her family and community*” (italics in original).

Importance of Pre-Sentence Reports

Judges have, in a number of recent cases, emphasized the importance of pre-sentence reports being made available to the Court before a sentence involving deprivation of liberty is imposed. The desirability of pre-sentence

reports was referred to in the earlier cases of S v H 1987(4)SA385(EC), S v Ramadzanga 1988(2)SA837(V) and S v Quandu 1989(1)SA517(A). However, this trend has lately become more pronounced, as evidenced by cases such as S v D 1999(1)SACR122(NC), S v J 2000(2)SACR310(C) and S v Kwalase (*supra*). In S v D, an appeal Court reversed a 6 year prison sentence imposed upon a child for rape committed when he was 16 years old because of the failure of the magistrate to call for a probation officer's report, and because only scant information about the accused's personal circumstances had been placed on record by his attorney. The Court maintained that the starting point should be that no child should be sentenced without a pre-sentence report having been considered.

In two recent review judgments, judges from the Cape Bench have set aside sentences imposed on young offenders because of the absence of pre-sentences reports.

In S v Van Rooyen (High Court case number 01/5413), an offender who was 18 years old at the time of commission of the offence of housebreaking had been sentenced to two years' imprisonment, of which one year had been suspended for four years. He was a first offender, unemployed, and still living with his parents. After querying the imposition of a sentence of direct imprisonment upon a juvenile offender, as well as the fact that it was imposed in the absence of a pre-sentence report, the Court received a reply from the magistrate that she had considered calling for a pre-sentence report, but decided against it as an 18-year-old is no longer considered to be a juvenile.

The High Court expressed some difficulty with this approach. The Court felt that at the very least, correctional supervision should have been considered, and set aside the sentence to enable the magistrate to call for and consider a report from a probation officer or correctional official.

Similarly, in R v B (High Court case number 0982/02), a sentence of three years' imprisonment for theft of golf clubs from a motor vehicle imposed upon a 15-year-old was set aside because of the failure to call for a pre-sentence report. The motivation for this failure, as provided by the sentencing officer,

was that the child had told the Court that he had received a five-year prison sentence in regional Court a couple of weeks earlier, and that a probation officer's report had been produced prior to the imposition of that sentence. This, the Court held, did not exonerate a sentencing officer from getting full particulars of the accused, especially where there were obvious indications that his family circumstances were problematic, as no biological parents appeared in Court, and an unrelated "aunt" assisted him. Also, the Court pointed out that getting access to the probation officer's report in the earlier regional Court case after being alerted by the High Court's query did not suffice, and, in any event, that report may not have been suitable or appropriate for the determination of a suitable sentence in this case. In summary, the sentencing officer had misdirected himself by imposing sentence on the basis of scant information on the accused's personal circumstances, which necessitated the case to be referred back for sentence.

Case Law regarding Various Sentence Options

(i) In S v Mtshali and Mokgopadi (Case A863/99WLD unreported) the sentences of two girls who had been referred to a reform school were overturned, when it appeared that there was no such facility for girls in the province of Gauteng, and that the girls had consequently been held in prison for almost two years awaiting the designation of an appropriate facility. Other provinces had refused them admission to provincially administered facilities, as the referral from another province would have cost implications for the receiving province. The Gauteng provincial authority, on the other hand, had declined to accept responsibility for the costs, and the girls remained incarcerated in prison as a consequence until the matter was brought to the attention of a judge by a social worker. Setting the sentence aside, the judge reasoned that the proceedings were not in accordance with justice, as the magistrates concerned had, through no fault of their own, made orders founded upon a misapprehension as to the nature of the consequences that would follow.

(ii) A reform school sentence was overturned on review by the Cape High Court in S v M 1998(1)SACR384(C). The two accused were 15 and 16 years

old respectively at the time of commission of the offence of stealing a bag of electrical switches from a deserted house. One was a first offender, the other had one previous conviction. A probation officer recommended a reform school sentence on the grounds that the two boys were disobedient at home, smoked dagga, and were starting to play truant. Their parents had lost control over them, and the probation officer was of the opinion that the necessary strict discipline to enable them to complete their schooling would be available in a reform school. The parents would have preferred a referral to an industrial school (available not as a sentence through the Criminal Procedure Act, 1977, but usually effected by means of a transfer to the children's Court). However, the presiding officer followed the recommendation of the probation officer in imposing a reform school sentence. The High Court pointed out that despite the wording of section 290 of the Criminal Procedure Act, 1977 which suggests that a reform school referral is an alternative to sentence, it is in fact a punishment in itself, and it can be experienced by those that are referred there as a severe punishment. Reform schools are not simply institutions where a young person can complete his or her education in a disciplined environment. Reform schools can be a place where a juvenile comes into contact with others who have marked criminal proclivities or who have committed serious criminal offences (reform schools have long been regarded as universities of crime). Accordingly, for this offence, committed on impulse, other options should have been considered, including the possibility of conversion of the matter to a children's Court inquiry so that such Court could refer the children to an industrial school.

(iii) S v Ceylon 1998(1)SACR122(C) concerned the imposition of a sentence of 5 months imprisonment for a 17 year old who was convicted of assault with intent to commit grievous bodily harm. There were several mitigating factors: the accused was a first offender as regards offences involving an element of violence, there was provocation, the accused tendered a guilty plea, and was in steady employment. No medical evidence was lead to illustrate that the single stab wound had had serious consequences. The sentence was regarded as shocking inappropriate in the circumstances, although the decision appears to turn more on the inappropriate use of short-term imprisonment for a first offender, than it does

on the youthful age of the accused. However, both the Convention on the Rights of the Child, 1989 which South Africa ratified in 1995, and the Constitution, provided that as far as a child under the age of 18 is concerned, detention should be a matter of last resort.

(iv) S v M 1996(2)SACR127(T) concerned a 14 year old juvenile, who had been convicted in the magistrate's Court of robbery and had been sentenced to a years' imprisonment. On review, the Court found that the conviction ought to have been one of theft and not robbery. The conviction was altered accordingly. In considering the sentence, the Court rejected a submission by the state that correctional supervision, the suspension of a sentence, placing an accused under the supervision of a probation officer, etc, are not true punishments. The Court held that all these sentencing options are forms of punishment in every sense of the word. The magistrate's sentence of a years' imprisonment was held to be shockingly inappropriate in view of the accused's age and the fact that he was a first offender. The magistrate's sentence was substituted with a suspended sentence of six months' imprisonment.

(v) In S v Dimpene 1996(2)SACR165(O) the appellant appealed against a sentence of three years' imprisonment, of which one year had been conditionally suspended. The appellant, a 20 year old first offender had been convicted in the regional Court of theft of a motor vehicle. His appeal was based on the submission that the magistrate had underemphasized his personal circumstances and had overemphasized the interests of the community. It was further submitted that correctional supervision ought to have been imposed.

In dismissing the first submission, the Court held that it was unable to find any misdirection in the judgment on sentence. Insofar as the second submission was concerned, the Court held that there are instances where correctional supervision is proper. However, it was quite incorrect to suggest that it is appropriate in all cases where the accused is a first offender. The Court further stated that even if the Court of appeal was of the opinion that correctional supervision was more appropriate than the sentence imposed by the trial Court, interference with the sentence was not justified unless an

accepted ground of appeal was present. The appeal was accordingly dismissed.

(vi) In S v Tsansbana 1996(2)SACR157(EC) the accused had been convicted in the magistrate's Court of theft and had been sentenced to six months' imprisonment which was suspended for four years, one of the conditions being that the accused not be convicted of an offence containing an element of dishonesty, committed during the period of suspension. On review, the Court held that the condition of suspension referring to an element of dishonesty was too widely formulated. The Court accordingly altered the condition to read, "that the accused is not convicted of theft or attempted theft committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine".

The other condition of the suspension required the accused to perform community service at a school, which community service must relate to the activities of the aforementioned organization. The reviewing judge held that problems could arise if a dispute arose as to which tasks the accused should perform and/or whether his failure to perform certain duties constituted a breach of the conditions of the suspension. The Court held that it was therefore essential that the nature and extent of the accused's community service be defined precisely.

(vii) Inappropriate sentencing of a juvenile was also raised in S v Tokota 1997(2)SACR369(E). The substance of the review concerned the issuing of two warrants of arrest, first in terms of section 170(2) of the Criminal Procedure Act, 1977 and in a second instance in terms of section 72(2) of the Act, consequent upon the failure of a 16 year old to appear in Court after having been warned to appear. In the first instance the juvenile was sentenced to R250 or 60 days' imprisonment, and the second time, imprisonment of 3 months was imposed.

The Court held that section 72 did not exclude liability of the child released into the care of a parent or guardian, and that a child's failure to appear after having been warned in accordance with section 72(1)(a) would constitute an

offence. Section 170 draws no distinction between juveniles and adults, and contraventions would render an accused liable to the same punishment as that specified in section 72(4), namely a maximum of R300 or 3 months' imprisonment.

After finding insufficient basis for the first conviction, and setting it aside, the Court held that it was clear that the second sentence, of direct imprisonment, was excessive: "... (I)t seems to me, taking into account the age of the present accused and the fact that he was a first offender, that an appropriate sentence would have been a suspended term of imprisonment."

7.4 Forensic Application

From the above case law, it is clear that the reasons why the review court substituted most of the sentences. It was due to the fact that not enough information was furnished to the presiding officer before he passed sentence. These problems can be eliminated in future if the services of forensic criminologists are used in matters involving juvenile offenders. Forensic criminologists can furnish the court with all the information that it needs regarding the nature of the crime, the personal circumstances of the offender, other relevant information relating to the reasons why the crime was committed and the effect of the crime on the victim.

7.5 The Child Justice Bill, 49 of 2002

Sections 61 – 72 deal with the various aspects regarding the sentencing of juveniles and provide as follows:

"Child to be sentenced in terms of this Chapter

61. A child justice Court must, after convicting a child, impose a sentence in accordance with this Chapter.

Pre-sentence reports

62.(1) A child justice Court imposing a sentence must request a pre-sentence report prepared by a probation officer or any other suitable person prior to the imposition of sentence.

(2) The probation officer or other person must complete the report as soon as possible but no later than one calendar month following the date upon which such report was requested.

(3) A child justice Court that impose a sentence other than that recommended in the pre-sentence report must record the reasons for the imposition of a different sentence.

(4) (a) A child justice Court may dispense with a pre-sentence report where a child is convicted for an offence referred to in Schedule 1 or where requiring such report would cause undue delay in the conclusion of the case to the prejudice of the child, but no child justice Court sentencing a child may impose a sentence with a residential requirement unless a pre-sentence report has first been obtained.

(b) For the purposes of paragraph (a), “a sentence with a residential requirement” includes a sentence where the residential requirement of the sentence is suspended.

(5) The officer presiding in a child justice Court who imposes any sentence involving detention in a residential facility must certify on the warrant of detention that a pre-sentence report has been placed before the child justice Court prior to imposition of sentence.

