Juvenile justice review 1997

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The 1997 juvenile justice review charts developments in juvenile justice law in South Africa from November 1996 until October 1997. The most significant development during 1997 was the release of the issue paper on Juvenile Justice by the South African Law Commission (Issue paper No 9, Project 106). It is expected that a discussion paper on the same topic, including comparative material and draft legislation, will be circulated for comment during 1998. Thereafter, the report of the Law Commission will be presented to the Minister of Justice, and it is expected that legislation will then be adopted.

South African Law Commission issue paper on juvenile justice

The issue paper is aimed at soliciting comment and proposals to be taken into account in the development of a separate juvenile justice system for young people under the age of 18 years. The first matter raised in the issue paper pertains to the possible inclusion of general principles, to be derived from international and constitutional documents in the proposed code, either at the commencement of the legislation, or where relevant to specific clauses or issues (such as pre-trial release or sentencing). The applicable instruments are: the United Nations Convention on the Rights of the Child (1989); the South African Constitution; and the triptych of international rules which have a bearing on children in conflict with the law, i e the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).

The principles as a whole, the issue paper points out, aim to promote the overall well-being of the child. Diversion, or channelling of cases away from

the criminal justice system, should be a key tenet of a cohesive juvenile justice system. Community and family involvement should be emphasised, and children themselves should be able to participate in decisions involving cases. The notion that children in conflict with the law should be held accountable for their actions is important, as well as the protection of due process rights. The Rules state that all proceedings should take place within the shortest appropriate period of time, and without unnecessary delay. As the Constitution reiterates, detention should be a matter of last resort and restricted to the shortest possible period of time. Mechanisms for the implementation of these principles need to be included in future legislation.

The issue paper refers to policy documents underlying South African attempts to reform the Child and Youth Care System, and, in particular, the Interim Policy Recommendations of the Inter Ministerial Committee on Young People at Risk, which were released in November 1996 and accepted by Cabinet in February 1997. A final report will be released in 1998. A theme which emerges from the Inter Ministerial Committee policy report is that of restorative justice — which relies on reconciliation rather than punishment — which has been pioneered in youth justice systems in various parts of the world. Restorative justice seeks to reintegrate the young person into the community once the young offender has accepted responsibility for the harm caused. A negotiated solution is arrived at, often with the assent of the victim of the offence, and plans are made to make good the harm done and to prevent re-offending. The issue paper includes restorative justice as part of the framework that should underpin a new juvenile justice code.

The remainder of the issue paper sets out the current legal and practical position in relation to the criminal process, including the present age of criminal capacity, arrest and pre-trial release procedures, courts (including children's courts), and sentencing. In addition, questions are raised about the feasibility of implementing a separate juvenile justice structure in urban as well as rural areas, and at lower-court level as well as in higher divisions, such as regional courts. The matter of separation of trials where adults and children are charged together is mooted, and available information on juvenile diversion is documented. Finally, proposals regarding potential monitoring systems for a new juvenile justice system are discussed in relation to intersectoral or sectorially based models. The recent history with legislation concerning awaiting trial children in prison has revealed all too clearly the need for monitoring of a future juvenile justice system, as well as illuminating the interdependency of the Departments of Welfare, Justice, Correctional Services and Education in the realm of implementation.

Pilot projects

As part of the overhaul of the child and youth care system, including juvenile

justice, the Inter Ministerial Committee on Young People at Risk initiated pilot projects which have been operative during the year under review. Three of the projects pertain directly to youth justice practice: first, an assessment centre project in Durban, which aimed to assess each arrested child as soon as possible after arrest, to locate families, and then to make recommendations for placement during the pre-trial phase (for further information on assessment centres see the 1995 Annual Juvenile Justice review); second, in Port Elizabeth, a related concept called 'Stepping Stones', which is a one-stop centre which includes in one venue a police station, court, probation services, and overnight accommodation; third, a family group conference pilot project in Pretoria, which seeks to expand practical knowledge about the family group conference as a diversion option.

