THE JUVENILE JUSTICE LAW REFORM PROCESS IN SOUTH AFRICA: CAN A CHILDREN'S RIGHTS APPROACH CARRY THE DAY?

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I. BACKGROUND TO THE SOUTH AFRICAN LAW REFORM PROCESS

The impetus for juvenile justice law reform sprang originally from concern for the plight of child detainees in the dark days of apartheid in the 1980s. Children, who were at the forefront of the struggle for democratic rule and against apartheid, were liable to be detained without trial as punishment for their political activism. Many hundreds of children were detained without trial under the infamous security legislation of the time.[1] However, in the early 1990s, the political climate changed: detention without trial for political activity abated; a moratorium was placed on the execution of the death penalty; Nelson Mandela was released from prison; and negotiations for the transition to democracy began to get underway. Because the focus during the struggle had been to achieve basic human rights and the franchise for all South Africans, it was only after this period that attention turned from children as political detainees to securing procedural rights for children caught up in the conventional criminal justice system.[2]

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1. *See* Tshepo L. Mosikatsana, *Children's Rights & Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341 (1998). Tshepo L. Mosikatsana provides estimates indicating that between 1984 and 1986, 11,000 children were detained without trial and almost invariably tortured, 18,000 more arrested on charges arising from political activities, and 173,000 held in police cells supposedly awaiting trials. Frequently, these children were as young as 11 years, and some were even younger on occasion. *See id.*

2. *See* A. Skelton, *Children, Young Persons and the Criminal Procedure*, *in* THE LAW OF CHILDREN AND YOUNG PERSONS IN SOUTH AFRICA (J.A. Robinson ed., 1997).

Historically, children charged with criminal offenses were treated in much the same way as their adult counterparts, with limited concessions being made in the course of criminal proceedings to account for their youth and immaturity.[3]

The impetus for the present day endeavor aimed at drafting legislation for the creation of a separate and new juvenile justice system had its origin in the early 1990s. Following upon the easing of political repression against children, human rights oriented non-governmental organizations launched campaigns to focus the public attention on children who were in detention for offenses not linked to the struggle. An influential role was played by the Community Law Center, then headed by Advocate Dullah Omar, now Minister of Justice.[4] Under his leadership, children's rights, and juvenile justice in particular, were a key area of research and advocacy of the Center. The advocacy had a practical basis as well as a research focus. Thus, university law students were contracted by the Center, designated "youth advocates," and dispatched to courts where juveniles were being tried in the Cape Town region, with the aim of intervening informally in the criminal process to provide aid to arrested children. They helped to track down their parents and guardians, and advocated for their release from custody in the pre-trial phase. Throughout this period, the major focus of the efforts of organizations involved in the campaigns was attempting to secure the release of children awaiting trial from prisons and police cells.[5] Two of the most prominent of these campaigns were the

3. For example, trials are held in camera, there is a formal requirement that parents or guardians should be notified of the arrest of a child accused, and parents may assist a child in criminal proceedings. At common law, youth is a mitigating factor for the purposes of sentencing. The Roman Dutch law principle that a child of seven years, but below the age of fourteen years, is rebuttably presumed to lack criminal capacity still applies, but in practice this principle has not proved to be an effective safeguard to protect younger children from arrest, detention, or conviction.

4. Other key organizations involved in the coalition were Lawyers for Human Rights, the Institute of Criminology (University of Cape Town), and the National Institute for Crime and the Rehabilitation of Offenders.

5. Both policy and law at the time provided for segregation of children from adults while in custody, in keeping with the United Nations Standard Minimum Rules on the Treatment of Prisoners (1955). However, numerous instances were discovered of breaches of the applicable provisions, easily justified by the authorities on the grounds that the children's ages were not proven. A legacy of resistance to the apartheid regime continues to be evident in the large numbers of children and young people who have no formal identification documents. The determination of a likely age—in order to determine whether a person falls within the definition of child—is thus a site for contest between children (and alleged "children") and police and prison authorities. *See* SOUTH AFRICAN LAW COMM'N, DISCUSSION PAPER 79, JUVENILE JUSTICE ch. 6 (1998)

"Release a Child for Christmas Campaign" and the "No Child Should Be Caged" initiative.

Two observations can be offered about the effect of the lobbying in the sphere of juvenile justice in the early 1990s on the present law reform process. First, the import and thrust of these initial campaigns—with their focus firmly fixed on the release of children from prisons—has continued until now to shape the contours of the law reform debates in South Africa. As will be pointed out, there has been a succession of legislative enactments to try to manage the problem of pre-trial incarceration of children, and the final session of the current Parliament, scheduled for February 1999, will again see legislation on this theme. Second, the successful media profile raised in the early 1990s advocating for comprehensive juvenile justice reform has continued, bolstered by prominent political support under the current Minister of Justice.