(6) If the certification contemplated in subsection (5) does not appear on the warrant of detention the person admitting the child to the residential facility in question must refer the matter back to the relevant child justice Court.

Purpose of sentencing

63. The purposes of sentencing in terms of this Act are to -

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualized response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the offence;

(c) promote the reintegration of the child into the family and community; and

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration.

Community-based sentences

64.(1) Sentences which allow a child to remain in the community and which may be imposed in terms of this Act are –

(a) any of the options referred to in section 47(4)(a), (b), (d), (e), (f) or (h);

(b) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three years;

(c) in cases which warrant such specialised intervention, referral to counselling or therapy in conjunction with any of the options listed in this section for such period of time as the child justice Court deems fit;

(d) where a child is over the age of compulsory school attendance as contemplated in the South African Schools Act, 1996 (Act No 84 of 1996),

and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding 12 months and for no more than 35 hours per week;

(e) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the child justice Court, or by the probation officer of the district in which the child justice Court is situated, for a maximum period of 250 hours and to be completed within twelve months;

(f) any other sentence, subject to section 71, which is appropriate to the circumstances of the child and in keeping with the principles of this Act and which, if it includes a period of time, may not exceed 12 months in duration.

(2) Before a child under the age of 14 years is sentenced to a sentence contemplated in subsection (1)(e), due consideration must be given to the child's age and development.

Restorative justice sentences

65.(1) A child justice Court that convicts a child of an offence may refer the matter to a family group conference or for victim-offender mediation.

(2) Section 48 applies where a child justice Court has referred a matter to a family group conference, and section 49 applies where a child justice Court has referred a matter for victim-offender mediation.

(3) Upon receipt of the written recommendations from a family group conference or victim-offender mediation, the child justice Court may -

(a) confirm the recommendations by making them an order of the child justice Court; or

(b) substitute or amend the recommendations and make an appropriate order.

(4) If the child justice Court does not agree with the terms of the plan made at a family group conference or victim-offender mediation and imposes a sentence which differs in a material respect from that agreed to or decided upon at the conference or mediation, the child justice Court must note the reasons for deviating from the plan on the record of the proceedings.

(5) (a) If a child has been sentenced in accordance with an order arising from a family group conference or victim-offender mediation, and fails to comply with that order, the probation officer must notify the child justice Court of such failure as soon as possible.

(b) The child justice Court may issue a warrant of arrest for the child and when the child appears before the child justice Court pursuant to such a warrant impose an appropriate sentence on the child.

Sentences involving correctional supervision

66.(1) A child justice Court may impose a sentence of correctional supervision for a period not exceeding three years on a child over the age of 14 years.

(2) The whole or any part of a sentence contemplated in subsection (1) may be postponed or suspended, with or without conditions contemplated in section 70(3).

Sentence with residential requirement

67.(1) No sentence involving a residential requirement may be imposed upon a child unless the presiding officer is satisfied that such a sentence is justified by –

(a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon the victim; or

(b) the previous failure of the child to respond to non-residential alternatives.

(2) A presiding officer imposing any sentence involving a residential requirement on a child must note the reasons for the sentence on the record and explain them to the child in language that he or she can understand.

(3) A sentence involving a residential requirement includes referral to a -

(a) programme with a periodic residence requirement where the duration of the programme does not exceed 12 months, and no portion of the residence requirement exceeds 21 consecutive nights, with a maximum of 60 nights for the duration of the programme;

(b) residential facility, subject to section 68; and

(c) prison, subject to section 69.

Referral to residential facility

68.(1) Subject to subsection (2), a sentence involving a residential requirement may not exceed a period of two years.

(2) (a) A sentence involving a residential requirement may be imposed for a period exceeding two years if the child is under the age of 14 years and the child would have been sentenced to imprisonment due to the seriousness of the offence were it not for section 69(1)(a).

(b) A child contemplated in paragraph (a) may not be required to reside in a residential facility beyond the age of 18 years.

(3) Upon completion of a sentence contemplated in subsection (1) or upon attainment of the age of 18 years in the case of a child referred to in subsection (2), the child concerned may request permission in the prescribed

manner from the head of the residential facility to continue to reside at such residential facility for the purposes of completing his or her education.

Referral to prison

69.(1) A sentence of imprisonment may not be imposed unless –

(a) the child was over the age of 14 years of age at the time of commission of the offence; and

(b) substantial and compelling reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element.

(2) No sentence of imprisonment may be imposed on a child -

(a) in respect of an offence referred to in Schedule 1; or

(b) as an alternative to any other sentence contemplated in this Act.

(3) If any child fails to comply with a condition of a sentence imposed on him or her, the child may, in the prescribed manner, be brought before the child justice Court which imposed the original sentence for reconsideration of an appropriate sentence which may, subject to subsections (1) and (2), include a sentence of imprisonment.

(4) A child justice Court imposing a sentence of imprisonment must announce the period of imprisonment in an open child justice Court and the coming into effect of the term of imprisonment must be antedated by the number of days that the child has spent in prison prior to the sentence being announced in child justice Court.

Postponement or suspension of passing of sentence

70.(1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding three years.

(2) The whole or any part of any sentence may be suspended, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding five years.

(3) The conditions contemplated in subsections (1) and (2) may be any condition appropriate to the circumstances of the child which is in keeping with the objects of this Act and which promotes the child's reintegration into society and may include –

- (a) restitution, compensation or symbolic restitution;
- (b) an apology;
- (c) the obligation not to commit a further offence of a similar nature;
- (d) good behaviour;
- (e) regular school attendance for a specified period;
- (f) attendance at a specified time and place of a family group conference or for victim-offender mediation;
- (g) placement under the supervision of a probation officer or correctional official as defined in section 1 of the Correctional Services Act, 1998 (Act No 111 of 1998);
- (h) a requirement that the child or any other person designated by the child justice Court must again appear before that child justice Court on a

date or dates to be determined by such child justice Court for a periodic progress report; and

(i) referral to any diversion option referred to in section 47(3)(d), (e), (f), (g), (h), (i), (j) or (k).

(4) A child justice Court that has postponed the passing of sentence in terms of subsection (1) on one or more conditions may request the probation officer concerned for regular progress reports indicating the child's compliance with the conditions.

(5) The conviction of a child in respect of whom passing of a sentence has been postponed must be expunged from any record if the child has met all the conditions imposed or at the expiration of the period in question, as the case may be.

Penalty *in lieu* of fine or imprisonment

71. Notwithstanding any other law, a child justice Court convicting a child of an offence for which a fine or imprisonment is prescribed as penalty may impose any one of the following penalties in place of that fine or imprisonment:

(a) Symbolic restitution to a specified person, group of persons or institution;

(b) payment of compensation not exceeding R500 to a specified person, group of persons or institution where the child or his or her family is able to afford this;

(c) an obligation on the child to provide some service or benefit or to pay compensation to a community charity or welfare organization identified by the child concerned or by the child justice Court if there is no identifiable person to whom restitution or compensation could be made; or

(d) any other competent sentence prescribed in this Act, but not imprisonment.

Prohibition on certain forms of punishment

72.(1) No sentence of life imprisonment may be imposed on a child.

(2) A child who has been sentenced to attend a residential facility may not be detained in a prison or in police custody pending designation of the place where the sentence is to be served.”

The South African Law Commission’s comments (2000:xxiv) on these provisions are the following:

“Sentence and pre-sentence reports

The Child Justice Bill, 2002 states that Court must, after convicting a child, impose a sentence in accordance with Chapter 8. Pre-sentence reports compiled by a probation officer or any other suitable person (including a forensic criminologist) are required in all matters, with a *proviso* that the report may be dispensed with in relation to less serious offences (specified in Schedule 1) or where requiring such a report would cause an undue delay which would be prejudicial to the best interests of the child. However, no Court may impose a sentence with a residential requirement unless a pre-sentence report has been placed before such Court, even if the residential requirement of the sentence is suspended.”

The presiding magistrates were requested to indicated whether or not there are enough sentencing options available in matter where juveniles are involved. They responded as follows:

Table 12 Enough sentencing options are available in cases where juveniles are involved

Options	Frequency	Percent
Definitely agree	9	9.3
Agree	27	27.8
Disagree	39	40.2
Definitely disagree	22	22.7
Total	97	100.0

Table 12 indicates that most of the magistrates, 39 (40,2 percent) are of the opinion that there are not enough sentencing options available in cases involving juveniles. Another 22 definitely disagreed with this statement. It can therefore be stated that the majority, 61 (62,9 percent) disagree with this statement. The reason for this might be because of the fact that there is no justice system available to juveniles only and there is no sentencing option applicable to juvenile offenders only. With regard to the issue of sentencing options available to presiding officers in cases involving juveniles the following comments were made:

Respondent 001: “Many teenagers live alone as their parents have passed away. It is difficult to sentence them to correctional service, as they have no guardians. Facilities similar to reform schools should be instituted to help in the positive upbringing of these children.”

Respondent 017: “Sending a child to a reformatory (as we know them) is not really an option. One should, however, have the ability to send children to similar institutions - but the emphasis should be on education, training, upliftment and rehabilitation. Our "reformatories" and "industrial schools" are shockingly inadequate and I am convinced that sending a child to these places does more harm than good. The so-called "places of safety" at which children are detained are likewise absolutely nothing to be proud of. If one speaks to the children who have been detained there it is shocking to hear about the conditions they lived in. much more control is needed over these institutions. ”

Respondent 028 said: *“Lyfstraf was in die verlede baie suksesvol toegepas op jeugdiges. ‘n Mens wil nie graag jeugdiges in die gevangenis laat opneem nie. Jeugdiges kom baie moeilik alternatiewe vonnis opsies na, soos bv. Gemeenskapsdiens. Dissipline is dus ‘n Probleem. Ek aanvaar daar is plekke waar dit dalk wel ‘n werkbare opsie is. Elke saak moet egter maar steeds op sy eie meriete beoordeel word.”*

Respondent 036: “. Incarceration of the juvenile is sometimes the only sentence applicable.” Respondent 094 added: “Little punishment options available for juvenile offenders. Exert pressure on parents/guardians rather than of juvenile offenders themselves. Corporal punishment was the best for these offenders because it made them pay for their offences personally and it was a good deterrent.”

