

PROSECUTORIAL ATTITUDES TOWARDS DIVERSION

BY

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1. Introduction

The first formal diversion programmes in South Africa were established in 1992 by NICRO in Cape Town and jointly by NICRO and LHR in Pietermaritzburg. Both these initiatives focussed on pre-trial community service as a diversion option for children charged with minor criminal offences. The development of these programmes introduced a new phase in the South African criminal justice process: from less than 200 cases in 1992/3¹ this number had increased to more than 5600 by 1997. Although this may be an encouraging trend in its own right, the number of cases diverted in South Africa remains low compared to the number of children entering the criminal justice system. Since the early 1990's there has been a strong advocacy and lobbying movement in South Africa to bring the criminal justice system in line with internationally accepted standards. As basic guidelines international instruments such as those formulated by the United Nations are utilised. The United Nations Standard Minimum Rule for the Administration of Juvenile Justice (Beijing Rules) are clear with regard to the administration of diversion²:

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without

¹ Skelton A.: Children in Trouble with the Law, p. 25, LHR, 1993.

² United Nations: Standard Minimum Rules for the Administration of Juvenile Justice, United Nations, New York, 1986

recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation for victims.

The SA Law Commission's Issue Paper on Juvenile Justice makes recommendations based on the Constitution and international instruments on juvenile justice and with regard to this research states a number of key points specifically applicable to this research³:

(2.5) ... that the overall approach should aim to promote the well-being of the child, and to deal with the child in an individualised way. A key aspect should be diversion of cases in defined circumstances away from the criminal justice system as early as possible, either to the welfare system, or to suitable diversion programmes run by competent staff.

(2.7) In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided by the principle of proportionality, the best interests of the child, the least possible restriction on the child's liberty and the right of the community to live in safety.

³

SA Law Commission: Issue Paper on Juvenile Justice, Issue Paper no. 9, Project 106, 1997, p 5.

From experience NICRO has learned that to run diversion programmes successfully it is essential to have a good working relationship with the local prosecutors. The fact that diversion as such is unregulated means that the discretionary powers of the prosecutor has a major impact on which cases are diverted. Whilst this in itself is not necessarily a counter-productive situation, it has the net effect that the prosecutor's knowledge, perception of and attitudes towards diversion and children in conflict with the law will have a major influence on the diversion of cases. To date there have not been developed any uniform guidelines or criteria in South Africa applicable to all jurisdictions and it is therefore understandable that children have different experiences of justice and diversion in different areas of the country⁴. Some Attorneys General, specifically in the Western Cape and Transvaal, have circulated guidelines to their prosecutors but even these still allow for considerable discretion on the part of prosecutors. In a study by the Community Law Centre it was concluded that:

*. . . the fate of juveniles charged in different regions is, overall, a somewhat arbitrary affair. If this is indeed the case, it is not penologically justifiable, and the goal of "equal justice" is not being met.*⁵

This report investigates a number of issues relating to diversion in an effort to make certain recommendations with regard to the running and management of diversion with a particular emphasis on the discretionary powers of prosecutors. The key questions are: To what extent does prosecutorial discretion influence decisions on diversion, and what systems or guidelines should be put in place to facilitate the expansion of diversion? The call for developing guidelines and criteria for diverting juvenile criminal cases is not a new one but there are other issues emerging such as who should apply these guidelines, and are prosecutors in fact positioned correctly in the system to make decisions regarding diversion? Other suggestions have been made with regard to

⁴ These inconsistencies could possibly result in racial biases. Refer Muntingh, L.M.: A Quantitative Analysis of two diversion programmes in Muntingh, L.M.: Perspectives on Diversion, NICRO, Cape Town, 1995.

⁵ Sloth-Nielsen, J. & Said, S.: Statistical Research on Juvenile Justice - Examining Court Records of Juvenile Offenders, Community Law Centre, 1995.

decision-making such as giving Family Group Conferences a central role⁶, but these have not found wide support to date. Skelton poses a similar question⁷:

However, there are reasons why the prosecutor is not necessarily the best person to make the decision as to who should be considered for diversion. Prosecutors work for the state, and this means that they are not unbiased impartial officials, but are in the business of bringing offenders to trial. They represent the victims' rights. This, in a sense gives them the right to decide on behalf of the victim that the case will not go to court, but it would also make them inclined to consider fewer cases for diversion than a social worker might.

The report is divided into eight sections as follows:

- prosecutorial discretion and decision-making
- juvenile crime in South Africa
- description of diversion procedure and report-back on statistics
- methodology of study
- fee-back from interviews
- conclusions and recommendations.

The first three sections are aimed at providing background and contextual information, and arrive

⁶ Juvenile Justice Drafting Consultancy: Juvenile Justice for South Africa - proposals for policy and legislative change, Cape Town, 1994.

⁷ Skelton, A (1995) Diversion and Due Process in L.Muntingh (ed) Perspectives on Diversion, NICRO Research Series, Nr 2, NICRO, Cape Town.

at a closer problem description. The following two sections are directly related to the fieldwork undertaken and the results from the interviews. The last section draws conclusions and makes recommendations based on the background and contextual information in relation to the interview data.