A parallel initiative, which can be regarded as a second key factor in South Africa's juvenile justice history, commenced in 1992. The National Institute for Crime and the Rehabilitation of Offenders (NICRO)[6] took the step of launching programs specifically targeted at young offenders, which were offered to courts as alternative sentencing options, or, something novel at the time in South Africa, as diversion options. In particular, the Youth Empowerment Scheme program (YES), a six-week, non-residential life skills program, was heralded as providing an ideal alternative to prosecution for children charged with petty offenses. Referral of young people to this diversion opportunity was predicated on the cooperation of district court prosecutors, who were lobbied to make use of this alternative. Since 1992, both NICRO as an organization with a national thrust and the range of diversion programs it now offers have expanded steadily.[7] Diversion programs for juvenile offenders are now available in all nine provinces in the country, particularly in major urban areas. According to the latest figures, more than 5600 children benefited from access to the NICRO programs in 1997.[8] However, this figure is thought to be a small

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[hereinafter DISCUSSION PAPER 79].

6. The South African equivalent of NACRO in the United Kingdom.

7. In addition to the YES program, victim offender mediation is offered, family group conferencing has been tested, and The Journey program offers a more intensive option.

8. *See* L. M. MUNTINGH, PROSECUTORIAL ATTITUDES TOWARDS DIVERSION (1998) (NICRO National Office, Cape Town).

percentage of the overall number of children charged with offending,[9] and there is clearly much scope for the further development of diversion.[10] However, both the provision of concrete diversion programs, and the extensive awareness campaign that has accompanied the introduction of diversion in South Africa, have resulted in a broad acceptance of the desirability of formally introducing diversion as a central aspect of any new juvenile justice system.[11]

In the initial period before South Africa's first democratic elections in 1994, therefore, the development of juvenile diversion can be tracked chiefly through two parallel and complementary initiatives. The first is public awareness of the plight of children in prison (at first confined entirely to attention on children awaiting trial, but over time, focusing to a limited extent on children sentenced to serve periods of imprisonment as well). Second is the development of diversion for juvenile offenders charged with petty offenses.[12]

A third crucial signifier of impending change, occurring within a year of the transition to democratic rule, was the judgment of the newly established Constitutional Court in the case of *S. v. Williams*.[13] In a constitutional challenge based mainly on violation of the right to freedom from cruel, inhuman, and degrading treatment or punishment, juvenile whipping was outlawed. Hitherto, judicially ordered strokes with a rod were a common penalty in juvenile criminal cases in South Africa, with some 35,000 children being sentenced to this form of punishment annually before the ban imposed by the Constitutional

9. *See id.* Interestingly, a recent analysis of the available statistics shows that the vast majority of children referred to the NICRO programs were charged with shoplifting or other minor economic offenses, with the amount in question being very low indeed (less than $15, or *R100*). *See id.*

10. *See id.* The United Nations Standard Minimum Rules for the Administration of Juvenile Justice state clearly that "consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority." The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Rule 11.2 (1985).

11. Diversion for child offenders is linked to theories of restorative justice, which are slowly gaining broad political currency in juvenile justice in South Africa, as well as in victim empowerment initiatives and other spheres. South Africa's Truth and Reconciliation Commission has been described as an "exercise in restorative justice on a massive scale." A. Skelton, Juvenile Justice Reform: Children's Rights and Responsibilities Versus Crime Control, Presentation at the Center for Child Law, University of Pretoria (Oct. 30, 1998).

12. In practice, diversion is still largely used only for juvenile offenders, and few diversion alternatives, other than pre-trial community service, are available for offenders over the age of 18 years.

13. 1995 (3) SA 632 (CC).

Court took effect. The abolition of the sentence of whipping as the routine "default option" for convicted children lent its own impetus to the movement to overhaul the juvenile justice system in the country. It left a gaping hole in the armory of sentencing options available to judicial officers, accompanied by a recognition that new options for children in conflict with the law would have to be devised.

As will be seen, the two prime concerns of the reformers of the early 1990s detailed above—limiting incarceration in prison and promoting diversion—form the backbone of the model juvenile justice statute that has been developed under the auspices of the South African Law Commission.[14] Key themes in the draft statute are described more fully in the second section of this paper.

However, there is no denying that the political conditions for child rights-based law reform in relation to juvenile justice have changed markedly in some respects from the position that prevailed in 1994. The idealistic notions about "saving children from prison" that prevailed when elections for a democratic government took place have given way to a more realistic assessment of the seriousness of some juvenile offending, and the concomitant need to ensure a more nuanced approach to juvenile justice (as opposed to the blanket slogans of the early campaigns).

Also, non-governmental organizations ("NGO's"), government departments, and key Ministries involved in the administration of juvenile justice have learned some important practical lessons over the last while, derived chiefly from the saga of legislative attempts between 1994 and 1998 which were aimed at limiting the imprisonment of children awaiting trial. One academic has described this history as "an illustration of an attempted reform that failed."[15]

A short summary of this recent history will suffice.[16] As many of the new parliamentarians had themselves experienced imprisonment under apartheid, and probably as a consequence of the high profile

14. The South African Law Commission Project Committee on the Review of Juvenile Justice released a Discussion Paper with a Draft Child Justice Bill attached in December, 1998. *See* DISCUSSION PAPER 79, *supra* note 5.