The presiding magistrates were asked to indicate whether pre-sentence report should be compulsory before a juvenile is sentenced to imprisonment. This is how they responded:

Table 13 Pre-sentence reports should be compulsory before a juvenile is sentenced to imprisonment

Options	Frequency	Percent
Definitely agree	55	56.7
Agree	31	32.0
Disagree	7	7.2
Definitely disagree	4	4.1
Total	97	100.0

Table 13 indicates that the majority of the magistrates, 55 (56,7 percent) are of the opinion that pre-sentence reports should be compulsory before a juvenile is sentenced to imprisonment. Another 31 (32 percent) agree with this statement. Interestingly enough it was found that most of the magistrates who did not look at the Child Justice Bill, 2002, that is 29 definitely agreed with the statement that pre-sentence report should be compulsory before a juvenile is sentenced to imprisonment. A further 24, who did not look at the Child Justice Bill, 2002 agreed with this statement (Chi-square 7,697; Df. 3; Prob. 0,020. The reason for this might be that the magistrates feel that they should be

adequately informed of the juvenile’s personal circumstances, the reason why the crime has been committed etc. before a sentence of this nature is imposed. Respondent 035 made the following comment: “In most cases juveniles are instigated by elderly persons to commit crime. So it is important that a thorough investigation regarding what made the child to commit crime should be taken seriously. Bear in mind they are threatened with death if they tell the truth. So their case is too pathetic.” Respondent 037 commented as follows: “Care should be taken to realise the difference between a first/second juvenile offender and repeat offenders. The nature of the crime and the involvement of grownups should be looked at carefully. Places of safety for juveniles are inadequate (too few) and provision should be made for separate places for different age groups.”

The participating magistrates were asked whether or not they received enough training with regard to the issue of sentencing. They responded as follows:

Table 14 Presiding officers receive enough training with regard to sentencing

Options	Frequency	Percent
Yes	34	35.1
No	63	64.9
Total	97	100.0

Table 14 clearly indicates that the majority of magistrates, 63 (64,9 percent) are of the opinion that presiding officers do not receive enough training with regard to the issue of sentencing. The reason for this might be that sentencing is a very complex issue and a lot of factors have to be taken into account when an appropriate sentence is considered. These factors and other issues that are important in this regard are not dealt with as a separate subject in legal studies and forms part of Criminal Procedure, which includes the criminal justice procedure as a whole. Respondent 013 commented as follows: “Sentencing is within the discretion of the presiding officer and it is an important part of the proceedings and enough training should be provided.”

Respondent 014 remarked as follows: “Specialised presiding officers with proper training and a special attitude must hear such cases. Such cases are very, very demanding and presiding officers must regularly be changed. This must also be the case with prosecutors. No pressure concerning time in which such cases are to be completed must be expected. Prosecutors must be allowed sufficient time for consultation. If during giving evidence the children become tired, sufficient time to relax must be allowed.”

7.6 Conclusion

The provisions of the Child Justice Bill, 2002 on sentencing are another important step by the South African Justice system to comply with the duty imposed on States Parties to comply with the obligations placed upon them by the United Nations Convention on the Rights of the Child, 1989.

An important difference brought about by the Child Justice Bill, 2002 is the requirement of a pre-sentence report before the imposition of sentence unless the juvenile is convicted of an offence in Schedule 1 or where requiring such a report would cause an undue delay, which would be prejudicial to the child. The Court must also furnish reasons if it imposes a different sentence than the one recommended by the person who compiled the report. Forensic criminologist can play a very important role here in assisting the Court to impose an appropriate sentence. The majority of the magistrates are of the opinion that there are not enough sentencing options available to them in cases involving juveniles. The majority of magistrates are of the opinion that pre-sentence reports should be compulsory before a juvenile is sentenced to imprisonment and most of the magistrates who hold this view have not looked at the Child Justice Bill, 2002. The majority of the magistrates are of the opinion that they do not receive enough training with regard to the issue of sentencing.

Chapter 8 deals with the important aspects relating to the pre-sentence report.

CHAPTER 8

PRE-SENTENCE REPORT

8.1 Introduction

In South Africa the use of pre-sentence reports are limited.

In this chapter the definition of pre-sentence report as well as the importance of the recommendation on sentence will be discussed.

The reasons for the relatively limited used of pre-sentence reports will be investigated.

The compiling and contents of pre-sentence reports will be highlighted with the focus on juvenile offenders. A proposed format to be used in matters where juveniles are involved will be provided.

In the last instance the impact that the proposed Child Justice Bill, 2002 will have on the forensic criminologist will be investigated.

8.2 Definition

Any report, which is drawn up by an expert of some kind, which is designed to assist the Court in the quest to find an appropriate sentence, can be described as a pre-sentence report (Terblanche 1999:111).

8.3 Necessity of Pre-Sentence Reports

In some instances pre-sentence reports are statutorily required. Correctional supervision may not be imposed without a report of a probation or correctional officer and no person can be committed to a treatment centre in terms of section 296 of the Criminal Procedure Act, 1977 without a probation officer

report. These reports have a specific purpose, which is somewhat different to other pre-sentence reports.

In all other cases the presiding officer has a discretion to obtain a pre-sentence report. In one instance this discretion is quite narrow, as it has frequently been held in our Courts that no juvenile offender should be committed to a reformatory without a probation report. This principle has to be followed unless good reasons exist for not doing so. It could happen, for example, that the information, which would normally be contained in a probation report, has already been produced during the trial on the merits of the case (Terblanche 1999:111).

8.4 The Purpose of a Pre-Sentence Report (Juvenile Offenders)

The main purpose of a pre-sentence report is to assist the presiding officer in gaining a better understanding of the offender, and the reasons for his crime. The pre-sentence report should be obtained whenever the presiding officer feels the need to be better informed as to the character (in the broadest sense of the word) and the possible future of the offender. Nothing prevents either the prosecutor or the defence attorney or advocate from obtaining a pre-sentence report (Terblanche 1999:111).

8.5 Reasons for Limited Use of Pre-Sentence Reports

A number of factors hamper the wider use of pre-sentence reports:

8.5.1 Shortage

There is a shortage of probation officers, with the result that only a limited number of reports can be produced. The use of reports by private experts offers no solution, as the offender has to pay for such a service and most cannot afford this.

8.5.2 Time Consuming

It takes time to produce a pre-sentence report. Information has to be gathered from various sources, it has to be collated and thought through by the author of the report. As a result this process would normally add another four to six weeks to the duration of the trial. This additional period is normally a worthwhile investment, but it may not provide sufficient incentive for a presiding officer with many cases pending on his Court roll, to add another one.

8.5.3 Standard of Reports

Presiding officers easily lose confidence in the value of pre-sentence reports generally when they experience a report, which is not properly researched, objective and well motivated. This, unfortunately, happens – for example, in S v Lowis 1997(I)SACR235 a report was submitted which was drawn up four years after consulting with the offender. However, the judicial officer may not, without good reason, reject evidence by experts and replace it with his own experience.

The result is that relatively few pre-sentence reports are obtained. Midgley found that in 1968 probation reports were obtained in only 11,3 percent of convictions in the Cape Town juvenile Court. A countrywide survey of sentences imposed in 1992 showed that such reports were involved in only 4,8 percent of the juvenile offenders, hardly more than adult offenders at 4 percent (Terblanche 1999:112).

8.6 Compiling and Contents of the Pre-Sentence Report

8.6.1 Overview of Initial Steps

After the forensic criminologist received an instruction, from the defence attorney, advocate, prosecutor or Court, to compile a pre-sentence report all the relevant information and documentation must be obtained. This will

include a copy of the charge sheet, a transcribed copy of the Court proceeding, any reports that were submitted to the Court during the trial as well as the statement made by the accused, if any.

At this stage knowledge of the general provisions of the Criminal Procedure Act, 1977 and general Court procedures will be valuable to the forensic criminologist to enable him/her to gain a better understanding of what transpired during the trial.

The next step will be to arrange for an interview with the accused. In the case of a juvenile offender, the forensic criminologist will have to have knowledge of the different developmental stages of children to enable him/her to relate to the child offender in a possible way to establish rapport. The forensic criminologist should also be aware of the language development of children to enable him/her to use words and sentences which the juvenile offender understands and can respond to.

After the relevant information have been obtained from the accused, the forensic criminologist will conduct interviews with other relevant people for example the parents, teachers, minister, caregivers, friends and family to obtain more information regarding the accused and to verify the information obtained from the accused. In the case of a juvenile offender much more attention will be given to interviews with teachers, sport coaches, and friends. The role of peer pressure and the impact it has on the accused is also important.

8.6.2 Contents of the Pre-Sentence Report (Focusing on Juvenile Offenders)

Biographical Details

The following information should be included here:

- (i) the full names of the accused;

- (ii) the age of the accused; and

(iii) his/her level of education.

Personal Background

The following information should be included here:

Scholastic Background

The accused's intellectual and scholastic functioning (insight, cognitive reasoning, perceptions, level of developmental stages, etc. are important here) should be presented to the court.

Family Background

This will include the number of siblings, the parents' occupations, relationship between the parents, between parents and children and between the children themselves. The accused's own childhood experiences and relationships. Relationships with teachers and fellow scholars should be discussed. His/her social adjustment with regard to norms and standards of the community, school, recreational activities and peer groups are very important. The accused involvement in sub-cultures should be investigated as well as his/her exposure to and use of alcohol and drugs are to be highlighted. The character of the accused should be assessed and a summary of his/her criminal history should be furnished.

Circumstances of the Offence

The present offence should be described in detail, including the nature of the crime, the motive, the degree of premeditation and the juvenile offender's participation and the extent of temptation. The accused attitude towards the crime and the victim is of particular importance. Whether or not the accused manifests genuine remorse for the damage and suffering he/she caused should be stated as well as to what extent he/she is willing to accept responsibility for his/her offending. The precipitating factors of the crime as

well as the consequences of the crime for the victim and his/her family should be mentioned.

Analysis and Evaluation of the Information

Here the forensic criminologist scrutinizes and interprets the information contained in the report and explains the crime in terms of suitable criminological theories.

This section discusses the relevance of the information contained in the report for the development of the accused and his/her offending. The forensic criminologist attempts to show what influence the offender's developmental history had in making him/her what he/she is. This is not aimed at excusing a person's criminal behaviour, but at explaining and understanding it.

The evaluation includes an assessment of the accused's personality and character, his/her strengths and weaknesses his/her criminal inclination or otherwise, his/her potential for growth and orderly living. An evaluation of the offender's support structure and resources in the community that could be used in his/her rehabilitation should also be included. The significance of an offender's childhood experiences, his/her educational background for his/her current as well as potential future social functioning should also be explained.

There are various mitigating and aggravating factors, which the Court takes into account when considering an appropriate sentence. In this regard the fact that the accused is a juvenile, a first offender, acted under the influence of an older person and that he/she pleaded guilty and shows genuine remorse for the crime can be regarded as mitigating factors which the Court may take into account during sentencing. There are however aggravating factors like the fact that the juvenile offender shows now remorse for his actions, has previous convictions of a similar nature, that the nature of the crime is very serious and the fact that the victim is a vulnerable person for example a very old lady which can lead to a heavier sentence. In order to show the objectivity of the forensic criminologist it is important for him/her to mention the applicable mitigating and aggravating factors in his/her report and give

reasons why it is regarded as aggravating or mitigating factors. These factors must be furnished to the Court because a forensic criminologist is an officer of the Court and as such must furnish all relevant facts to the Court to enable it to exercise its discretion.

Recommendation

Pre-sentence reports are expected to contain a recommendation regarding an appropriate sentence for the offender.