2. Prosecutorial discretion and decision-making

Under South African law the prosecutor is *dominus litis* and the diversion of a case has to date depended on the voluntary withdrawal of charges by the prosecutor⁸. It is also true that at present prosecutors exercise considerable power without any substantial checks or reviews, save that when they may consult with the Attorney General on particular and problematic cases. By and large prosecutors, especially in lower courts handling minor cases, operate on their own within the broad guidelines given by the Attorney General. It is therefore with good reason that it is asked:

*Why not subject prosecutors' decisions to a simple and general requirement of open findings, open reasons, and open precedents, except when special reasons for confidentiality exist. Why not strive to protect prosecutors' decisions from political or other ulterior influence in the same way we strive to protect judges' decisions?*⁹

⁸ SA Law Commission: Issue Paper on Juvenile Justice, No. 9, Project 106, 1997, p. 37

⁹ Davis, K.C. *Confining, Structuring and Checking Prosecuting Power*, 1971.

The manner in which diversion programmes are currently run, leave a lot of decision-making to individual role-players (specifically prosecutors and social workers). Decisions regarding which cases are diverted, the number of hours of community service and their performance evaluation in educational programmes are taken by individual role players. Cases do not appear in front of a panel where they are discussed nor are there proper accountability structures to ensure that decisions made are consistent. It is in response to these wide discretionary powers, characteristic of diversion and alternative sentencing, that Czajkoski and Wollan¹⁰ state:

The operators of the criminal justice system frequently perform as moral entrepreneurs: they set standards of conduct and promote citizen actions in the name of the criminal law but beyond its substance. Evidence for this overriding of the law can be seen in juvenile justice; in conditions of probation, parole, diversion and clemency; and, recently, in various forms of creative sentencing involving restitution and community service work.

It is especially with the diversion of cases where the offence is generally not too serious that a prosecutor often operates in a grey area and his or her decisions have to be based on legal as well as social factors. The decision to divert a child (or an adult for that matter) is not based solely on the strictly legal information contained in the docket. There are other considerations, especially where the decision effects the life and rights of a child. The South African Constitution of 1996 clearly states that the rights and interests of the child shall be paramount. There is as yet no proper, coherent and consistent system in place to ensure that the interests of the child are upheld as paramount in each and every court in South Africa. The consequence is that, theoretically, two identical cases may have very different experiences of the justice system because the decision to divert or prosecute depends so much on the individual prosecutor who has his or her own perceptions of children in conflict with the law and how these children should be treated. It is in this sense that a lack of certainty on the part of the accused is created and consequently inequality before the law.

¹⁰ Czajkoski, E.H. & Wollan, L.A.:(1986) Creative Sentencing - a critical analysis, Justice Quarterly, Vol 3, No. 2, p. 216.

It is perhaps opportune here to review the factors that influence a prosecutor's decision to prosecute or withdraw. Prosecuting successfully still remains the key indicator of a prosecutor's ability to serve justice, and is thus crucial to the prestige and upward mobility of a prosecutor¹¹. The same author identifies 14 factors in a study of prosecutors' decision making; some of these are control variables and are indicated as such:

- Exculpatory evidence
- Corroborative evidence
- Physical evidence
- Number of witnesses
- Defendant-victim relationship
- Defendant arrested at scene
- Gender (control variable)
- Race (control variable)
- Prior record of convictions
- Offence type
- Use of weapon
- Type of victim
- Victim provocation
- Statutory severity.

Albonetti identifies three key areas in which the prosecutor exercises considerable discretion under American law (and in this case there is not much difference between the position of South African and American prosecutors): (1) the circumstances under which a criminal charge will be filed (2) the level at which an alleged offender will be charged, and (3) when to discontinue. It is also the task of the prosecutor to limit uncertainty when making a decision and in this regard the

¹¹ Albonetti, C.A. Prosecutorial discretion - the effects of uncertainty, p 295, 1987.

prosecutor has to take cognizance of (1) cause and effect relations, and (2) preferences regarding possible outcomes.

For the prosecutor who has to make a decision whether to divert a case or not, the situation can become complicated as he or she wants to limit uncertainty and ensure the most favourable outcome. However, the prosecutor's inability to control the accused's behaviour directly impedes on the predictability of a favourable outcome¹². The prosecutor faced with a case presenting particular questions may decide to limit uncertainty and select the option that provides a satisfactory, but not necessarily an optimal, solution. Diversion by definition deviates from the conventional criminal justice process and therefore creates uncertainty as it decreases the control of the prosecutor over the case. In the diversion process new decision-makers are introduced as well as new criteria that will determine the outcome of a case. The individual accused person's participation in an extra-judicial programme is not judged by the prosecutor nor does the prosecutor determine if that person has successfully completed the programme. These decisions are made by social workers or probation officers who may or may not have substantially different interests to the prosecutor.