A singular feature of the projects was that each incorporates an information collection and analysis programme as part of the design, which will result in the availability of improved data on a variety of aspects pertinent to juvenile justice — for instance, arrest rates, length of time children spend in police cells before appearing in court, their ages and the offences for which they are charged, the number of withdrawn cases, etc. These are all valuable tools which can guide the development and implementation of a juvenile justice system. At this point this information will be available only in these jurisdictions, as national data — especially on arrests by police and trial-related information — is not produced.

An interim report on the projects was published by the Inter Ministerial Committee in August 1997 and final reports are expected in 1998.

Recent cases

In *S v N* 1997 (1) SACR 84 (Tk) the court of review was faced with examination of the trial proceedings of a 15-year-old girl who had been convicted on a guilty plea to dealing in 7 kg of dagga. The accused was arrested, appeared in court the next day, and was then arraigned, convicted and sentenced that same day. She was sentenced to a fine, which she could not pay, and at the time of review was therefore serving the alternative sentence of imprisonment. She was unrepresented, and neither her parents nor guardians were present. It was this fact that led the review court to enquire whether the proceedings were in fact conducted in accordance with justice. Referring to the provisions of s 74 of the Criminal Procedure Act requiring parents or guardians of those under the age of 18 years to attend criminal proceedings as peremptory, and taking account of the right to assistance created by s 73(3), the court nevertheless held that the mere fact of non-compliance with these provisions does not constitute a fatal irregularity per se. But the court emphasised that fairness is the most fundamental requirement in modern criminal-law jurisprudence. In this case, in view of the seriousness of the charge, as well

as the fact that the question of parental assistance was left entirely to the accused (even though she was advised of the right to legal representation), it was incumbent upon the trial court to invoke s 73(3) in the conduct of a fair trial. In the premises, a gross irregularity was committed by proceeding in the absence of a parent or guardian.

This case follows a growing number of cases in which the juvenile's right to parental assistance has been brought to the fore and cited as a ground for challenging the conduct of proceedings (see *S v M* 1993 (2) SACR 487 (A) and *S v Kondile* 1995 (1) SACR 394 (SE)). The effect of the decision is to place an additional burden on trial courts to inquire into the whereabouts of the parents or guardians where children are unassisted at court or risk a fatal irregularity in the proceedings. The court cited as 'disturbing features', going to the roots of the inquiry, the fact that the accused gave a residential address within the jurisdiction of the lower court in question, and that no evidence was presented of any hardship in securing the attendance of her parent or guardian (at 88*c–d*). Also, the charge was serious and the probabilities were that the accused did not know this, nor would she have known the nature of the punishment likely to be imposed. The accused was obviously disadvantaged in the trial process and there was no evidence that she was mature enough to conduct her defence as if she were an adult person (at 88*h*).

While the decision of the court is obviously to be welcomed, the development of appropriate juvenile justice standards (such as the standard for the requirement that family members be notified and required to attend proceedings) would be greatly enhanced if judicial interpretation was linked to the provisions of the Constitution, rather than confined to the text of the Criminal Procedure Act alone. If the failure to have parents or guardians in assistance at the trial can be seen in appropriate instances as a breach of a fundamental procedural right of a child, then the best interests of the child (s 28(3) of the Constitution) surely require too that evidence be sought by trial magistrates to place on record the extent of endeavours undertaken to secure parental attendance.

With regard to *S v M* 1996 (2) SACR 127 (T) a similar point can be made. The case concerned a 14-year-old accused, sentenced to 12 months' imprisonment for a first offence of robbery (the verdict was changed on review to one of theft), which the judge described as shockingly inappropriate. It was argued by a member of the Attorney-General's staff that other possible sentencing options — correctional supervision, suspended sentences, deferred sentences and placement under the supervision of a probation officer — were not punishments in the true sense of the word. This statement was roundly rejected by the judge, who reiterated that these alternatives were in fact 'true punishments'. It would appear that no probation officer's report had been presented to court prior to the sentencing decision of the lower court, as one suggested

option proffered by the Attorney-General was to remit the matter to the sentencing officer for the purposes of requesting such a report.