15. Dirk van Zyl Smit, *Criminological Ideas and the South African Transition*, 39 BRIT. J. CRIMINOLOGY 198 (1999).

16. *See* J. Sloth-Nielsen & L.M. Muntingh, *1998 Juvenile Justice Review*, S. AFR. J. CRIM. JUST. (forthcoming 1999); J. Sloth-Nielsen, *1997 Annual Juvenile Justice Review*, 11 S. AFR. J. CRIM. JUST. 97 (1998); J. Sloth-Nielsen, *Pre-Trial Detention of Children Revisited: Amending Section 29 of the Correctional Services Act*, 9 S. AFR. J. CRIM. JUST. 61 (1996); J. Sloth-Nielsen, *No Child Should Be Caged: Closing the Doors on the Detention of Children*, 8 S. AFR. J. CRIM. JUST. 47 (1995).

accorded the campaigns for the release of children who were awaiting trial in prisons in the lead up to the 1994 elections, one of the first bills passed by the incoming government was one dramatically affecting children in prison. In a now oft-cited speech in Parliament, the President too, had, shortly after taking office, committed himself to improving the plight of detained children. Parliament therefore passed an amendment to the Correctional Services Act (which regulates prisons) to prohibit any detention of children in a prison while awaiting trial. The amendments put a blanket ban on pre-trial detention of any person under the age of eighteen, after the initial forty-eight hour period in police custody, which was permissible pending a first appearance in court. Children under fourteen years can not be held in a prison at all, and their detention in police cells was confined to the twenty-four hour period before a first appearance in court. Apart from these limited concessions, it was intended that pre-trial detention in prisons be prohibited for all children under the age of eighteen years, irrespective of the offense with which the child had been charged or prior criminal history. It was envisaged that children awaiting trial would be detained in a more humane welfare institution (place of safety), rather than prisons.

This new arrangement was unanimously agreed to by all political parties and greeted with acclaim by individual members of parliament. But the new legislation lay dormant, paper on the statute book, for some months after its passage through Parliament.[17] However, in 1995, the press began again to profile the plight of vulnerable and impoverished child detainees who were being held in appalling conditions in some prisons, and, probably in response, the legislation was suddenly promulgated without warning, literally overnight, on May 10, 1995.[18] Some 1500 children were released immediately from prisons and from police cells, and the new ban on pre-trial detention (other than in welfare facilities) plunged the entire child and youth care system as well as the criminal justice system into chaos. It is now established wisdom that some of the released children committed serious offenses within days of their release. Staff at welfare institutions could not control, manage, or find vacancies for children awaiting trial sent into their care

17. It was all but ignored by the administration, notably the Welfare Department, which was supposed to be providing alternative secure facilities to house children awaiting trial, and (strangely) by the very NGO's advocating for juvenile justice reform.

18. For more detail, see J. Sloth-Nielsen, *The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the Constitutionalization of Children's Rights in South Africa*, 1996 INT'L J. CHILDREN'S RTS. 323, 332.

from criminal courts, and took to demonstrating outside some magistrates courts against their new custodial role with respect to child criminals. Children accused of serious and violent offenses appeared in court, only to be released onto the streets as it became apparent that there were simply no available alternatives to detention in prison. A few released children caught on quickly that they would not be held accountable for their crimes, and thus began a cycle of arrest and immediate release, without intervening criminal proceedings ever proceeding to finality.

It soon became clear that the issue of pre-trial incarceration of juvenile offenders was to constitute the first public backlash against the new government. The prohibition on the detention of children in prison became linked, in the public mind, with the early signs of a rising crime rate. In a remarkable *volte face*, the media headlines now depicted children who were formerly "poor incarcerated urchins" as "teenage thugs." Urgent steps needed to be taken in the face of one of the most severe crises to hit the present government.[19]

Consequently, the government was forced to backtrack, indicative of wavering political will where children's rights were in conflict with fears about crime. Only six months after the 1994 amendment had come into operation, a Private Members Bill put forward by a stalwart of the African National Congress proposed that, as a temporary and extraordinary measure, courts should be empowered to order that certain children be held in prison to await trial. Thus a second amendment was made to the Correctional Services Act, as it became clear that the infrastructure to replace prisons with welfare facilities could not be obtained overnight. The second amendment, which took effect in May 1996, provided for limited circumstances when children over fourteen years, but younger than eighteen years, could be detained in prisons while awaiting trial. The 1996 amendments were intended to be temporary given the morally uncomfortable position that government had been compelled to adopt. A legislative provision was included which was supposed to ensure that the authorization to detain children would lapse after two years. However, due to a drafting error, the legislation did not cease to have effect in May 1998, and it continues to

19. The appointment of the chairperson of the Parliamentary Portfolio Committee on Correctional Services, who developed the Private Members Bill introduced to amend the prior legislation, to the position of Ambassador to the Netherlands shortly after its passage through parliament, was allegedly the result of his involvement in the first juvenile detention debacle.

regulate the position of children awaiting trial today.