In juvenile justice extra-judicial concerns play an increasingly important role. Information that has little or no relevance in an adult case may be central when deciding the future of a child. It is for this reason that as juvenile justice systems develop they become increasingly corporatist in nature and involve more and more role players operating with common aims¹³. The in-puts provided by judicial and extra-judicial role-players eventually form the basis upon which decisions are based. The prosecutor's decision should be rational, balanced and just. However, to qualify as rational, balanced and just, a decision must be made with the knowledge of all possible alternatives¹⁴. From experience we know that this is extremely difficult in practice and even more so in the South

¹² Albonetti, C.A. Prosecutorial discretion - the effects of uncertainty, p 294, 1987.

¹³ McConville, Sanders and Leng: The Case for the Prosecution, p 125, 1991.

¹⁴ Albonetti, C.A. Prosecutorial discretion - the effects of uncertainty, p 293, 1987.

African criminal justice system. Decisions are often made based on very limited information as there is no additional in-put to that of the investigating officer or where additional information is available, there is limited use or consideration of alternative options. Even where additional information is available and due consideration is given to alternative options that are available, the decision to divert rests firmly in the hands of the prosecutor whose decision is for all practical intents and purposes not review-able unless representation is made to the Attorney General whose decision will be final.

The decision to prosecute or divert a child is then influenced by a number of factors of which some are structural and inherent to the functions of a prosecutor, such as the legal requirements of the position requiring that the strength of a case should be assessed before it is brought before a court of law. Furthermore, the prosecutor has to make a decision on what the possible result will be of a prosecution or diversion and ultimately what will achieve the most satisfactory results. It is then required of the prosecutor to make an assessment, based on available information, as to the desirability of this prosecution or diversion based on extra-judicial factors.

The offender participating in a diversionary programme submits him or herself voluntarily to the decisions of justice officials and social workers without being convicted of any crime in a court of law. In exchange for this the offender has the reward of not being processed further through the criminal justice system. It follows then that there is virtually no control over, or accountability of, those individuals who decide which cases can be diverted and to which programmes. The guidelines currently employed in South Africa are based on what diversion programme administrators deem fit and what the prosecutors feel are apt. The lack of consistency in cases diverted presents a growing problem and is directly related to the discretionary powers that prosecutors and social workers have.

Related to the discretionary powers of role players is the level of knowledge or expertise of decision makers. Can we rightly assume that a public prosecutor with sound legal training can make a balanced decision on the well-being of a young offender, or, that a social worker with two years experience can **justly** determine the number of hours of community service that an offender

should perform? These questions pertain to the principle of justice by precedent. When decisions are made concerning the conditional withdrawal of a charge and the rendering of community service or participation in a diversionary programme, it has to be ensured that this is done in a consistent and accountable manner.

As the criminal justice system is transformed and new policies develop, such as the emphasis on the diversion of juvenile cases, the position and motives of decision-makers in a modified justice system should also be questioned. Sabol reports on the use of alternative sentencing (fines and community service) to divert offenders from imprisonment in Britain¹⁵. He found that, unless the discretionary powers of decision-makers (in this case sentencers) were not restricted by law, there is no reason to assume that sentencing practices will conform with the modified penal policy. He explains as follows:

... they (Home Office) also demonstrate that in an environment in which penal policy changes, but sentencers' goals do not, sentencers are more likely to shape penal policies into tools which enable them to achieve their aims, rather than comply, necessarily with those of the Home Office. In such a context, it is necessary to restrict the discretion afforded to sentencers; otherwise, there is no reason to expect their compliance.

¹⁵

Sabol, W.J. (1990) Imprisonment, fines, diverting offenders from custody - implications of sentencing discretion for penal policy, Howard Journal of Criminal Justice, Vol 29 No. 1, p. 40.

The wide discretionary powers of decision-makers presents a further problem namely, discrimination in terms of race and social status. The evaluation of Cape Town based diversion programmes showed that there are clear racial biases in the cases diverted by public prosecutors¹⁶. Evans found in the evaluation of two English diversion projects in Westminster and Bromley that are making use of cautions by the police, that the cautioning rate had increased slightly since the programmes were introduced, but that there are indications of discrimination according to age and social status¹⁷. Sixteen year old offenders had a much better chance for being diverted than seventeen year olds. Similarly, employed young adults were also diverted more regularly than unemployed young adults, and employed young adults doing non-manual labour also had a better chance of being diverted than offenders doing manual labour.

Whilst the general assumption is that diversion will improve the administration of juvenile justice some researchers have in fact questioned the constitutionality of diversion and pose some substantial challenges to diversion as a practice¹⁸. These questions pertain to the presumption of

¹⁶ Muntingh, L.M.: A quantitative review of two diversion programmes in Muntingh L.M.: Perspective on Diversion, NICRO Research Series No. 2, NICRO, Cape Town, 1995.

¹⁷ Evans, R. (1993) Evaluating young adult diversion schemes in the metropolitan police district, *Criminal Law Review*, July, p. 495.

¹⁸ Klauberg, T.: Constitutional Implications of Diversionary Practices for Juvenile Offenders, LLM

innocence, the right to a fair trial and the right to a speedy trial. The fact that the diversionary procedure happens prior to the court process, relieves the state of the task of proving its case beyond reasonable doubt.