While the lower court's sentence was changed by the court of review to a non-custodial sentence, no reference is made in the judgment to the constitutional requirement that detention for children be a matter of last resort, and imposed for the shortest appropriate period of time (s 28(1)*(g)*). Given that sentencing first offenders of this young age to direct imprisonment, without consideration of alternatives, and without social history evidence being presented, is likely to fall foul of this constitutional injunction, it might have been appropriate to mention the constitutional provisions in the judgment. Once again, it would have contributed to the creation of a benchmark in the law relating to sentencing of juveniles, as opposed to the conventional 'shockingly inappropriate' test for overturning sentences on review, which has the effect of necessitating individual review of each and every sentence, where disproportionately severe sentences are alleged to have been imposed.

Inappropriate sentencing of a juvenile was also raised in *S v Tokota* 1997 (2) SACR 369 (E). The substance of the review concerned the issuing of two warrants of arrest, first in terms of s 170(2) of the Criminal Procedure Act, and in a second instance in terms of s 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 s 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 s 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 s 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.'

Children awaiting trial in prison

Section 29 of the Correctional Services Act, as amended, was renewed by Parliament for one more year before the deadline in May 1997. The amendment brought about in 1996 will cease to operate in May 1998, whereupon the previous amendments brought about by the Correctional Services Amendment Act 17 of 1994 will once again become operative, unless further legislation is introduced to the parliamentary process (see J Sloth Nielsen 'No child shall be caged: Closing the doors on the detention of children' 1995 *SACJ* 47;

'Pre-trial detention of children revisited: amending section 29 of the Correctional Services Act' 1996 *SACJ* 61 for a history of these provisions).

The number of children awaiting trial in prison appears to have risen steadily throughout the year under review. From a total of 604 children in prison on 31 December 1996, there were, at 30 September 1997, 1 182 children awaiting trial in South African prisons, according to figures supplied by the Department of Correctional Services.

In the tables below, the number of children awaiting trial in prison on a monthly basis is provided (all of the tables in this section were compiled by Lukas Muntingh, Director of Research, NICRO).

Table 1: Number of children awaiting trial in prisons: September 1996 – September 1997

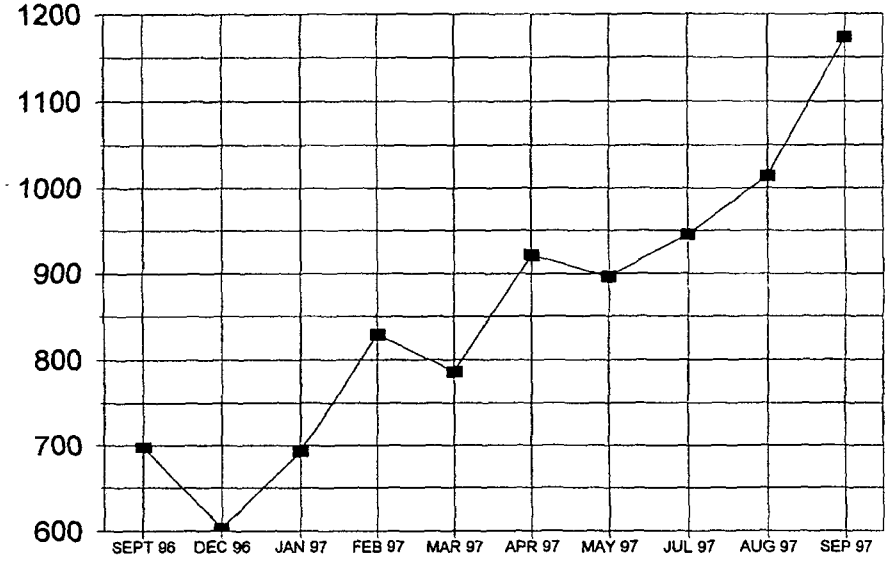
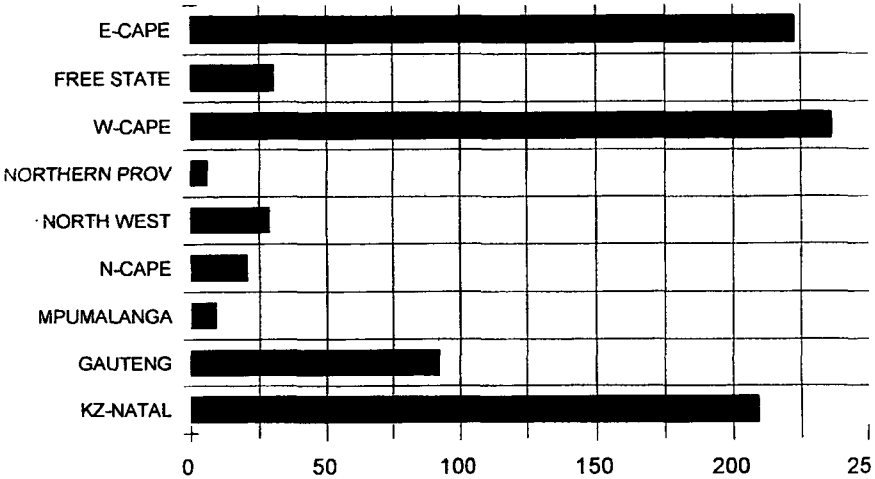