The duty to impose an appropriate sentence rests with the presiding judicial officer. This is a duty, which cannot be abdicated to anybody else. The function of the pre-sentence reporter is the same as the function of any expert giving evidence in Court, namely that such a person is entitled to express their opinion, but the Court has to make the decision. In this process it has to analyse the pre-sentence report carefully and critically. The presiding judicial officer may, therefore, not simply follow the recommendation of the pre-sentence reporter.

The appeal Court has remarked in S v W 1994(1)SACR610(A)611 and in S v Mtsi 1995(2)SACR206(W)208e, that the authors of pre-sentence reports, when they act forensically, should reach their recommendations in the manner in which a Court will decide on sentence.

If the recommendation of the pre-sentence report is not followed, the Court should give reasons for this decision (Terblanche 1999:113-114).

When making a recommendation on an appropriate sentence in a specific matter, it is very important that the different sentences that might be considered be discussed and reasons for recommending a specific sentence be furnished. The forensic criminologist must have a thorough knowledge of all the sentence options available for juvenile offenders. The relevant provisions in the Criminal Procedure Act, 1977 must be taken into account to avoid, for example, the scenario where community service is recommended for a 12-year-old offender.

It is also important for a forensic criminologist to have knowledge of the various social resources in the community when recommending a sentence with a residential requirement and to confirm that the juvenile can be accommodated in the relevant facility before such a recommendation is made.

8.7 The Child Justice Bill, 49 of 2002

As indicated in paragraph 8.3, there is a tendency in our Courts to obtain a pre-sentence report before sentencing a juvenile offender. Section 62(1) of the proposed Child Justice Bill, 2002 provides that a juvenile Court must request a pre-sentence report before imposing sentence. For the first time in our criminal justice system, the Legislature places a duty on presiding judicial officers to request a pre-sentence report before imposing a sentence on a juvenile. The Legislature also place a timeframe on the completion of the report in section 62(2), being one calendar month following the date upon which such report was requested.

The Court may dispense with a pre-sentence report only in matters where the juvenile is convicted of an offence referred to in Schedule 1 or where the requiring of such report would cause undue delay in the conclusion of the case to the prejudice of the child. The Court may however, not impose a sentence with a residential requirement unless a pre-sentence report has first been obtained. This is also applicable even where the residential requirement of the sentence is suspended.

In terms of section 62(5) the Court imposing a sentence involving detention in a residential facility must certify on the warrant of detention that a pre-sentence report has been placed before it.

Section 62(3) provides that in the event of the Court imposing a sentence other than that recommended in the pre-sentence report must record the reasons for the imposing of a different sentence.

From the above it is clear that the forensic criminologist will have an even more important role to play in the adjudication of juvenile offenders once the Child Justice Bill, 2002 is implemented.

8.8 Conclusion

From the above it is clear that pre-sentence reports have an important place and role in our criminal justice system, especially where juvenile offenders are involved. This role and the role of the forensic criminologist will increase in the proposed new juvenile justice system.

In Chapter 9 the focus will be on special child justice courts and the confidentiality of children's court hearings.

CHAPTER 9

SPECIAL CHILD JUSTICE COURTS AND CONFIDENTIALITY OF CHILDREN'S COURT HEARINGS

9.1 Introduction

Throughout the world there are a variety of different models being used in juvenile justice systems and Courts. At present South Africa does not have a separate justice system for juveniles.

In the first part of this chapter various models being used in international countries will be discussed, the position in South Africa will be highlighted and the proposed amendments in the Child Justice Bill, 2002 will be provided.

It is important to incorporate the procedures, requirements and provisions relating to juvenile Courts into legislation to enable all parties involved to know exactly what are expected from them in the Courts.

In the second part of this chapter the confidentiality of children's Court hearings will be discussed. These provisions are very important in protecting the rights of juvenile offenders and juvenile witnesses.

9.2 Special Child Justice Courts

9.2.1 International Perspective

There are a wide variety of models, which establish juvenile justice Court systems to be found in international literature.

In Belgium juvenile offenders (persons under the age of 18) are not prosecuted before the ordinary Courts but before juvenile Courts, composed of a single judge. The juvenile Courts do not impose criminal sanctions, but educative measures.

Juvenile Courts can be seized not only where a minor is suspected of having committed an offence, but also with respect to minors who are in a problematic educational situation, often for reasons beyond their control, e.g. because of their living conditions, or because of the behaviour of their parents. The purpose of this latter competence is to allow juvenile Courts to take preventive measures, in order to prevent minors from becoming criminal offenders.

A mixed regime is applicable to persons between 16 and 18 who, in principle, are referred to the juvenile Court, but who can be brought before ordinary Courts if the judge deems it more appropriate to have them tried according to ordinary procedure. Some offences committed by minors of that age are always prosecuted before the ordinary Courts, for example road traffic offences and physical injury caused in connection with such offences (Van den Wyngaert 1993:10).

In Denmark children under 15 years of age are not punishable. Therefore they cannot be prosecuted, remanded in custody etc. But they may be interrogated by the police. If intervention is necessary, the child in question must be handed over to the welfare authorities. This is an administrative body, and its decisions are subject to judicial review in civil proceedings.

Juveniles above the age of criminal responsibility can be prosecuted in accordance with the ordinary rules for adults, but the majority of 15 – 17 year olds are transferred to the social welfare authorities as a condition of the prosecutors' waiver of prosecution (Van den Wyngaert 1993:64).

In England and Wales young offenders are dealt with in a separate regime. The rules of criminal responsibility are that no person under the age of 10 can be guilty of a criminal offence, and between the age of 10 and 14, he or she can be guilty only if the prosecution can establish that the young person knows the difference between right and wrong, or has a mischievous discretion. With the exception of really serious offences, the young offender was dealt with by magistrates in Juvenile Courts, whose jurisdiction also extended to care proceedings in respect of children in need of care rather

than correction. Recent legislation has changed this, so that the care aspect of the Magistrates' Courts will be dealt with in family proceedings Courts with the criminal jurisdiction being exercised in Courts renamed "youth Courts", youths being persons of 17 years and below (Van den Wyngaert 1993:73).

In France minors who are under eighteen years of age at the time of the offence are judged by specialist Courts, the so-called young offenders charter.

The preliminary judicial investigation, which is obligatory for minors prosecuted for *crimes*, *délits* or *contravention* of the 5th class, is normally carried out by the juvenile judge: a judge appointed on the basis of his ability and interest in the problems of young offenders. However, in case of a crime, the investigation is conducted by a *juge d'instruction* who has special qualifications for dealing with minors.

The trial stage of the proceedings must comply with more complex rules. If the case concerns a simple *délit*, the juvenile judge can try the matter himself *in camera*, and will impose a reduced sentence due to mitigating circumstances. If the case involves a more complicated offence or an offence for which imprisonment appears to be the necessary punishment, the juvenile judge refers the matter to a juvenile judge which comprises 3 members (a president who is the juvenile judge and two assessors who are laymen, chosen for their interest in young offenders). In the case of a crime, the *juge d'instruction* refers the case to the *chambre d'accusation* which can in turn either submit it to the juvenile Court if the accused is under 16, or to the assize Court for minors if he is between 16 and 18. This assize Court is made up of a member of the Court of appeal as president, two assessors who are normally taken from the juvenile judges within the Court of appeal, and nine jurors (Van den Wyngaert 1993:105).

In Germany the Juvenile Court Law provides for some procedural specialties for offenders between 14 and 21 years. These cases are brought before juvenile Courts. Although juvenile Courts are staffed according to the general provisions of the GVG, both the professional and the lay judges must comply with higher standards of knowledge and experience in educational affairs; the

same is true for the prosecutor. This legal requirement, as a rule, is usually not met in practice. Very often, younger judges and prosecutors with no additional competence in other fields are appointed as judges and prosecutors in juvenile Courts. If a woman happens to become a judge or a prosecutor, she will very likely be sent to a juvenile Court just by the fact of her gender, which, according to a well-settled prejudice, guarantees her special skills in educational affairs.

With respect to juveniles, the principle of legality of prosecutions is not applicable: the prosecutor has the discretionary power to bring a formal charge against the juvenile or to refrain from doing so. This system is meant to avoid formal proceedings against juveniles.

Detention on remand is subjected to stricter rules than those applicable to adults. Juveniles, are, if possible, detained on remand in reformatories rather than in prisons.

Judicial Aid for Juveniles, a public welfare organisation giving social help to deviant juveniles, has the right to participate in any juvenile Court proceedings. The main task of Judicial Aid is to explore the personal and social situation of the accused juvenile more thoroughly than the Court would be able to do. Thus the prognosis of the Court when deciding on the sanction will be supported by additional information.

In order to prevent negative educational influences and labelling mechanisms by the juvenile's exposure to spectators, trials of juveniles are not public.

Parents or other legal guardians of the juvenile may act as counsel, having the right to apply and to appeal. The juvenile may be partially excluded from the hearing, if the proceedings might be disadvantageous or detrimental to his education.

Remedies are limited to one additional instance, which according to the juvenile's option may be general appeal or cassation.

Finally, the Court can decide to have the name and the case of the sentenced juvenile deleted from the official criminal records with the effect that legally, the juvenile is without a previous criminal record (Van den Wyngaert 1993:137).

In Greece offences committed by children and adolescents, i.e. by persons ages 7 – 12 and 17 years respectively, are brought before the Juvenile Court. It is competent to try even offences which would be qualified felonies if committed by an adult. The three-member Juvenile Court decides on offences which are punishable by confinement in a Reformatory Institution for at least five years. As far as other offences are concerned, the one-member Juvenile Court is competent (Van den Wyngaert 1993:163).

In Ireland there is no distinct system of juvenile justice as such. The general law of criminal procedure is adapted to deal with the case of a child or young person in three main ways.

First, a child under seven years has an absolute defence of *doli incapax* to any criminal charge, while there is a rebuttable presumption that a child between 7 and 14 years of age is *doli incapax*; persons aged 14 and older are fully liable for their criminal acts. Secondly, when dealing summarily with an offence alleged to have been committed by a child or young person, the District Court – which holds special sittings as the Children’s Court – may deal with the case with an appropriate degree of informality and may dispose as the best interests of the juvenile require. Thirdly, children and young persons are subject to a distinct regime of sanctions and penalties (Van den Wyngaert 1993:185).

In Italy proceedings against juvenile offenders are brought before a specialized Court.

These proceedings differ fundamentally from those against adults. The general principle is to take into account the minor’s personality and educational needs. Accordingly, a judicial police for minors exists, and it is permissible to assess a minor’s personality, whereas it is forbidden to do so

for an adult accused. Detention on remand can only be ordered in the most serious cases, and house arrest or placing the minor in a community is favoured. The *parte civile* proceedings are not open to a victim of an offence that is prosecuted before the minor's Courts. Information supplied to the media is restricted. The trial is not public. The minor is examined by the president of the Court. There is ample room for a suspended sentence, for a semi-custodial sentence, for a community-service order, for pardon and for a *nolle prosequi* (Van den Wyngaert 1993:253).