Statistics show that a fairly select group of children is diverted and as will be shown later, the offence plays a key role in this regard. For example, of the total number of diversion cases handled by NICRO in 1997/8, 47.4% were charged with shoplifting. If these are compared with Assessment Centre figures at the Durban Magistrates Court where almost all children that are arrested in the Durban Magisterial District are assessed by a probation officer, the profile is substantially different in that 30.4% of children arrested, were charged with shoplifting¹⁹. It is apparent then that in the absence of guidelines that cover a wide range of variables (judicial and extra-judicial), it is the inclination of prosecutors to rely heavily upon the charge against the juvenile to determine suitability for diversion. It is the general impression that there is a presumption in favour of prosecution and that this can be over-turned, permitting that there is sufficient evidence of extenuating and mitigating circumstances. Diversion and its expansion has been identified as a key tenet of a number of policy documents such as the NCPS²⁰, IMC Policy Recommendations²¹ and Justice Vision 2000²². If this is to be achieved it follows that certain mechanisms need to be put in place to ensure that diversion is considered as a first option in the criminal justice process and not a secondary option for exceptional or problematic cases.

It follows then that such a system has to be designed and operated in such a manner that this is indeed achievable. At the present moment the diversion of a case is dependent on too many variables that inconsistently affect it. The criminal justice system has an important gate-keeping function in terms of the activation of social services to children. Many children only become “visible” to the system after they have been arrested and these children are often to a greater or lesser degree in need of care. It would then be an unbalanced approach to give too much weight to the offence at the cost of other (extra-judicial) variables. It is with these concerns in mind that the IMC recommended that assessment should be multi-disciplinary to ensure that a balance is

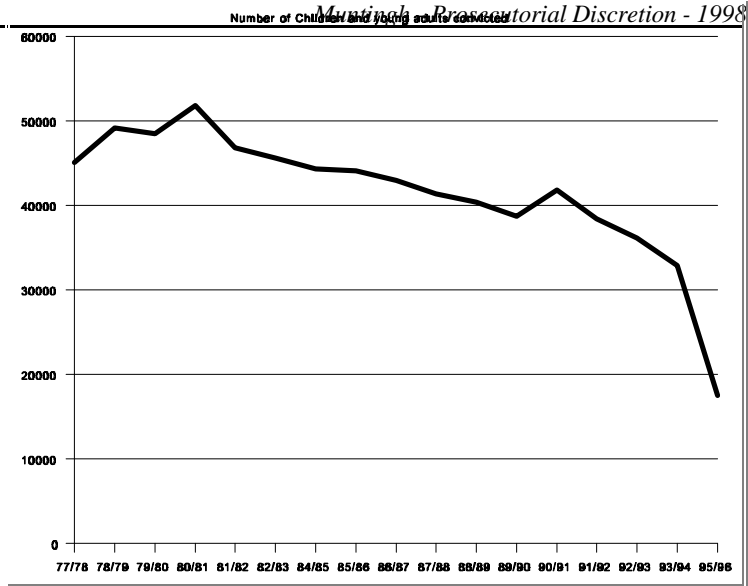
¹⁹ Sloth-Nielsen, J.:Report on the Durban Pilot Assessment, Reception and Referral Centre, Inter-Ministerial Committee on Youth at Risk, Pretoria, 1997.

²⁰ See National Crime Prevention Strategy, Section 1.6 - Diversion Programme for Minor Offenders

²¹ IMC Interim Policy Recommendations, pp 39 - 47, 1996

²² Justice Vision 2000, Department of Justice, p.28.

maintained between the so-called judicial and welfare concerns. It is however the case that at the moment the power rests firmly with the prosecutor and not with the probation officer.



3. Juvenile crime in South Africa

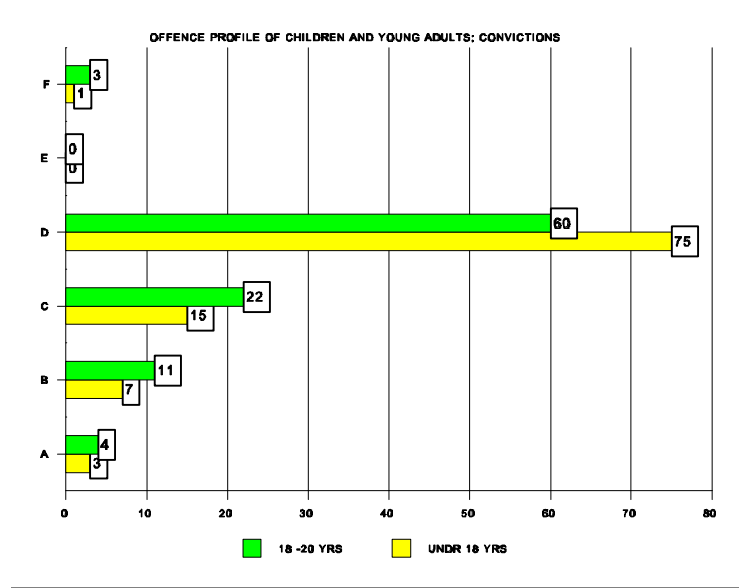
Reliable statistical information on juvenile crime is a problem, thus complicating planning and evaluation of services. However, bit by bit, pockets of reliable data have been gathered and these mainly relate to sentencing and imprisonment figures. The major gap in the information is arrest figures and there are to date no accurate and comprehensive figures in this regard.