In the intervening two years since promulgation, the average number of children in prison has slowly escalated. From a base of approximately 600 children awaiting trial in prison on any one day in September, 1996, the numbers have slowly crept up to the point where, in October, 1998, there were approximately 1600 children in prison on any given day. An intersectoral cabinet committee (the Inter-Ministerial Committee on Young People at Risk) was established shortly after the original legislation was promulgated to investigate practical ways in which to address the crisis in juvenile facilities. This committee (amongst other activities) was to oversee plans to rebuild existing welfare facilities or, where necessary, to commission new accommodation, so as to provide one secure place of safety for detained children in each of the nine provinces. These would be managed by departments of welfare, rather than those of corrections. However, as it dawned in the first part of 1998 that the temporary legislation would not lapse as intended, it also became increasingly clear that the planned welfare alternatives to house children awaiting trial were not in place.

The same parliamentarians who in 1994 declared the plight of children awaiting trial in prisons to be the "highest priority" of government were, when the drafting error became a matter of public record in early 1998, somewhat more cautious about the wisdom of bold steps to set things right. There was a palpable sense of relief that the state would still have the authority in law to detain juvenile offenders in prison, and even NGO's that had the capacity to do so failed to challenge the state's reliance on a technical drafting mistake to save the day.[20]

The political mood has changed, and in the intervening four years, crime has become the dominant concern of the government. The charter of rights accorded that arrested, detained, and sentenced people in the new constitution are increasingly being viewed as constituting a "free ticket" for criminals. In response, harsh legal measures[21] recently have

20. It is arguable that a court application for rectification could have been sought since the intention of the legislature at the time of drafting was clearly that the amendment should have a life-span not exceeding two years.

21. Mandatory minimum sentences were introduced in the Criminal Procedure Amendment Act 105 of 1997, which came into operation on April 1, 1998. Amendments to make it more difficult for accused persons charged with serious offenses to obtain bail were passed in 1997, and the Prevention of Organised Crime Bill (Bill 118 of 1998) is at an advanced stage in the parliamentary process. The Bill draws heavily on Californian legislation dealing with street gangs. What are defined in the

been, and are still being, rushed through Parliament in an attempt to abridge and curtail the perceived criminal justice "black holes" that the constitution has allegedly brought about. In this climate, parliamentarians are understandably anxious about provisions that might allow children charged with serious and violent offenses to be released into communities that are vociferously expressing their disaffection with crime and the failings of the criminal justice system. Thus children's rights organizations have by and large refrained from challenging the status quo and, in particular, the steadily rising child detention figures. But, arguably, the organizations that originally championed the release of children from prisons have been forced to develop a different (more pragmatic) agenda in the present climate of crime control. These organizations have come to accept the inevitability of detaining serious offenders in prison even where they are of tender years; however, NGO's continue to draw attention to the view that the continued spotlight on a few children in prison detracts from the systematic overhaul of the entire juvenile justice system. The shifting sands of media attention on children awaiting trial in prisons have indeed created an arena in which progressive reform towards the creation of a new juvenile justice system is all the more difficult to achieve.

II. THE PARALLEL PROCESS: DEVELOPING A NEW JUVENILE JUSTICE STATUTE FOR SOUTH AFRICA

Alongside the parliamentary endeavors described above, a Project Committee[22] of the South African Law Commission has been undertaking the task of drafting a separate juvenile justice statute for South Africa. The appointment of the Project Committee was a culmination of the early efforts by NGO's to secure separate legislation on juvenile justice. It was also linked to South Africa's ratification of the 1989 United Nations Convention on the Rights of the Child[23] that requires a ratifying country to draft child-specific legislation in relation

Bill as "gang-related activities" will constitute an offense for which a three-year prison sentence may be imposed. And membership in a gang may be regarded as an aggravating factor for the purposes of sentencing. Even more recently, voices have been raised in support of what has been termed "Urban Terrorism" legislation to grant the police greater powers of detention without trial beyond the 48 hours allowed by the constitution.

22. The members of the Committee were appointed by the Minister of Justice.

23. The Convention was ratified on June 16, 1995.

to juvenile justice.

The Project Committee, appointed in December 1996, was (at the time of appointment) comprised entirely of representatives from the NGO's that were associated with the early campaigns. The committee members have themselves executed most of the actual drafting at this point, so that the ideas contained in both the first Issue Paper[24] and the more recent Discussion Paper[25] are the product of the views of members of civil society, as opposed to having been fashioned by governmental legal advisers.

The remainder of this paper will focus on the content of the Draft Bill proposed by the Project Committee, its vision, and the model that has emerged. In particular, the influence of some of the socio-political factors identified above upon both the content and contours of the draft legislation will be highlighted. The proposals have, after all, been centrally affected by the practical developments since 1994, as well as by what the drafters perceive as being realistic and achievable—both politically and economically.[26] Thus, rather than an academic or "ivory tower stance" so often found in Law Commission proposals, the Project Committee has striven to draft legislation that is not only rooted in a child-rights framework, but is also likely to garner support from the government and politicians alike.

A. Drafting Legislation for a Child Justice System

The drafters have premised their proposals on the idea that what is required to address the problems in the field of child justice is to design a system: a system which encompasses processes and procedures that chart a plan of action from a juvenile's first contact with the authorities (i.e., police intervention) to the end of the system (i.e., appeal and review of sentences). Included in the system are mechanisms for its monitoring, and for gathering and producing the research and statistical information base necessary to ensure the continued development of the juvenile justice system as a whole.