In Netherlands a different set of rules pertains to the prosecution and trial of persons who have not yet reached the age of eighteen on the date when prosecution commences, the reason being that ordinary criminal procedure is considered unsuitable for the trial of juveniles. In juvenile criminal procedure, the emphasis is very much on the education and protection of underage persons. One result of this approach, however, has been that the juvenile accused often has fewer rights than the adult.

Perhaps the most remarkable characteristic of juvenile criminal procedure is the central position occupied by the juvenile judge, to whom, above all others, the interests of the juvenile offender are entrusted. Hardly a decision of any importance can be taken during the preliminary investigation, without the juvenile judge somehow being involved. The lengths to which this may go are well illustrated by the fact that the juvenile judge acts both as investigating judge during the preliminary judicial investigation, and as trial judge. This combination, quite different from the normal procedure that is applicable to adults, is now, however, considered as being contrary to article 6 of the European Convention on Human Rights.

Gradually, new ideas on juvenile criminal procedure are gaining ground. The idea that the interests of the juveniles themselves justify different rules of procedure, even if this means fewer procedural rights, is no longer accepted. In 1989, a bill was presented to parliament in which a revision of the criminal procedure pertaining to juveniles is proposed: this bill stems from the notion that, if juveniles are recognized as full legal subjects, the differences between

adult and juvenile procedure must be kept as small as possible (Van den Wyngaert 1993:311).

In Scotland no child under 8 years can be guilty of any offence. A child over the age of 8 who is alleged to have committed an offence may be dealt with by way of prosecution under the 1975 Act, or under the procedures contained in Part III of the Social work (Scotland) Act, 1968.

(i) Prosecution of Children

No child may be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance. A child may only be prosecuted before the High Court or the sheriff Court. If the child is prosecuted under solemn procedure the proceedings follow the normal pattern. If the child is prosecuted under summary procedure in the sheriff Court, certain special procedures apply. Thus the sheriff must sit in a different building or room from that in which he normally sits, or, if this is not possible, he must sit on a different day from those on which other Courts in the same building are doing criminal business. The Act of Adjournal (Consolidation), 1988 sets out the procedures which must be followed by the sheriff during the conduct of the hearing of the case against the child, procedures which are, in the main, intended to safeguard the interests of the child.

No newspaper report of any proceedings in a Court shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any person under the age of 16 years concerned in the proceedings, whether that person be involved as an accused person or as a witness.

(ii) Proceedings under Part III of the Social Work (Scotland) Act, 1968

Part III of the Social Work (Scotland) Act, 1968 established a framework for dealing with young persons in need of “compulsory measures of care”. Section 32(1) of the 1968 Act provides that a child may be in need of compulsory measures of care if, *inter alia*, the child has committed an offence.

The responsibility for determining whether a child is in need of such measures rests with a body known as a “children’s hearing”. Responsibility for referring the child’s case to the children’s hearing rests with a local authority officer known as the reporter.

The reporter may receive information from any person or source that a child may be in need of compulsory measures of care (including the police who have a duty to report alleged offences involving children to the reporter). On receiving such information the reporter conducts an initial investigation and decides whether or not any further action is required. If he decides that no further action is required he may inform the child and his parents and the person who brought the case to his notice, or any of those persons. He may, as an alternative course of action, refer the case to the local authority so that they may, through their social work department, make arrangements for the advice, guidance and assistance of the child and his family. Where it appears to the reporter that the child is in need of compulsory measures of care, he refers the matter to the children’s hearing.

The children’s hearing consists of a chairman and two other members (including at least one man and one woman). Hearings are held in private in accommodation which must be dissociated from criminal Courts and police stations. Where a child is notified that his case has been referred to a children’s hearing he is obliged to attend that hearing. The child’s parent has a right to attend, and is required to attend unless the hearing are satisfied that it would be unreasonable to require such attendance, or that such attendance would be unnecessary for the consideration of the case.

If there is a risk of conflict between the interests of the child and those of the parent, it is the duty of the chairman of the hearing to ensure that the interests of the child are safeguarded, and this may be done by the appointment of a person to safeguard the child’s interests.

At the hearing, the chairman explains the grounds on which the case has been referred to the hearing, and asks if the child and his parent accept those

grounds. If the grounds are accepted in whole, or in part, the hearing may proceed to deal with the child's case in its entirety or in respect of the grounds of referral that have been accepted. Where the grounds for referral are not accepted, the hearing then refers the case to a sheriff whose function it is to determine whether such grounds of referral as have not been accepted are established. The hearings before the sheriff, which must take place within 28 days of the referral, are held in private. They are not criminal hearings but civil proceedings to which the ordinary rules of civil, as opposed to criminal, evidence apply.

Where the sheriff is satisfied that any of the grounds of referral remitted to him have been established he returns the case to the reporter to make arrangements for a children's hearing to consider and determine the case. Where he decides that none of the grounds of referral has been established, the application is dismissed and the referral to the children's hearing is discharged in respect of those grounds.

Where the children's hearing considers and disposes of a case, whether without or after referral to the sheriff, its responsibility is to determine whether the child is in need of compulsory measures of care. If the hearing decides that such measures are needed they make what is known as a "supervision requirement". This may require the child to submit to supervision in accordance with conditions laid down by the hearing. These may include conditions as to the place where the child is to live (other than a residential establishment). In more serious cases, where it is thought appropriate in the interests of the child, the hearing has the power to require the child to reside in a residential establishment.

No child may be subject to a supervision requirement of any kind for any time longer than is necessary in his interests, and no supervision requirement may remain in force for more than twelve months. Supervision requirements are subject to review, and where a local authority thinks that in the interests of the child a requirement should be varied or brought to an end, they are required to refer the case to the reporter for review. The matter is then brought before the hearing who may continue the requirement, vary it or terminate it.

Decisions of the children's hearing, whether on initial referral or on review, may be made the subject of appeal to the sheriff, and the child, its parent and reporter all have the right to appeal to the Court of Session on points of law in respect of any irregularity in the case. The one matter which cannot be appealed to the Court of Session is the decision of the hearing to impose a supervision order where the ground of appeal is that the treatment prescribed is inappropriate for the child (Van den Wyngaert 1993:339).

9.3 Current Position in South Africa

9.3.1 Children's Court

The Children's Court is a creation in terms of the Child Care Act, 1983 (Act 74 of 1983), and as such does not form part of the criminal process. There are, however, a number of overlaps with the criminal justice system. Every magistrate is automatically a Commissioner of Child Welfare in terms of section 6 of the Child Care Act, 1983.

There are at present three ways in which cases can be diverted from the criminal Courts to a children's Court. Firstly, the prosecutor may decide that a matter should be heard in the children's Court rather than in a criminal Court. The case is then referred by the prosecutor withdrawing the charges against the accused juvenile and instructing that the case be referred. The grounds upon which prosecutors tend to base the decision to withdraw the charges would generally include one of the following: that the offence with which the child has been charged is of a less serious nature; that the child appears physically to be in need of care; that the motive for the crime is of a less serious nature, or because the prosecutor knows the child from previous appearances and feels that he or she is merely mischievous or still too young to deserve the possibility of a criminal conviction.

Secondly, section 11 of the Child Care Act, 1983 provides that if it appears to a magistrate during the course of proceedings or on the grounds of any

information given under oath that the child does not have a parent or guardian or that it would be in the interest of the safety or welfare of the child to be taken to a place of safety, the magistrate may order that the child be taken to a place of safety and brought as soon as possible before a children's Court.

Thirdly, section 254 of the Criminal Procedure Act, 1977 provides that if it appears to a magistrate at the trial of any person under 18 years that the accused may be a child as referred to in section 14(4) of the Child Care Act, 1983 the trial may be stopped and the Court may order that the accused be brought before a children's Court. If conviction has already occurred before the Court decides to stop the proceedings, the verdict shall be of no force and the Court may refer the case to the children's Court.

The children's Court proceedings take the form of an inquiry, not of a trial, and no conviction or sentence is given at the end of it. After the inquiry the Court is empowered to make an order placing the child, normally with parents under supervision, with foster parents, in a children's home or in a school of industries.

Currently the option of referring or converting a criminal matter involving a child charged with an offence is under utilized, with only an estimated 5 percent of cases being referred (South African Law Commission 1997:241).

Skelton (1997:169) indicates that the children's Court appears to offer a good alternative for children in conflict with the law who are in need of care or protection. Unfortunately, however, there are problems associated with it. Although the provisions have been on the statute books for some time, the referral of children to the children's Court is not used as often as it should be. It is currently uncommon for children to be legally represented at a children's Court inquiry. This may change in the light of the Child Care Amendment Act, 1996 (Act 96 of 1996), which provides in section 8A that the child has a right to be informed that he or she may request legal representation at any time during the proceedings. The section further provides that the Court may approve the appointment of a legal representative for the child if it is considered by the Court to be in the child's best interests, or may order that a

legal representative be provided at State expense if it is considered in the best interests of the child. Although these provisions fall short of guaranteed legal representation, it is likely that express provisions within the Act are likely to result in more children being represented.

The child will often be held in a State place of safety pending the children's Court inquiry. These facilities have come under a negative spotlight, as have schools of industries.

Although there may be problems surrounding the children's Court inquiry process, these disadvantages are usually outweighed by the advantages of a proper assessment being made by a social worker, and also by the fact that the criminal matter falls away, thereby giving the disadvantaged child a chance to avoid a criminal record.

Matthias and Zaal (1996:51) point out that although South Africa has had specialized children's Courts since as early as 1937, they have rightly been described as the least studied and least understood of all of South African's Courts. This is partly because, in order to protect the children who appear before them, children's Courts conduct their proceedings *in camera* and thus remain permanently behind a veil of secrecy. Furthermore, lawyers rarely appear in the children's Courts, and the commissioners' decisions are not reported. The children's Courts deal with a variety of tasks assigned to them under the Child Care Act, 1983. These include assessing applications for adoptions, fostering arrangements and consent to certain marriages affecting minors. This article deals primarily with one of the most difficult areas of work of the children's Court, namely, its processing of cases where decisions have to be made about whether to remove children from their present environments into institutional or other substitute-familial care.

9.3.2 Juvenile Courts

The South African Law Commission (1997:240) gives the following summary of the current position regarding juvenile Courts in South Africa:

“There is no separate criminal Court for juveniles in South Africa. In some urban areas where there are sufficient numbers of accused persons under the age of 18 to warrant it, a Court is set aside to deal exclusively with such cases and these Courts are referred to administratively as juvenile Courts. In areas where there is a lower population all criminal cases are channelled through the same Courts. Trial of juveniles is required by law to be held *in camera*, regardless of which Court they are appearing in.

In the present system, Courts at all three levels (district, regional and high Court) can and do have jurisdiction over cases where juveniles are accused. The choice of forum usually depends on the seriousness of the charge and the sentencing powers of the Courts.