Figure 1 shows the number of children convicted per year for the period 1977/8 to 1995/6²³. The number of children convicted per year dropped by 66.2 % from a high of 51 785 in 1980/81 to 17 526 in 1995/6. This sharp decrease cannot be ascribed wholly to diversion as these programmes really came off the ground only in the early 1990's. The reasons for this should be sought in the growing inability of the criminal justice system to process and finalise cases speedily. The

²³ Muntingh, L.M.: Review of Sentencing Trends: 1977/8 to 1995/6, NICRO Occasional Paper No 15, NICRO, Cape Town, 1998. Please note that reports for the year 1983/4 and 1994/5 were not released by CSS.

decreasing number of convictions per annum is also reflected in the other age categories, namely 18 - 21 years and adults.

In terms of the offence profile²⁴ of convicted cases, Figure 2 shows that 75% of children were convicted for property offences (Class D), another 15% for crimes against the person (Class C), and lesser proportions for the other categories. The 18 - 20 year group had a slightly wider spread amongst the six offence classes with 60%

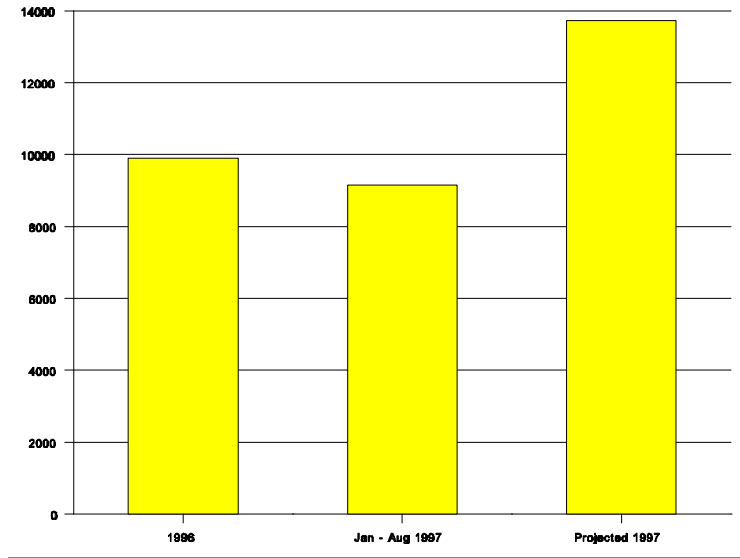


property crimes and 22% crimes against the person. A significant difference between the two age categories is also noted for Class B, which includes (a) family life and care of children (b) indecent, sexual and related matters (c) drugs and dependence producing substances (d) other matters against communal life.

The number of children being convicted for property offences also showed a rapid decline from 1993/4 to 1995/6. Although this drop should be seen in the context of the overall decrease in convictions, the contribution of diversion cannot be negated. In 1996/7 some 3500 persons attended NICRO diversion programmes and, although outside the period under review, in 1997/8 this figure increased to 5600.

²⁴ The offence classes are as follows: Class A - Government authority and good order, Class B - Communal life, Class C - Personal relations, Class D - Property, Class E - Economic affairs, Class F - Social affairs.

Number of Children Sentenced to Imprisonment - 1996
Mutual Prosecutorial Discretion - 1998



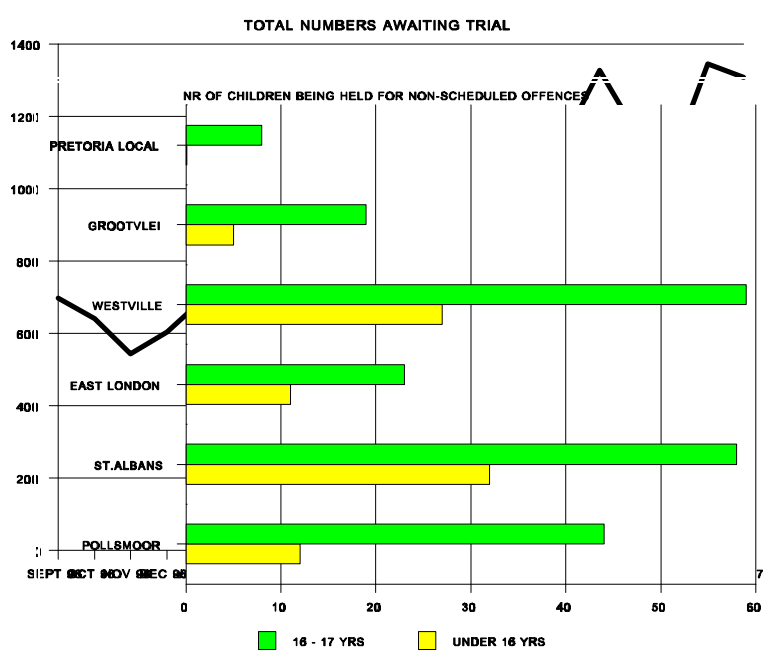
The proportion of young people (7 -20 years) convicted by the courts has shown a steady decline since the early 1980s and has since the mid-1980's remained under 15% of the total and children have dropped to under 10% of the total.