Why a systems approach? First, in South Africa, as in many other

24. *See* SOUTH AFR. LAW COMM'N, ISSUE PAPER 9, JUVENILE JUSTICE (1997).

25. *See* DISCUSSION PAPER 79, *supra* note 5.

26. South Africa is a developing country with extremely limited resources for social development. Fiscal constraints are frequently cited as a reason for the lack of progress in implementing new legislation and policies. The drafters were conscious of the need to propose a new child justice system that would be possible for the state to implement.

countries, the administration of juvenile justice as it currently functions involves a range of government departments: the police[27] arrest suspects and investigate cases; justice[28] administers courts; and welfare is nominally responsible for diversion. Such diversion services, at the moment, are offered through NGO's in receipt of welfare department subsidies. Provincial welfare departments, in addition to employing probation officers and social workers who perform probation functions, bear responsibility for the management and staffing of alternative care facilities, such as places of safety and secure care facilities for children in conflict with the law. Finally, the Department of Correctional Services, at the national level, bears responsibility for prisons, including those for young offenders.

The experiences with the precipitous release of children from prison in 1995, and the inter-sectoral coordination that occurred following this crisis to improve and extend the capacity of the welfare system by providing alternative care facilities for use instead of prisons, have provided valuable lessons. The Project Committee concluded that at a purely practical level, implementing a new juvenile justice system would in all likelihood continue to be an inter-departmental affair, such that the drafters of any legislation would have to provide legal provisions easily understood by police, social workers and lawyers. Therefore, a coherent overall vision (or game-plan) would enhance its effectiveness.

A second reason for seeking to design a system, rather than a set of disparate procedural rules, was that our comparative research seemed to indicate that successful juvenile justice systems indeed followed this route. In particular, the project committee examined the literature on juvenile justice from New Zealand, Uganda, and Scotland, all of whose legislative provisions seem to indicate a coherent model.

B. Diversion

An obvious challenge that has faced the project committee from the outset, arising from the specific juvenile justice history that South Africa has so recently experienced, has been the need to balance the legal requirements pertaining to children detained in prison with the plight of the many other children in the country who are arrested, charged, processed through the adult court system, and sentenced. And,

27. Members of the South African Police Service, a national department.
28. Also a national department.

until now, only statistical records of children awaiting trial in prison have been reasonably well documented and accessible. There is, by contrast, no reliable information indicating what proportion of juveniles in conflict with the law the numbers of children in prison represent. In short, whilst it has been loosely estimated that some 15,000 children might be admitted to prison to await trial each year, analysts have been unable to determine with any clarity how many children[29] are actually arrested annually in the country. It has been asserted that a possible figure is between 60,000 to 160,000 children, a far greater number than those admitted to prison.

A starting point in relation to the underlying philosophy of the Draft Bill has been the assumption that the majority of arrested children are charged with less serious offenses, and that these children should be diverted from the criminal process at the earliest stage possible. The system as a whole therefore needed to entrench the possibility of diversion for the majority of accused children. Until now, diversion has been effected mainly through the good offices of individual prosecutors, who withdraw cases against children on condition that they attend a program,[30] complete community service, write an essay, or whatever. This has been shown to be problematic, as the use of diversion differs considerably from prosecutor to prosecutor, and from region to region. Some prosecutors use diversion options as a matter of first recourse, whilst others refuse to allow its practice at all. There is enormous inequality, therefore, in children's access to diversion opportunities at present. No legislative framework for diversion has existed until now, and the drafters intended to ensure that diversion—as the first option for children in conflict with the law—was effectively regulated in the proposed statute.

Thus the Draft Bill proposes that diversion be given formal legislative definition and content, and that a set of minimum standards apply to those bodies or institutions offering such opportunities.[31] The opportunities for diverting cases at the earliest possible stage are greatly

29. It has been estimated reliably that in relation to the criminal justice system as a whole, approximately 10% of persons charged with offenses await trial in prison, and that this proportion has remained constant despite the rising crime rate as well as the enormous rise in incomplete criminal trials. However, the juvenile (child) proportions may well differ, as there are alternative placement possibilities for children awaiting trial, including placement in places of safety (welfare institutions) and release into the care of a parent or guardian.

30. Commonly the programs offered by NICRO.

31. *See* DISCUSSION PAPER 79, *supra* note 5.

increased in the proposed legislation. The Draft Bill proposes the introduction of a formal police caution for the first time if this is recommended by a probation officer, and proposes that probation officers could have the authority to divert cases of their own accord (without reference to the prosecuting authorities), where children are charged with petty offenses listed in a schedule attached to the draft legislation.

The recommendations concerning diversion in the proposed legislation have been further influenced by the reality that services, programs, and alternative diversion possibilities[32] are in somewhat short supply at grass-roots levels, especially outside the larger urban areas. The contribution of NICRO towards the development of diversion options has been alluded to, but from within the state, no explicit moves to develop further diversion options or new alternative sentences to underpin a new child justice system has yet occurred. The approach of the drafters of the proposed bill has been to include a range of measures aimed at stimulating an increase in the availability of diversionary options. So, for example, the Draft Bill develops a set of new orders which can be used either as diversion options, or as alternative sentences. They include supervision and guidance, a positive peer association order,[33] a family time order,[34] and so forth.[35]

It is clearly expressed that these orders can be monitored by a designated person in the community such as a teacher, religious leader, or any other suitable adult. Human or financial resources from the State are therefore not an essential requirement. This is intended to ensure that these orders can be utilized in even remote rural areas, where probation officers or social workers are not necessarily available.