Table 2 on page 103 shows the provincial disparity in relation to the numbers of awaiting trial children. The provincial average is provided for the period September 1996–September 1997.

One reason for the increase in numbers of children detained in prison is the current programme of renovations of places of safety to enable them to become secure care facilities. This has meant closure of some places of safety for a period, with a resultant increase in the numbers of children in prison. There may well be other reasons: delays in finalising trials, greater prevalence of serious and violent offending, or changing perceptions about the necessity or desirability

of pre-trial incarceration of children, occasioned by the popular sentiment about crime in general. Where they are available, local statistics do not appear to indicate an increase in the rate at which children are being arrested.

Table 2: Average no of children per province



Statistics are available to show the numbers of detained children who have been awaiting trial for more than six weeks. This gives some indication of success in speedy finalisation of trials. The available information for the period September 1996–September 1997 is provided in Table 3 on page 104. Table 3 appears to show an improvement (relative to the increase overall in the numbers of awaiting trial children) in finalisation of cases, as there are proportionately fewer children who have been in prison for longer than the stipulated six weeks.

The majority of children are held in urban prisons in six centres: Durban, Pietermaritzburg, Port Elizabeth, East London, Cape Town, and Johannesburg. Of the children in prison on this date, 512 (43,32 %) were detained on those charges enumerated in Schedule 2 to the Amendment Act, while 670 (56,68 %) were charged with non-scheduled offences (notably theft and housebreaking). Monitoring of the implementation of s 29, which was initiated by the Inter Ministerial Committee, is described in the 1996 Annual Juvenile Justice review. The programme is now being undertaken by a non-governmental organisation at the behest of the Department of Welfare. Monitors continue to report breaches of the provisions of s 29, such as lengthy remand dates (where the legislation specifies 14 days at a time), pre-trial imprisonment for seemingly minor offences (such as theft of sweets), and failure to hear oral evidence as required by the section. In addition, despite the prohibition pertaining to the pre-trial detention of children under the age of 14 years in prison, instances of children younger than this age in prison are on record.