Despite the decreasing number of children being convicted, the number of children being sentenced to imprisonment is expected to increase rapidly in the future according to a study done by the Community Law Centre at the University of the Western Cape²⁵, as presented in Figure 3. Based on the figures for 1996 and the first eight months of 1997, it is projected that there will an increase of nearly 39% in the number of children sentenced to imprisonment in 1997.

²⁵

Community Law Centre: Children in prison in South Africa - a situational analysis, UWC, 1998.

An indication of the speed at which the wheels of justice are currently grinding, is the number of children awaiting trial in prison, often for extended periods. Despite numerous efforts from state and NGOs as well as amendments to legislation, this figure has been increasing steadily as indicated in Figure 4²⁶.



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NICRO Submission to the Parliamentary Portfolio Committee on Justice regarding the Criminal Procedure Amendment Bill, Number 59 of 1998.

A recent survey²⁷ of six prisons revealed that of the total group of 638, 298 or 47% were being held for non-scheduled offences. Figure 5 shows the number of children according to age groups per prison being held for non-scheduled offences.

From the above it is evident that there are serious problems in the South African criminal justice process when dealing with juvenile cases. The fact that juvenile justice is currently administered by several pieces of legislation exacerbates the problem. The SA Law Commission Issue Paper on Juvenile Justice proposes such unified legislation but there remain substantial matters for clarification and refinement²⁸ :

(7.12) There is a need for a distinct procedure prior to charge, to ensure that diversion decisions are taken and that cases involving juveniles are correctly channelled to a suitable option such as a programme, to a children's court inquiry, or to a criminal court.

4. Methodology of study

Since 1992 NICRO and other NGOs have held numerous workshops across South Africa with prosecutors, probation officers and magistrates on juvenile justice and specifically diversion. These workshops were in most cases educational and aimed at training role players in utilising

²⁷ NICRO Submission to the Parliamentary Portfolio Committee on Justice regarding the Criminal Procedure Amendment Bill, Number 59 of 1998.

²⁸ SA Law Commission: Issue Paper No. 9, Project 106, Juvenile Justice, 1997, p 37.

diversion and raising awareness around juvenile justice issues. This research project was undertaken to consult with prosecutors on diversion with specific reference to how they experience the process (positive and negative), how they apply the training they have received and how they would like to see diversion operating. Central to this is the aim of coming to a closer description of how prosecutors select cases for diversion and how criteria, if formalised, are applied.

In order to solicit this information, interviews were conducted with 21 prosecutors and one magistrate in three provinces, namely the Western Cape, Mpumalanga and the Northern Province. The three provinces were selected for specific reasons; the Western Cape because diversion is well developed there and NICRO services widespread which facilitates access to diversion programmes; Mpumalanga because diversion has started there only recently (through NICRO) and the referral numbers have been fairly low to date; and the Northern Province because there are no NICRO services and no formal diversion programmes.

The selection of individual prosecutors in no way claim to be representative as this would have changed the sampling technique significantly. The assumption was made that a fairly small sample of prosecutors would be able to produce the necessary information as the topic, diversion, is fairly specialised. Furthermore, that Senior and Control Prosecutors essentially determine the diversion and prosecution policy in their courts and that junior prosecutors would make decisions accordingly. In addition, some Attorneys General have also circulated guidelines on diversion and that would further influence decision-making.

Prosecutors were interviewed by means of an interview schedule of which a copy is attached as Appendix 1. The interview schedule addressed the following issues:

- Views on juvenile justice and juvenile offenders
- Knowledge and understanding of diversion
- Suitability of diversion
- Diversion and due process
- Guidelines for the diversion of criminal cases

- Limitations to diversion
- Regulated and unregulated diversion
- Levels of diversion
- Suitability of diversion programmes
- Suggestions and proposals for change
- NGO and community involvement

The issues were discussed with the respondents based on questions formulated around that topic. It was however the case, as is normal with interview schedules, that responses often span more than one question or that certain questions are not appropriate due to the respondent's particular situation. Follow-up questions were used frequently to clarify specific issues raised by respondents. The interviews lasted between one and two hours each. Responses to individual questions were then grouped and analysed for common themes, similarities and exceptional responses.

The following presents a summarised profile of the respondents interviewed according to race, sex, years of experience and years in position. On average the respondents had been in their current position for 3.6 years and a total of 8.1 years experience in the criminal justice system.

Table 1 Profile of respondents

Jurisdiction	Race	Sex	Years experience	Years in position	Position
Northern Province					
Pietersburg	White	Male	25	15	Snr Pros.
Tzaneen	White	Female	15	12	Control Pros.
Thohoyandou	African	Female	10	1.5	Control Pros.
Mpumalanga					
Barberton	White	Male			Snr Pros
Barberton	White	Male			Snr Magistr.