Further, a provision has been included in the Draft Bill to the effect that if a judicial officer has decided diversion to be an appropriate option in a particular case, where formal programs are not available, that judicial officer must "as far as possible, develop a diversion strategy which meets the standards and requirements of diversion . . .

32. Alternative sentencing possibilities are equally thin on the ground, especially in consequence of the abolition of whipping as a sentence.

33. Aimed at ensuring that a child does not have contact with a person or group suspected of having a bad influence on that child.

34. This is intended to ensure that a child stays at home after a certain time, and uses his or her spare time to achieve planned personal goals.

35. The content of the orders emerges from the draft forms attached to the Draft Bill. The orders referred to are contained in the Form K's, that is Form K1- K8. *See* DISCUSSION PAPER 79, *supra* note 5, at 418-43.

and which is appropriate to the circumstances of the child, his or her family, community of origin and the alleged offense."[36]

C. The Proposed Preliminary Inquiry

Perhaps the most important innovation in the Draft Bill is the suggested introduction of a new pre-trial inquiry procedure, which is to be named the "preliminary inquiry." This inquiry should be a mandatory stage in cases involving children, and it must occur before a matter can proceed to criminal trial. The notion of this inquisitorial element in the overwhelmingly adversarial criminal procedure prevailing in South Africa is derived from the need to entrench diversion, as well as the idea that in a model juvenile justice system, somebody or some official should bear primary responsibility for promoting the rights of the child. This is true especially where a range of departments and institutions are involved in different aspects of the justice process.

The objects of the inquiry, presided over by a magistrate (judicial officer), are expressed as follows in the Draft Bill:

> to ascertain whether the child has been assessed by a social worker, in other words whether social history report has been compiled, and
>
> to establish whether the matter can be diverted without the necessity of a criminal trial, and
>
> where the child does not admit responsibility for the offense, to refer the matter to the prosecution for the trial to be commenced, and
>
> to establish that there is sufficient evidence upon which a trial can proceed, and
>
> to determine whether the child should be released or kept in custody pending a trial.[37]

A further objective of this pre-trial procedure, which must in most cases be held within the first forty-eight hours after a child's arrest, is to inquire whether transfer to the welfare system is an appropriate option. In these instances, the child would be treated as being in need of care, and the criminal proceedings would fall away.

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36. *Id.* § 41(5).
37. *Id.* § 40.

The preliminary inquiry[38] is intended to be the center-piece of the new system. It attempts to shift the debate from the present concentration of attention on the plight of children awaiting trial in prison, to a more systematic approach to the procedure to be applicable to all juvenile cases. The inquiry provides a distinct phase in the criminal procedure to ensure the sifting of petty cases from serious matters, and of divertable matters from those which must proceed to trial. It also gives a more rational framework, with the necessary social background information available, to enable a proper inquiry into the necessity of pre-trial detention.

Because the proposed child justice system attempts to build on existing capacities within the various departments responsible for the administration of juvenile justice, rather than creating an entirely new infrastructure, it is suggested that the proposed preliminary inquiry will be favorably received by the departments concerned as well as by the fiscal authorities. The system will draw on existing judicial officers and its success will depend to a large extent on a pool of properly trained, innovative, and children's rights-oriented judicial officers prepared to undertake the task of chairing the pre-trial inquiry.

D. Assessment and the Role of Probation Services

This aspect of the Draft Bill has evolved from recent developments in the field of child justice in practice, and relates again to the peculiarities brought about by the country's experiences in regards to the detention of children awaiting trial in prison. The inter-sectoral committee (the Inter Ministerial Committee on Young People at Risk) established by the government in collaboration with NGO's to resolve the crisis occasioned by the release of children from prison in 1996[39] has had some notable achievements in its short life span. First, the concept of probation work for children in conflict with the law, and the providing of probation workers at the earliest possible stage after arrest has been promoted within the Welfare Department. In many parts of the country, additional staff have been appointed. These probation workers have received training in children's rights, diversion, assessment of children for diversion, and so forth. Although the services of probation officers are not equally available in every province, a start has been made.

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38. *See id.* §§ 37-52.
39. *See* discussion *supra* notes 17-18 and accompanying text.

Second, probation workers have been instrumental in testing aspects of the new juvenile justice system, in particular through what have come to be termed assessment centers. Various pilot projects in this regard have been initiated, evaluated,[40] and are now running as a more permanent facet of the present juvenile justice system. The assessment process (i.e., a brief social history investigation, completed as soon as possible after contact with the police and before a child is required to plead in court) is now seen as the key to sifting potentially divertable cases from those that are more serious. The involvement of probation officers early in the process has reduced court time and unnecessary remands. Substantial numbers of children have also been identified as being in need of care, and have been taken out of the criminal justice system altogether. Most crucial, the availability of basic social history information, collected by probation officers before a child appears in court for the first time, has emerged as central to efforts to ensure that children are not remanded to prison unnecessarily. In the past, if a parent or guardian was not present at court at the date of first appearance before a magistrate, children would routinely be remanded to await trial in prison, even where the offense was not serious. The intervention of probation officers through assessment has improved the availability of information on the child, and magistrates are better equipped to decide on suitable placement pending the outcome of any trial. Consequently children are less likely to await trial in prison for offenses which are not serious.