District Courts do exercise an increased jurisdiction with regard to juvenile cases linked to the fact that the sentences for juveniles differ from those of their adult counterparts, and it is therefore not uncommon for robbery cases involving juveniles, for example, to be dealt with by the district Court. However, there appears to be a lack of consistency in this approach and some cases involving juvenile accused are referred to the regional and high Courts. Cases may also be referred to the regional Court only for sentence, especially if the accused has previous convictions, meaning that a sentence in excess of district Court jurisdiction is warranted.

It has generally been advocated that the procedure and conduct of juvenile Courts in South Africa fall short of the minimum standards provided by the international children’s rights instruments. This is despite some statutory provisions meant, at least in theory, to protect and promote children’s rights under the juvenile justice system and Courts.

It would appear that the Courts have not succeeded in promoting the dignity and worth of young people appearing before them, their proper growth and development and their reintegration into society, as is required by the international instruments. Some problems relate to the physical appearance of Courtrooms, with elevated benches and an absence of a child friendly environment. In addition there are a number of specific concerns which have

been noted by academics and activists in the field. These relate to procedural problems such as the lack of legal representation of children in the criminal Courts, long delays in the finalization of trials involving juveniles and problems with the separation of young offenders from adult co-accused persons. In addition, personnel working with young offenders are not specially qualified or trained for this work and there is a high turnover of staff.”

9.4 The Child Justice Bill, 49 of 2002

9.4.1 Sections 50 – 59 of the Child Justice Bill, 2002

“Certain Courts regarded as child justice Courts

50.(1) (a) Any Court to which proceedings against a child is postponed for plea and trial in terms of section 42 must be regarded as a child justice Court.

(b) Preference must be given to a Court contemplated in section 89(1) of the Magistrates’ Court Act, 1944 (Act No 32 of 1944), when deciding to which Court proceedings must be postponed in terms of section 42.

(2) The head of such administrative region as defined in section 1 of the Magistrates’ Court Act, 1944 (Act No 32 of 1944), must as far as is reasonably practicable provide a Court room for a child justice Court that is conducive to -

(a) privacy and the dignity and well-being of children; and

(b) informality and participation by all persons involved in the proceedings.

Establishment and jurisdiction of One-Stop Child Justice Centres

51.(1) The Cabinet member responsible for the administration of justice, in consultation with the Cabinet members responsible for social development, safety and security and correctional services, may establish centralized

services for child justice to be known as One-Stop Child Justice Centres which may be situated at a place other than the local magistrate's Court or police station.

(2) Every One-Stop Child Justice Centre must have -

- (a) offices for use by members of the South African Police Service;
- (b) offices for use by probation officers;
- (c) facilities to accommodate children temporarily pending the conclusion of a preliminary inquiry; and
- (d) a child justice Court which has the same jurisdiction in respect of offences as a Court as contemplated in section 89(1) of the Magistrates' Court Act, 1944 (Act No 32 of 1944).

(3) A One-Stop Child Justice Centre may have -

- (a) offices for use by a child's legal representative;
- (b) offices for use by persons who are able to provide diversion and prevention services;
- (c) offices for use by persons authorized to trace the families of a child;
- (d) offices for use by persons who are able to provide correctional supervision;
- (e) a children's Court; and
- (f) a child justice Court which has the same jurisdiction in respect of offences as a Court of a regional division as contemplated in section 89(2) of the Magistrates' Court Act, 1944 (Act No 32 of 1944).

(4) Each Cabinet member referred to in subsection (1) is severally responsible for the provision of such resources and services as may be required to enable a One-Stop Justice Centre to function effectively.

(5) (a) The Cabinet member responsible for the administration of justice may determine the boundaries of jurisdiction of One-Stop Child Justice Centres by notice in the *Gazette*.

(b) The boundaries of a One-Stop Child Justice Centre do not have to correspond with the boundaries of any magisterial districts.

(6) If a One-Stop Child Justice Centre has concurrent jurisdiction with a magistrate's Court due to the fact that the geographical area of jurisdiction of the magistrate's Court or part thereof falls within the boundaries of geographical jurisdiction of the One-Stop Child Justice Centre, the jurisdiction of the One-Stop Child Justice Centre in relation to the hearing of cases in terms of this Act takes precedence.

Parental assistance

52.(1) Subject to subsection (2) and (5), a child must be assisted by a parent or an appropriate adult at proceedings in a child justice Court.

(2) If a parent or an appropriate adult cannot be traced after reasonable efforts and any further delay would be prejudicial to the best interests of the child, the child justice Court may dispense with the obligation that the child must be assisted by a parent or an appropriate adult.

(3) The parent of a child or an appropriate adult who has been warned by an inquiry magistrate to attend proceedings in terms of section 42(3), must attend such proceedings unless exempted in terms of subsection (5).

(4) If a parent or appropriate adult has not been warned to attend as contemplated in subsection (3), the child justice Court may at any stage of the

proceedings subpoena or cause to be subpoenaed any parent or appropriate adult to appear at such proceedings.

(5) A parent of an appropriate adult warned to appear as contemplated in subsection (3) or subpoenaed in terms of subsection (4) may apply to the child justice Court for exemption from the obligation to attend the proceedings in question, and if the presiding officer of the child justice Court exempts a parent or an appropriate adult he or she must do so in writing.

(6) Where a child is not assisted by a parent or an appropriate adult, and such child requests assistance, an independent observer may, if such observer is available, assist a child in circumstances referred to in subsection (1) of this section.

Conduct of proceedings in child justice Court

53.(1) At the start of proceedings in a child justice Court, the presiding officer must in the prescribed manner –

(a) inform the child of the nature of the allegations against him or her;

(b) inform the child of his or her rights; and

(c) explain to the child the further procedures to be followed in terms of this Act and the Criminal Procedure Act.

(2) Notwithstanding section 93 of the Magistrates' Courts Act, 1944 (Act No 32 of 1944), the presiding officer in a child justice Court may not summon assessors to assist him or her.

(3) The child justice Court may participate in eliciting evidence from any person involved in the proceedings if it would be in the best interests of the child.

(4) The proceedings of the child justice Court must, with due regard to the child's procedural rights, be conducted in an informal manner to encourage maximum participation by the child and his or her parent or an appropriate adult.

(5) The child justice Court must protect a child from hostile cross-examination where the cross-examination is prejudicial to the well-being of the child or the fairness of the proceedings.

Admissibility of certain evidence

54. (1) Evidence obtained as a result of a confession, an admission or a pointing out rendered admissible in terms of section 218 of the Criminal Procedure Act is only admissible as evidence in a Court if the child's parent, an appropriate adult or legal representative was present when the confession or admission was made or the point out took place.

(2) No evidence relating to an identity parade is admissible in a Court without the aforementioned representation on behalf of the child.

(3) (a) If a child refuses to have a parent or an appropriate adult present at the procedures contemplated in subsections (1) and (2), or where a parent or an appropriate adult is not present or cannot be traced and a legal representative is not available, an independent observer must be present at such procedure.

(b) An independent observer may assist a child at such procedure.

(4) The police official responsible for the case must request an independent observer to assist the child if required in terms of subsection (2).

Children in detention at child justice Court

55. (1) No child may be subjected to the wearing of leg-irons when appearing in any child justice Court, and handcuffs may only be used in a child justice Court if there are exceptional circumstances warranting their use.

(2) (a) A child held in a cell in or at the child justice Court must be kept separate from adults and be treated in a manner and kept in conditions which take account of his or her age.

(b) A girl must be kept separate from boys and must be under the care of an adult women.

(c) Where a child is transported to or from a child justice Court the child must, if reasonable possible, be transported separate from adults.

(3) The National Commissioner of the South African Police Service must issue a national instruction on the treatment and conditions of children while in detention at child justice Court.

Establishment of criminal capacity

56. (1) The criminal capacity of a child over the age of 10 years but under the age of 14 years must be proved by the State beyond a reasonable doubt.

(2) The prosecutor or the child's legal representative may request the child justice Court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the child justice Court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice Court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the child justice Court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 191 of the Criminal Procedure Act.

Separation and joinder of trials involving children and adults

57. (1) Where a child and a person other than the child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials.

(2) An application for such joinder must be directed to the child justice Court in which the child is to appear after notice to the child, such person and their legal representatives.

(3) If the child justice Court grants an application for joinder of trials, the matter must be transferred to the Court in which such person is to appear.

(4) The Court to which the matter has been transferred must afford the child concerned all such benefits conferred upon such child by this Act.

Time limits relating to conclusion of trials

58. (1) A child justice Court must conclude all trials of accused children as speedily as possible and must ensure that postponements are limited in number and in duration.

(2) Sections 33, 34, 35 and 36 apply with the changes required by the context to a child justice Court where a child appearing in the child justice Court for the first time is in detention.

(3) Where a child remains in detention in a place of safety, secure care facility or prison and the trial of the child is not concluded within a period of six months from the date upon which the child has pleaded to the charge, the child must be released from detention, unless charged with an offence listed under item 1, 2 or 3 of Schedule 3.

Child justice Court may divert matter

59. (1)(a) If at any time before the conclusion of the case for the prosecution it comes to the attention of a child justice Court that a child acknowledges or intends to acknowledge responsibility for an alleged offence, the child justice Court may make an order for diversion in respect of the child if the prosecutor indicates that the matter may be diverted.

(b) Chapter 6 applies with the changes required by the context if the child justice Court makes an order contemplated in subsection (1).

(c) A child justice Court that makes a diversion order must postpone proceedings pending the child's compliance with the diversion condition in question.

(2) (a) The child justice Court must, upon receipt of a report from the probation officer that the child has successfully complied with the diversion conditions, acquit the child on all charges in question.

(b) An acquittal may be made in the absence of the child.

(3) If a child fails to comply with an order relating to diversion, section 40 applies with the changes required by the context."

9.4.2 Summary of the above provisions by the South African Law Commission (2000:xxi):

“Designation and jurisdiction of the child justice Court

A child justice Court is a Court at district Court level which has the jurisdiction to adjudicate in respect of all offences except treason, murder and rape. Although cases involving child accused may be heard in Regional or High Courts, preference must always be given to referral of cases to the child justice Court (section 50(1)(b)). The chief magistrate must designate a child justice Court in his or her magisterial district and such Court must, as far as possible, be staffed by specially selected and trained personnel. The Courtroom, where practicable, should be located and designed in a way which is conducive to the dignity and well-being of children, the informality of the proceedings and the participation of all persons involved. The sentencing jurisdiction of a district magistrate’s Court applies to the child justice Court.

Establishment and jurisdiction of One-Stop Justice Centres

The Minister of Justice and Constitutional Development, in consultation with other relevant Ministers, is empowered by the Child Justice Bill, 2002 (in section 51) to establish and maintain centralized services for child justice which may be situated at a place other than a Court or police station. Such centres must provide for offices to be utilized by police and probation officers, facilities to accommodate children temporarily pending the finalization of the preliminary inquiry and a child justice Court. The centre may also include an office for persons providing legal representation for children, offices for persons providing diversion and prevention services, offices for persons authorized to trace families of children, a children’s Court to hear children’s Court inquiries and a Regional Court. Each government department is severally responsible for the provision of such resources and services as may be required to enable the functioning of a One-Stop Child Justice Centre.