Jurisdiction	Race	Sex	Years experience	Years in position	Position
Kabokweni	African	Female	2	0.5	Control Pros.
Evander	White	Female	8	8 months	Senior Pros.
Witrivier	White	Male	2	2	Prosecutor
Nelspruit	White	Male	8	2	Snr Pros
Bethel	White	Female	10	6	Control Pros.
Bethel	Coloured	Female	2	2	Prosecutor
Bethel	White	Female	2	2	Prosecutor
Western Cape					
Bellville	White	Female	16	5	Snr Pros.
Stellenbosch	Coloured	Male	2	0 (Temp)	Control Pros.
Vredendal	Coloured	Female	5	1	Control Pros.
Somerset West	Coloured	Female	3	1	Control Pros.
George	Coloured	Male	10	1.5	Snr Pros.
Worcester	White	Female	8	5	Snr Pros.
Wynberg	White	Female	10	2	Snr Pros.
Mitchells Plain	Coloured	Female	1	10 months	Control Pros.
Cape Town	White	Female	16	5	Snr Pros.

Table 2 Race and gender profile of respondents

	African	Coloured	White	Total
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Male	0	2	6	8
Female	2	4	8	14
Total	2	6	14	22

The majority of respondents were female of whom nearly 57% were white, 28% coloured and 14% African. It is significant that no African males were found in any of these positions.

Table 3 Respondents per province and position

Position	W-Cape	Mpumalanga	Northern Province	Total
Prosecutor	0	3	0	3
Control Prosecutor	4	2	2	8
Senior Prosecutor	6	3	1	10
Magistrate	0	1	0	1
Total	10	9	3	22

Only one magistrate was interviewed and that was in Mpumalanga. One Control Prosecutor in the W-Cape was temporarily in the position as the permanent one was on extended sick leave. In total, 18 of the 22 respondents were Control and Senior Prosecutors.

5. Definition of diversion and report on diversion statistics

(a) Description of diversion process

Diversion is defined as the channelling of *prima facie* cases from the formal criminal justice system on certain conditions to extra-judicial programmes, at the discretion of the prosecution²⁹.

²⁹ Muntingh, L. & Shapiro, R.: An Introduction to Diversion from the Criminal Justice System,

This definition can be regarded as limiting in as much as it refers to formal programmes; this is however not the intention. Two important factors emerge from this definition namely, that is must be *prima facie* cases. In other words, should the case have proceeded it would have resulted in a conviction. Furthermore, diversion is not limited to the pre-conviction stage; diversion includes any action taken at any stage in the criminal justice process that would take that case out of the conventional process of charge, plea, trial, conviction and sentence. Although this definition allows for diversion to take place at any stage, it is the situation that more than 80% of cases diverted are done so by prosecutors at a pre-trial stage. This then justifies the emphasis of this research on the role of the prosecutors in the diversion process.

The usual route that a diverted case can follow is set out in Figure 6. After arrest and charge the case is assessed by a probation officer, if such a service is available. The probation officer would verify personal details and based on available information (solicited from parent or guardian if present) make a recommendation on the prosecution or diversion of the case. In summary, the criteria applied refer to the following: seriousness of offence, age, intended plea, background information, socio-economic conditions and whether there had been any prior convictions (if such information is available). The docket as well as the probation officer's report would then proceed to the prosecutor who will, based on this and, if necessary interview the accused, make a decision on prosecution, diversion or unconditional withdrawal. Should the case be referred for diversion the necessary case details will be forwarded to NICRO or any other service provider. NICRO or

the other service provider will make an assessment of the case through an interview and decide on whether the case is acceptable or not, and if acceptable, to which programme it should be referred as there are five different programmes available. If the case is not suitable, it will be referred back to the prosecutor. If the case is accepted, it will be referred to a specific programme and progress will be monitored. Should the participant not comply with the conditions of the diversion, ie. attendance of the programme and complying with its requirements, this will be reported to the prosecutor who will then proceed with the prosecution as usual.

It should be emphasised that the process outlined above applies to situations where there are probation services in place as well diversion programmes. Where such services are not in place or not fully operational the process will naturally run differently and extended delays may be experienced. For example, in the Boland area there is no 24-hour probation service available and Magistrates' Courts have to share probation officers that visit the court once or twice a week. Furthermore, it is not always possible to get a probation officer or social worker to do a pre-trial assessment and this responsibility often ends up with the prosecutor who is naturally not trained for it.

There are in fact very few jurisdictions in South Africa where diversion runs as smoothly as indicated in Figure 6. These areas are all located in the larger metropolitan areas such as Cape Town, Port Elizabeth, Durban, Pietermaritzburg, Johannesburg, Pretoria, Kimberley and Bloemfontein. This is however not to say that diversion does not occur in the smaller towns or rural areas but rather that the process is often severely hampered by infra-structural and systemic shortcomings.

(b) Overview of statistics

NICRO currently has five diversion programmes available to the criminal justice system, namely: Youth Empowerment Scheme (YES), Pre-trial Community Service (PTCS), Family Group Conferencing (FGC), Victim Offender Mediation (VOM) and The Journey. In addition, most of

these can be combined, and the YES and PTCS are most frequently used as a combination option.

The YES is a six week life skills programme presented in a group format (10 - 20 participants) one afternoon per week. The parent(s) participate in the first and last sessions. PTCS allows the offender to perform community service in lieu of prosecution, the number of hours ranging from 10 to 120. FGCs and VOM provide the opportunity for the offender to meet with the victim and work out a mutually acceptable agreement and plan to prevent further offending. In FGCs, as the name indicates, the role of the families on both sides is more prominent than in VOM where mediation is more individualised. The Journey is a longer term programme (3 - 12 months) that incorporates life skills training, outdoor education, and in some instances vocational training, depending on the participants³⁰.