Although assessment services in the manner described here are not yet uniformly available in all regions, the Draft Bill entrenches assessment[41] as a necessary prelude to the preliminary inquiry. Thus, in the instance of every arrested child, a duty is placed upon the arresting officer to accompany the child to assessment within twelve hours of arrest (unless the child has been released from police custody before expiration of this period, in which case the child must appear at assessment within 48 hours). Thereafter, the legislation proposes that assessment be mandatory in all cases except petty cases; there will thus be a duty upon the state to ensure that these services[42] are available, even in rural communities. Further, the Draft Bill aims to entrench as

40. *See* THE INTER-MINISTERIAL COMMITTEE ON YOUNG PEOPLE AT RISK, REPORT ON THE PILOT PROJECTS (1997).

41. *See* DISCUSSION PAPER 79, *supra* note 5.

42. The constitution makes provision for every child's right of access to social services. In other words, there is some constitutional precedent for requiring that the state ensures access to these services when children are in trouble with the law.

far as is possible an approach that bases decisions (including the decision to detain a child) on effective assessment of the child as an individual, rather than schedules of offenses.[43]

E. A New Jurisdiction: The Envisaged Child Justice Court

South Africa has a three-tiered criminal court system: the first tier is comprised of the district courts, which have jurisdiction over all offenses save murder, treason, and rape. The district courts have sentencing powers of up to two years imprisonment. The next tier is comprised of the regional courts, which have wider geographical jurisdiction, sentencing powers of up to fifteen years imprisonment, and criminal jurisdiction for all offenses including murder and rape, but excluding treason. At the highest level are the high courts, which have geographical jurisdiction broadly similar to provincial boundaries, unlimited sentencing powers,[44] and the jurisdiction to try all offenses. At present, there is no dedicated juvenile court system in South Africa, although in large urban jurisdictions, one court room is usually utilized for juvenile hearings, so that there is an administrative arrangement which results in a quasi-juvenile court. Other than in large urban centers, children are generally tried in the same courts in which adult hearings are conducted.

The Draft Bill grants jurisdiction for juvenile criminal cases to a new child justice court,[45] which would be placed at the lowest level of jurisdiction in the hierarchy as possible, that is, at the district court level. After the preliminary inquiry, the usual adversarial trial[46] (with appropriate legal representation for the child accused) would ensue. However, it is proposed that the child justice courts would have increased sentencing jurisdiction of up to five years imprisonment. This is to ensure that as many criminal trials as possible, where children are defendants, would then be able to be dealt with by a more specialized forum at the lower level. Serious cases that would ordinarily be

43. Thus there is no objection to diversion or transfer to the welfare system where a child is in need of care, even where a serious offense is at issue, and the Draft Bill makes it clear that diversion and the use of alternative sanctions are possible in relation to any offense.

44. Except the power to impose the death penalty, which was ruled unconstitutional by the Constitutional Court in 1995.

45. *See* DISCUSSION PAPER 79, *supra* note 5.

46. The constitution provides for a range of rights for detained, accused or sentenced persons (in section 35), which seems to reflect a preference for adversarial trial procedures.

transferred to higher courts because of the possibility of higher sentences could therefore be retained at the lower court level. This was deliberately framed with the intention of promoting specialization in juvenile justice matters,[47] and to ensure that as many children as possible have access to the more specialized forum.

In this regard, it is worth pointing out that the Draft Bill does not allow for waiver of juvenile status where a child is under the age of eighteen years,[48] even where the charges against such a child are regarded as serious, and even where the penalty is likely to be severe. Instead the Draft Bill proposes that where a sentence may be imposed which may exceed the proposed five-year sentencing jurisdiction of the child justice court, the matter may be tried in a regional court or high court. However, any such higher-level court must nevertheless follow the principles and procedures applicable to the child justice court, and most especially the principles applicable to sentencing. This does not, it is submitted, amount to waiver of juvenile court jurisdiction.

F. A System Which Accommodates Serious and Petty Cases

The Draft Bill clearly attempts to create a new system which can address juvenile justice in a comprehensive manner. Thus, because of the fact that transfer to the adult system is not a feature of the proposed model, provisions on sentencing in particular have been drafted to allay concerns that the proposed Bill is primarily oriented towards first time and petty offenders. Therefore, a prison sentence of a maximum of fifteen years may be imposed on a child in terms of section 78(9), although such a sentence may only be imposed where the seriousness of the offense and the protection of the community requires such a sentence, or where the child has previously failed to respond to non-custodial sentences. A further limitation is evident in the provision that a prison sentence must be imposed as such: it cannot be "added on" to another form of sentence as an alternative (for example as an alternative to a fine). And still further, mindful of experiences with the release of

47. It has proven extremely difficult to promote specialization in higher tier courts, as they encounter child accused rather infrequently, and regional and high court staff have thus far shown little interest in developing specialized procedures for child accused.