Parental assistance

The child's parent or an appropriate adult must attend the proceedings and assist the child unless he or she has been exempted in writing by the Court from the obligation to attend, or if all efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child. Where a child is not assisted by a parent or an appropriate adult and if such child requests assistance, an independent observer may be nominated by a child justice committee.

Conduct of proceedings in a child justice Court

At the commencement of the proceedings the presiding officer must inform the child of his or her rights, the nature of the allegation against him or her and the procedures which are to be followed. Lay assessors will not be used in the child justice Court. The presiding officer may, if it would be in the best interests of the child, play an active role in eliciting evidence from any person involved in the proceedings. The proceedings must be conducted in an informal manner (whilst protecting the child's procedural rights) and should encourage the maximum participation of the child and his or her parent or an appropriate adult. The presiding officer also has the duty to protect the child from hostile cross-examination if it is prejudicial to the well-being of the child or the fairness of the proceedings.

Separation and joinder of trials involving children and adults

The Child Justice Bill, 2002 provides (in section 57) that if a child is co-accused with an adult, such adult must be tried separately. The proviso to this general rule is that an application may, before commencement of the trial, be made to the Court for a joinder of the trials concerned. If the Court grants the application, the child will be tried together with the adult in the Court where such adult is to be tried, and that Court must ensure, as far as possible, that the child receives all benefits conferred upon him or her in terms of the Child Justice Bill, 2002.

Court may divert matter

If, at any time before the end of the state's case, it comes to the attention of the presiding officer that the child acknowledges or intends to acknowledge responsibility for the offence the Court may, with the consent of the prosecutor, refer the child to any diversion option and may postpone the matter to enable the child to comply with the diversion conditions. Upon receipt of a report from the probation officer that the child has successfully completed the diversion, the Court must acquit such child. If the child fails to comply with the diversion conditions the prosecutor may have the matter placed on the roll and issue a summons in respect of the child in order to continue with the trial. If the diversion option selected by the Court is a family group conference, victim-offender mediation or other restorative justice process, the probation officer must furnish the Court with written recommendations arising from such process."

9.5 Shortcoming in the Child Justice Bill, 2002

There is no provision in the proposed Child Justice Bill, 2002 for the conversion of a matter to a children's court inquiry after the preliminary inquiry stage. This means that the opportunity to use a section like section 254 of the Criminal Procedure Act, 1977 will not be available to the presiding officer at any stage during the trial or sentencing process. It might happen, for example that once a pre-sentence report has been compiled, the fact that the child is in need of care becomes clearer, but then there is no provision in the Child Justice Bill authorising a conversion into a children's court inquiry. Section 254 of the Criminal Procedure Act, 1977 will be repealed with the implementation of the Child Justice Bill, 2002. It is therefore recommended that a section like section 254 of the Criminal Procedure Act, 1977 be inserted into the Child Justice Bill, 2002 to provide for such a conversion and allow for a discretion of the presiding officer in this regard.

9.6 Confidentiality of Children's Hearings

9.6.1 International Perspective

Article 40(2)(b)(vii) of the United Nations Convention on the Rights of the Child provides that States Parties shall ensure that every child's privacy be fully respected at all stages of the proceedings.

9.6.2 Current Position in South Africa

The provisions with regard to the presence of other people in criminal proceedings where children are involved, either as accused or as witnesses, are stated in section 153(3A), (4), (5) and (6) of the Criminal Procedure Act, 1977 and provides as follows:

“(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise.

(4) Where an accused at criminal proceedings before any Court is under the age of 18 years, no person, other than such accused, his legal representative and parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the Court.

(5) Where a witness at criminal proceedings before any Court is under the age of 18 years, the Court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the Court.

(6) The Court may direct that no person under the age of 18 years shall be present at criminal proceedings before the Court, unless he is a witness

referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorised by the Court.”

Section 154(3) of the Criminal Procedure Act, 1977 provides as follows with regard to the publication of certain information relating to criminal proceedings where children are involved either as accused or witness:

“(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.”

Du Toit, E *et al* (2002:22–9) indicate that in S v Citizen Newspapers (Pty) Ltd & another, S v Perskorporasie van Suid-Afrika Bpk & another 1980(3)SA889(T) it was held that the proper approach to be adopted in determining whether the subsection has been contravened is to enquire whether the articles in question might have revealed or reveal the identity of the juvenile accused to a hypothetical ordinary average reader of the articles in question who had no prior or special knowledge of any of the incidents or persons referred to in the article.

9.6.3 The Child Justice Bill, 49 of 2002

Section 60 deals with privacy and confidentiality and provides as follows:

“Privacy and confidentiality

60.(1) At any sitting of a child justice Court no person may be present unless his or her presence is necessary in connection with the proceedings of the child justice Court or unless the presiding officer has granted him or her permission to be present.

(2) No person may publish any information which reveals or may reveal the identity of a child or of any witness under the age of 18 years appearing at any proceedings before a child justice Court.

(3) Subject to subsection (4), no prohibition under this section precludes –

(a) access to information pertaining to a child if such access would be in the interests, safety or welfare of any such child or of children in general;

(b) the publication, in the form of a law report, of –

(i) information for the purpose of reporting any question of law relating to the proceedings in question; or

(ii) any decision or ruling given by any child justice Court on such question,

(c) the publication, in the form of any report of a professional or technical nature, of research results and statistical data pertaining to a child if such publication would be in the interests, safety or welfare of the child or of children in general.

(4) The reports referred to in subsection 3(b) or (c) may not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and may not mention the place where the offence in question was alleged to have been committed.”

9.7 Forensic application

Forensic criminologist must be aware of the procedures in juvenile Courts as well as of the provisions with regard to confidentiality to enable them to adhere to these procedures and provisions and act according to it.

9.8 Conclusion

Since South Africa does not have a separate justice system for juvenile offenders, the provisions of the Child Justice Bill, 2002 relating to the proposed Juvenile Courts and juvenile system are a clear effort to bring the South African Legal system in line with the juvenile Court systems of other countries referred to in this chapter.

Although the opinion is held that these are positive steps in ensuring the protection of children's rights, it is important that thorough and intensive training be given to all officials involved in the proposed system. All role-players can make a huge contribution in the success of this system if everyone is committed to help juvenile offenders from becoming criminals.

The present situation regarding confidentiality of children's hearings stays basically the same in the proposed Child Justice Bill, 2002.

CHAPTER 10

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

10.1 Introduction

In this chapter the findings of the project will be furnished, recommendations will be made and the appropriate conclusions will be highlighted. The findings will include the International perspective, the current position in South Africa and the proposed Child Justice Bill, 2002.

10.2 Findings

There are various International Instruments providing guidelines for the protection of the rights of children in general and particularly the rights of children in conflict with the law.

Since the ratification of these Instruments by South Africa since 1995, the Government has taken various steps to comply with these guidelines. The Constitution, 1996, various amendments to Acts of Parliament and the proposed Child Justice Bill, 2002 are important changes made in this regard. The majority of the magistrates, who participated in the research project, indicated that they have not looked at the proposed Child Justice Bill, 2002. More magistrates who deal mainly with criminal cases have not looked at the Child Justice Bill, 2002 (hypothesis 3). Magistrates with longer years of service do not deal mainly with criminal cases (hypothesis 2).

Knowledge of the applicable International Instruments, the current position in the South African law and the provisions of the proposed Child Justice Bill, 2002 is of great importance to the forensic criminologist to enable him/her to effectively operate within the criminal justice system. The limitations, restrictions and prohibitions with regard to sentence options for juveniles are for example important when making a recommendation regarding an appropriate sentence in a case where a juvenile offender is involved.

The International Instruments also provide important guidelines to State Parties with regard to the establishment of a minimum age for criminal capacity. This issue is being linked to a child's development and emotional, mental and intellectual maturity as well as the child's age. The establishment of a minimum age for criminal responsibility differs widely between the different Continents and even between different States in one Continent. In certain countries there are no fixed minimum age for criminal responsibility.

In South Africa the issue of criminal capacity is being regulated by the common law. Children under the age of 7 years of age can under no circumstances be prosecuted. Most of the magistrates indicated that criminal capacity should be only be considered at the age of 14 years. Although there was no clear majority for a specific age it is clear that most magistrates are of the opinion that a child of 7 years should not be criminally responsible for his/her actions. The different moral developmental stages of children are very important in this regard and this should always be taken into account when a decision in this regard is considered. If the proposed Child Justice Bill, 2002 is implemented it will be the first time that the issue of a minimum age for criminal capacity will be included and ruled by legislation in South Africa.

In terms of the Child Justice Bill, 2002 the Director of Public Prosecutions has to issue a certificate if a child under the age of 14 years of age is to be prosecuted. When making this decision various factors must be taken into account, including the appropriateness of diversion, the educational level of the juvenile, the cognitive ability of the child, domestic and environmental circumstances, the nature and gravity of the offence and the impact of the offence on the victim. The forensic criminologist can play a very important role in assisting the Director of Public Prosecutions in making this decision by furnishing him/her with a report in this regard.

Another problem in the South African context is the fact that a lot of juveniles are not sure of their exact ages. There are various provisions in the legislation controlling this situation and enabling presiding magistrates to estimate the ages of these juveniles. The Child Justice Bill, 2002 also deals with this issue

and provides important guidelines to be followed by the presiding magistrates and probation officers.

The International Instruments do not establish a minimum age below which a child may not be deprived from his/her liberty, but important guidelines are being provided to State Parties indicating that the detention of a child should only be used as a measure of last resort. The United Nations Convention on the Rights of the Child links the minimum age for criminal capacity to the deprivation of liberty implying that children below the minimum age for criminal capacity should not be deprived of their liberty. Detention of children should also not be used as a substitute for inadequate social assistance facilities. The International law also states that if the detention is inevitable it should be for the shortest possible duration. The children should be treated with humanity and their needs according to their ages should be taken into account.

In South Africa amendments were made to the Correctional Service Act, 1959 during 1996 to eliminate and limit the detention of children. These amendments created various problems since there were not enough places of safety available to accommodate all the juvenile offenders. There were also loopholes in the amendments and magistrates could still order the detention of a child under certain circumstances. The amendments were also used by offenders to avoid detention by indicating that they were below 18 years of age. The relevant Government departments compiled a National Protocol for the Management of Children Awaiting Trial in an attempt to control and limit the detention of children. The majority of the magistrates are in favour of children being detained. Furthermore the majority of the magistrates are of the opinion that the best method to ensure a juvenile offender's attendance at court is to release him/her in the care of his/her parent. Most of the magistrates who hold this view have not looked at the Child Justice Bill, 2002 (hypothesis 4). Most of the magistrates are in favour of the releasing juvenile offenders on bail.

The proposed Child Justice Bill, 2002, if implemented, puts more control measures in place regarding the detention of children and the relevant role-

players are forced to take more responsibility to ensure that the detention of children is in line with the obligations placed on State Parties in terms of the International Instruments.