Table 3: Children awaiting trial for more than six weeks, relative to the total number awaiting trial

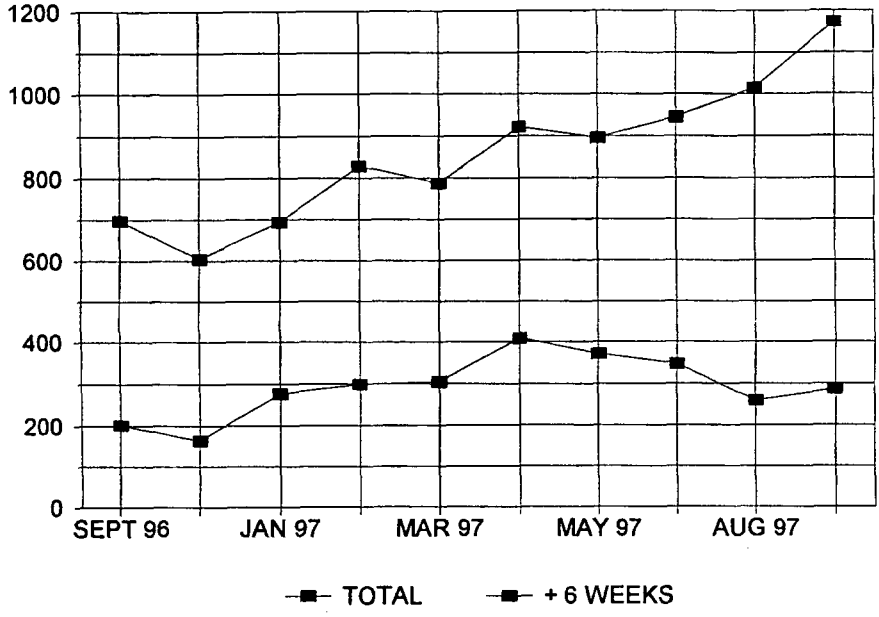
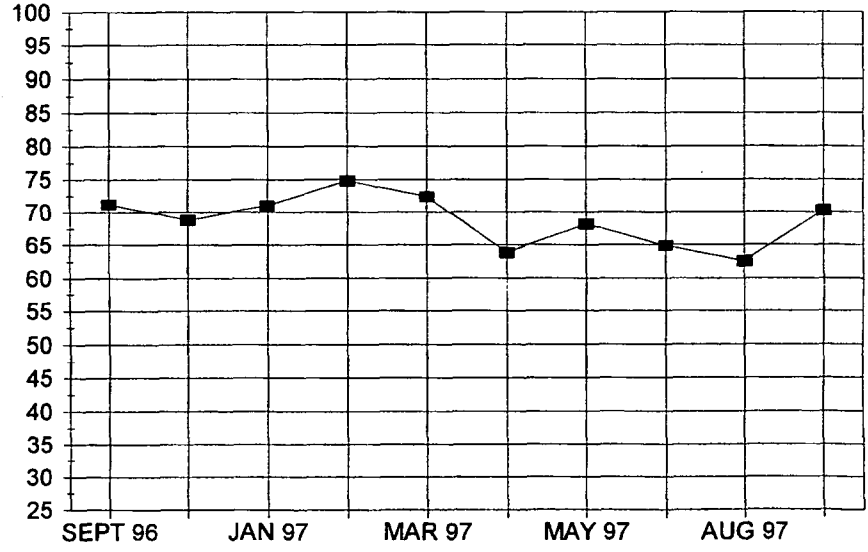


Table 4: The percentage of children detained in the six 'major' prisons, as set out above, relative to the total number of children awaiting trial over the period September 1996–September 1997



It appears that the thorny question of children in pre-trial detention in South African prisons is destined to continue to dominate public discussions and activity in the area of juvenile justice development, and that questions about alternative placements, pre-trial release, and alternatives to incarceration will necessarily have to form a central part of juvenile justice law reform.

Children sentenced to imprisonment

There would appear to have been a substantial increase in the number of children sentenced to imprisonment in the year under review. In the 1996 review comparative statistics for the number of children in prison on 31 July 1995 and 31 July 1996 are provided. Unfortunately, the comparative material for 1997 pertains to a different date, namely 30 September 1997. It is submitted, however, that this does not materially detract from the value of the information. On 30 September 1997 there was a total of 1 361 children serving sentences of imprisonment, an increase over the previous year of 51,89 % in the daily average of sentenced children.