48. It is proposed that the new legislation will apply to all persons below the age of 18 years who are alleged to have committed an offense. For a discussion of the selection of 18 as the upper limit for the proposed statute, see DISCUSSION PAPER 79, *supra* note 5.

serious juvenile offenders from pre-trial detention in 1996, the legislation does not prohibit pre-trial detention of children in prisons, but introduces offense-based criteria and age limits for pre-trial admission to prison.

G. The Minimum Age of Criminal Responsibility

Most contentious of all has been the question of the minimum age of criminal responsibility, which in practice is inevitably linked to perceptions and preconceptions about serious juvenile crime. Cardinal principles related to children's rights and international law underpin the proposed South African legislation, so that it is reasonably clear that the upper limit of the new juvenile justice system will be eighteen years, as stated in the United Nations Convention on the Rights of the Child, and reiterated in the South African Constitution. The problem of drafting legislation within a children's rights framework[49] to regulate the position where younger children are accused of serious offenses is not novel to South Africa. This may prove to be a dominating theme in the political debates about the new juvenile justice system that lies ahead. There are indications of a reluctance to forecast with too much finality on this issue at this interim stage, because of the risk of the ripple effect it might have on other aspects of the proposed legislation.

Therefore, the Project Committee has not proposed a definitive solution for the minimum age of criminal capacity. Rather, the Draft Bill presents three possible choices for debate. The first option proposed is a fixed minimum age of twelve or fourteen years. Second, the Draft Bill frames a provision with a fixed minimum age of prosecution, with exceptions for serious offenses such as murder, rape, and armed robbery.[50] The third possibility involves retaining some vestige of the Roman Law presumption that a child under the age of fourteen is presumed incapable of forming a criminal intent, which can be rebutted by the state on production of evidence concerning the maturity of the child and his or her ability to form a criminal intent. The minimum age could then be set at ten or twelve years, with the

49. The Convention provides that the minimum age of responsibility should not be set too low. The Committee on the Rights of the Child has criticized countries where the minimum age has been set below ten years. At present, the minimum age in South Africa is seven years, although a child between seven and fourteen years is rebuttably presumed to lack capacity. In practice, this presumption has not protected young children from arrest, prosecution and conviction.

50. *See* DISCUSSION PAPER 79, *supra* note 5, § 4.

presumption applicable to children between this age and fourteen years.

III. CAN A CHILDREN'S RIGHTS APPROACH CARRY THE DAY?

The Project Committee members have been acutely aware that the final legislation that will be introduced to Parliament will occur against a backdrop of an ever-increasing fear of crime. Media reports (even "scientific studies") draw attention to an alleged increase in youth crime, and (in one study) hold youth accountable for substantial proportions (up to eighty percent) of criminal activity in the country. All the while that the drafting process towards a children's rights oriented criminal procedure has been underway, Parliament has been adopting a range of harsh legislative provisions in relation to the criminal justice system in general.

So, in recent months, South Africa has seen the introduction of statutory minimum sentences (from which children are not excluded) and tough anti-bail provisions implemented in 1998. The introduction of RICO-type[51] legislation aimed at throttling the gangs, which too sweeps children into its ambit, is imminent.[52] It has been suggested that many of these new provisions are part of a pre-election strategy, designed to address the public backlash against crime before the May 1999 elections. The Project Committee is well aware that the tough new crime control atmosphere may ultimately compromise or dilute the proposed draft legislation.

The Draft Bill released by the Project Committee represents, it is submitted, an attempt to tread a middle path without compromising the ideal of a children's rights framework. Indeed, the non-governmental sector and welfarists are likely to complain that the Draft Bill reneges on the promise to ban pre-trial detention in prisons, and moreover, contemplates abandoning children charged with serious crimes to the mercy (if one can call it that) of superior courts with vast sentencing jurisdiction. On the other hand, though, those presently campaigning for ever harsher prison sentences, the return of the death penalty,[53] and so forth, may view the proposals as constituting a "soft approach" to

51. *See* The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1961 (West 1998).

52. *See* The Prevention of Organised Crime Bill, 1998, Bill 118. The Bill draws heavily on California legislation dealing with street gangs.

53. A moratorium on hangings was announced as part of the negotiations which led to the unbanning of the African National Congress. In 1995, the Constitutional Court upheld the position that the death penalty is unconstitutional.

child offending, particularly as diversion and the philosophy of restorative justice form central pillars of the model. There may well be objections from these quarters to the proposed outright ban on the use of imprisonment as a sentence for young persons under the age of fourteen years.

The challenge for the future, however, is to ensure that the proposed system survives the cut and thrust of the political process more or less intact. A key element of this would be acceptance of the fundamental principle that the criminal code for juveniles should apply to *all* children under eighteen years, without exception. If exceptions were to be contemplated—for children charged with serious offenses, or children above a certain age[54]—there is a risk that a philosophy of crime control rather than children's rights will determine the future of juvenile justice in South Africa.

54. As in the United States and Canada.