International law makes it mandatory for every child accused of having infringed the penal law to receive legal or other appropriate assistance in the preparation and presentation of his/her defence. This implies that a non-lawyer can also be used to assist a child during the criminal proceedings. The child has to be informed of the charges against him/her promptly.

In South Africa a parent or guardian may assist juvenile offenders. In terms of the Constitution, 1996 a child has a right to have a legal practitioner assigned to him/her by the State in civil proceedings affecting the child. The Constitution, 1996 also provides that all accused persons, therefore including children, may have a legal practitioner assigned by the State, at State's expense in criminal matters. This right, however, only applies if substantial injustice would result otherwise. This right is therefore limited in scope and dependant upon a vague, unpredictable ground – the substantial injustice test. The majority of the magistrates are of the opinion that juvenile offenders should receive legal representation in all matters where the parents cannot afford legal representation. Most of the magistrates are of the opinion that legal representatives acting on behalf of juvenile offenders should be specifically trained to do so. In South Africa only legal practitioners legally qualified to do so may appear in the Courts.

In terms of the Child Justice Bill, 2002 a child can only be represented by a legally qualified attorney or advocate. Their parents or guardian may assist them. The right of a juvenile offender to be provided with legal representation at State expense is controlled by the Child Justice Bill, 2002 and in certain circumstances the child must be provided with legal representation at State expense, if the parents cannot afford legal representation. The Child Justice Bill, 2002 furthermore prohibits the waving of legal representation in cases where legal representation has been provided at State expense. More magistrates indicated that they disagree with the statement that a child should be allowed to waive his/her legal representation in some circumstances.

The International Instruments places a duty on State Parties to promote diversionary measures without reverting to formal trial and states that State Parties should make available a wide variety of dispositions as alternatives to institutional care.

In South Africa diversion is not included in any legislation and although there are various diversion programmes available there is no formal control over the implementation thereof by prosecutors. The National Director of Public Prosecutions issued policy directives in this regard to prosecutors. The majority of the magistrates are of the opinion that diversion is working. Of these the majority is male (hypothesis 1). The majority furthermore indicated that prosecutors consider diversion in all deserving cases. The majority of the magistrates are of the opinion that diversion should not be considered in all cases involving juvenile offenders.

The Child Justice Bill, 2002 makes provision for diversion, provides for the close monitoring of the diversion process and ensures that all deserving cases will be considered thoroughly for diversion.

Knowledge of the diversion process, the procedures to be followed and the circumstances under which juvenile offenders are being considered for diversion is very important to a forensic criminologist. This will play an important role in furnishing the court with a recommendation regarding an appropriate sentence in cases where the juvenile failed to comply with the conditions for the diversion and the criminal trial proceeds and the child is convicted.

International law requires that any reaction to a juvenile offender should always be in proportion to the circumstances of both the offender and the offence. It also prohibits corporal punishment and the imposition of the death penalty.

In South Africa the death penalty has been abolished by the Constitutional Court in 1994 and corporal punishment in 1995. A juvenile offender under the age of 15 years may not be sentenced to community service. Pre-sentence

reports are not compulsory in our current justice system. Most of the magistrates indicated that there are not enough sentencing options available in cases where juvenile offenders are involved. The majority of the magistrates indicated that they do not receive enough training regarding the issue of sentencing.

A forensic criminologist should be aware of the different factors that the court take into account when considering an appropriate sentence as this will enable him/her to be of valuable assistance to the court. Knowledge of the different sentence options is also of very great importance to the forensic criminologist, as he/she must make a recommendation to the court regarding an appropriate sentence.

The Child Justice Bill, 2002 provides various sentence options for juvenile offenders. The Child Justice Bill, 2002 makes the obtaining of pre-sentence reports compulsory in cases where a sentence with a residential requirement is to be imposed, even when the sentence is suspended. The Child Justice Bill, 2002 furthermore requires that reasons be furnished if a court does not impose the recommended sentence. The majority of the magistrates are in favour of pre-sentence reports being compulsory in matters where juveniles are to be sentenced to imprisonment. Most of these magistrates have not looked at the Child Justice Bill, 2002 (hypothesis 5).

Internationally there are a wide variety of models, which establishes juvenile justice Court systems.

In South Africa children's Courts do not form part of the criminal process. Criminal proceedings can be diverted into a children's Court inquiry if the prosecutor decide to do it before the trial starts, taking various factors into consideration and the presiding magistrate may decide to do so during the trial in certain circumstances, for instance if it appears that the child is in need of care. There is no separate criminal justice system for juveniles in South Africa.

The Child Justice Bill, 2002 provides for a separate juvenile justice system for South Africa that includes child justice Courts and One-Stop Child Justice Centres. The only shortcoming in this regard is the failure to provide for the conversion of a criminal trial into a children's Court inquiry by the magistrate, after the criminal proceedings has started.

The International Instruments oblige State Parties to ensure the protection of a child's privacy throughout the proceedings.

South African legislation provides for the protection of the privacy of both juvenile offenders and child witnesses.

The above position remains unchanged in the Child Justice Bill, 2002.

10.3 Conclusions

Protecting the rights of children, especially the rights of children in conflict with the law, is a very important issue included in the discussed International Instruments. The International Instruments place various duties on State Parties in this regard. This include the establishment of a minimum age for criminal responsibility, the limitations and conditions relating to the detention of children, the right to legal representation at State's expense, the availability of a wide variety of diversion options, the passing of appropriate sentences, the availability of various sentence options for juvenile offenders and a separate juvenile justice system.

Since the ratification of these International Instruments, the South African Government has taken various important steps to fulfil the duties place upon it as a State Party. The first changes were made through the interim Constitution, 1993, followed by the Constitution, 1996. The abolishment of the death penalty and corporal punishment followed as well as the amendments to the Correctional Service Act, 1959 regarding the detention of children. An Interim National Protocol for Children Awaiting Trail was implemented and the South African Law Commission started with an investigation into a separate

juvenile justice system. The Child Justice Bill, 2002 was drafted and introduced into Parliament in August 2002. The proposed Child Justice Bill, 2002, if implemented will be the completion of this process. For the first time important issues such as the establishment of a minimum age for criminal responsibility, diversion and compulsory pre-sentence reports will be included in legislation in South Africa. Furthermore it will create a separate juvenile justice system with child justice Courts and One-Stop Child Justice Centres.

Forensic criminologists can and should play an important role in the juvenile justice system starting with the preliminary inquiry and ending with the passing of sentence. Forensic criminologists should use this opportunity and they should strive to become more involved in this process. The expertise of forensic criminologists to all the role-players in the justice system in the prevention and explanation of juvenile delinquency is very important.

10.4 Recommendations

As stated above the process of adequately protecting the rights of children in conflict with the law has started in 1993 in our Country with the interim Constitution, 1993 and is now at the stage where Parliament is considering the Child Justice Bill, 2002. As indicated the Child Justice Bill, 2002 proposes and creates a whole new juvenile justice system for our Country. The biggest problem that is foreseen at this stage is the fact that we do not have the infrastructure that will allow the successful implementation of the Child Justice Bill, 2002. There are also not enough trained probation officers available to attend to all the juvenile offenders and the places of safety are not up to standard and not enough of these places are available. It is therefore recommended that the Child Justice Bill, 2002 be implemented in different stages to allow for changes to the infrastructure and attendance to other problems, such as the training of all the officials involved in the process. In this regard all the relevant role-players should make a huge combined effort to make a success of the proposed Child Justice Bill, 2002.

It is furthermore advised that magistrates, prosecutors, police officers, probation officers and legal representatives be trained in the various aspects of the Child Justice Bill, 2002 to ensure that all the provisions are complied and thereby ensuring the adequate protecting of the rights of juvenile offenders.

The reasons why more male than female magistrates are of the opinion that diversion is working should also be further investigated.

There is a huge need in our Country for a separate juvenile justice system and it will be to the benefit of all of us if the Child Justice Bill, 2002 is successfully implemented.

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ADDENDUM

'n Afrikaanse weergawe van die vraelys is ook beskikbaar

February 2003

To: Presiding Magistrates in Gauteng

From: C Badenhorst
MA Criminology Student
P O Box 11720
Erasmuskloof X3
PRETORIA 0048

Tel: (012) 315 1529 (w) / 083 278 2299

Dear Sir / Madam

QUESTIONNAIRE

This research is being conducted as part of my MA degree in Criminology.

There are no right or wrong answers. Your views on the various topics are required.

Please complete the questionnaire **anonymously**. Please do not write your name or address on it.

Please answer the questions as indicated in the following example:

Gender

Male	Female
1	2

2

If you are female, then write a "2" in the block on the right.

Please answer all the questions. If you skip one question, your answer cannot be evaluated. If you require more information, you are welcome to contact me personally.

Please return the questionnaire in the enclosed envelope.

1. Gender

Male	Female
1	2

2. What is your age?

Under 25 years	26 - 30 years	31 - 40 years	41 - 50 years	51 and older
1	2	3	4	5

3. Language preference

Afrikaans	English	Sepedi	Sesotho	Setswana	SiSwati
1	2	3	4	5	6
Tshivenda	Xitsonga	isiNdebele	isiXhosa	isiZulu	
7	8	9	10	11	

4. Number of years of service as a Magistrate

0 - 5	6 - 10	11 - 15	16 - 20	21 or more
1	2	3	4	5

5. Have you had the opportunity to look at the proposed provisions of the Child Justice Bill 49/2002?

Yes	No
1	2

6. Do you deal mainly with?

Civil cases	Criminal cases	Both
1	2	3

7. How many cases involving juvenile offenders do you deal with on a weekly basis?

None	1 - 10	11 - 20	21 - 30	31 or more
1	2	3	4	5

8. The minimum age for criminal responsibility should be....

7 years	10 years	14 years	15 years or older
1	2	3	4

9. Are you of the opinion that juvenile offenders should be detained at all?

Yes	No
1	2

10. The best method to secure a juvenile's attendance in court is:

Arrest	Summons	Oral warning	Written warning	Bail	Parental Responsibility
1	2	3	4	5	6

11. Juveniles should be released on bail

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

12. Juveniles should receive legal representation at the State's expense in all matters where his/her parents cannot afford it

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

13. A child should be in a position to waive legal representation in some circumstances

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

14. Legal representatives acting on behalf of juveniles should be specifically trained.

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

15. Diversion is working.

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

16. Do prosecutors consider diversion in all deserving cases?

Yes	No
1	2

17. Are you of the opinion that diversion should be considered in all cases involving juveniles?

Yes	No
1	2

18. There are enough sentencing options available to presiding officers in matters where juveniles are involved.

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

19. Pre-sentence reports should be compulsory before a juvenile is sentenced to imprisonment.

Definitely Agree	Agree	Disagree	Definitely Disagree
1	2	3	4

20. Are you of the opinion that enough training is given to presiding officers with regard to the issue of sentencing?

Yes	No
1	2

21. Please give your view on any of the above questions that you would like to make comments on:

***Thank you very much for your co-operation.
Please return the questionnaire in the enclosed envelope.***