Information for this date on the offence classification is not available. The age breakdown of the children in prison on this date is provided below, as is the breakdown by province.

Table 5: Ages of children serving sentences of imprisonment on 30 September 1997

Age	7–13	14	15	16	17	Total
Number	14	23	101	332	891	1 361
%	0,07	1,68	7,42	24,39	65,46	100

Notably, an alarming increase in prison sentences for the youngest group must be pointed out: from 1 child between 7 and 13 on 31 July 1995, to 4 on this date in 1996, to 14 on the date given above.

The provincial breakdown of children serving sentences is provided in Table 6 below.

Table 6: Children serving prison sentences on 30 September 1997 per province

Province	Number	%
Free State	110	8,08
Northern Province	86	6,31
North West	99	7,27
Northern Cape	53	3,89

Province	Number	%
Western Cape	197	14,47
Eastern Cape	217	15,94
KwaZulu Natal	210	15,42
Mpumalanga	77	5,65
Gauteng	312	22,92
TOTAL	1 361	100

In the 1996 Annual Juvenile Justice review a comparison was drawn between 1995 and 1996 for each province in so far as the increase in the daily average was concerned. It was pointed out that the percentage increase in the numbers of children sentenced to imprisonment was not uniform across all provinces, as some had then shown no increase or a limited increase. The variance between 1996 and 1997 statistics is once again not evenly spread across provinces, and some provinces show a far greater percentage increase in imprisonment for children than do others. The biggest increases are in the Northern Cape (178 %), the Eastern Cape (178 %), and the Northern Province (130 %), while Gauteng is the lowest at 14,7 % increase over the 1996 figures, and KwaZulu Natal also remains proportionately lower at 27,27 %.

Further, information from the Department of Correctional Services detailing figures for all children admitted to prison to serve sentences (rather than the daily count on a particular day of the year) appears to indicate that the daily average is somewhat misleading. It appears that during the statistical year 1996 a total of 9 893 children were admitted to prison to serve sentences, and that the number for 1997 will be even higher than this. Between 1 January 1997 and 31 August 1997 9 152 children were admitted to prisons to serve sentences of imprisonment.

By contrast, NICRO, who run most formal diversion programmes for juvenile offenders, have indicated that the total number of children who were referred to the YES programme, pre-trial community service and other options offered by the organisation for the year 1996 was 4 421, less than half the number sentenced to imprisonment.

The ages of children sentenced to imprisonment for the statistical year 1996 are provided below in Table 7.

Table 7: Ages of children sentenced to imprisonment for the statistical year 1996

Age	7–13	14	15	16	17
Number	38	147	616	2 311	6 781
%	0,38	1,48	6,22	23,35	68,54

Given the large discrepancy between the daily count of children serving sentences and the total admitted to prison to serve prison sentences over a period of a year, it can be deduced that the majority of children are being sentenced to serve short-term sentences, possibly prison terms imposed in lieu of fines which they are unable to pay. The imposition of short-term sentences for children may be questionable in the light of the constitutional injunction that detention be imposed as a matter of last resort; clearly, urgent attention needs to be paid to the development of alternative and community-based sanctions for children.

Conclusion

The sharp increases in imprisonment of children, both pre-trial and for the purposes of serving sentences, is a source of concern in the new constitutional democracy in South Africa. While policy initiatives and legal development proceed towards institutional reform and the creation of a new juvenile justice system that will comply with international law and South Africa's international commitments incurred as a result of ratification of the United Nations Convention on the Rights of the Child (1989), in practice children are being incarcerated at an ever-increasing rate. Given present prison conditions under which most children are held, there is little hope of rehabilitation or educational and vocational development taking place, especially if most children are destined to serve short-term sentences. Clearly, the focus needs to turn to diversion options where at all appropriate and possible, and to better utilisation of alternative sentencing options.