The following statistics are based on the diversion services rendered by NICRO in the 1997/8 financial year. NICRO is currently the primary provider of diversion programmes in South Africa and in the 1997/8 financial year rendered services in seven of the nine provinces and by the end of 1998 will do so in all provinces. The following provides a short overview of diversion statistics as collected by NICRO.

Table 5 Diversion cases 1/4/97 - 31/3/98 as handled by NICRO

	WC	E-C	KZN	Free St	N-Cape	Gaut.	Mpumal.	TOT.
Unknown	6	5	36	2	0	3	3	55
YES	1181	505	1144	231	213	1082	97	4453
PTCS	153	10	210	7	0	168	0	548
FGC	31	0	3	13	20	16	4	87
VOM	1	11	8	1	0	0	0	21

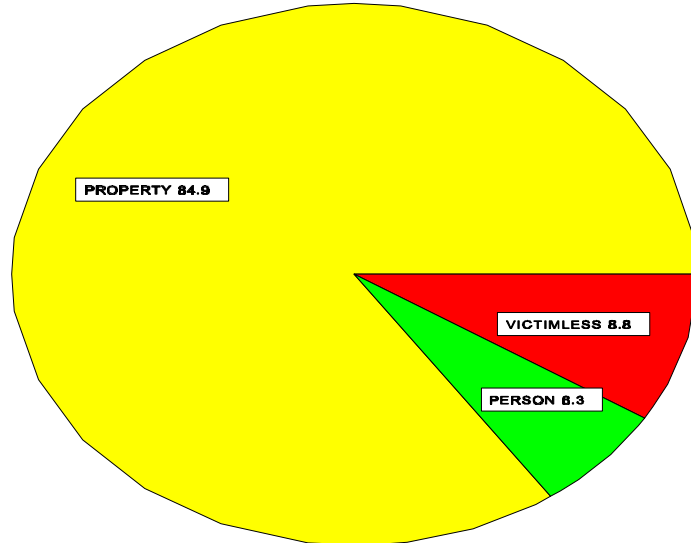
³⁰ For a more detailed description of the NICRO diversion programmes, please see Muntingh, L. & Shapiro, R.: NICRO Diversions - an introduction to diversion from the criminal justice system, NICRO, Cape Town, 1997.

	WC	E-C	KZN	Free St	N-Cape	Gaut.	Mpumal.	TOT.
Journey	18	0	0	17	0	45	0	80
Other	1	38	1	1	0	17	0	58
YES & PTCS	27	1	169	13	0	40	0	250
CSO	7	10	6	0	0	2	0	25
Family	0	32	0	15	0	0	0	47
TOTAL	1425	612	1577	300	233	1373	104	5624

From Table 5 it is clear that diversion cases are concentrated in three of the seven provinces, namely W-Cape, KZ-Natal and Gauteng. These three provinces accounted for 77.7% of the diversion cases handled by NICRO during the period under review. The majority of cases (79%) are referred to the Youth Empowerment Scheme (YES) as this particular life skills programme is group based, usually 10 - 25 participants, that run one afternoon per week over six weeks. The other programmes are more focussed on the individual and will thus handle a lower proportion of the total case load.

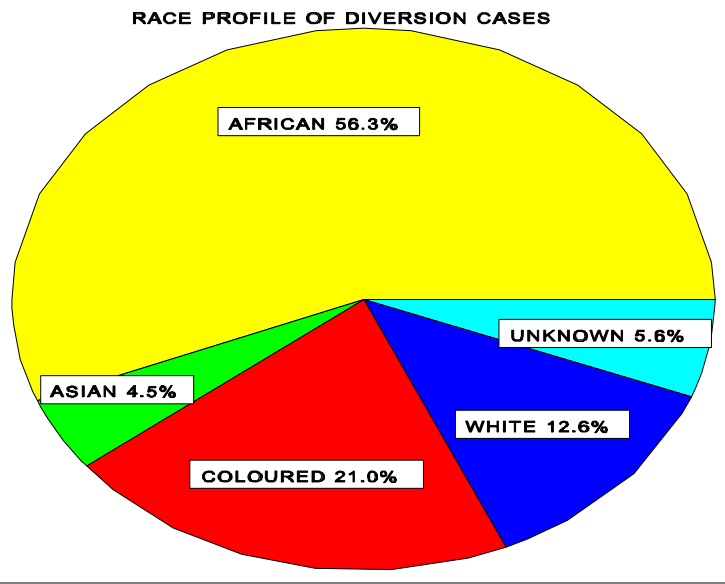
The offences with which children are charged are very varied although the majority are property related as indicated in Figure 7. The fact that nearly 85% of cases are related to property offences are firstly an indication of the type of cases considered for diversion and secondly points in the direction of the socio-economic conditions underlying juvenile crime. Victimless offences refer primarily

OFFENCE PROFILE - GROUPED IN PERCENTAGES OF TOTAL

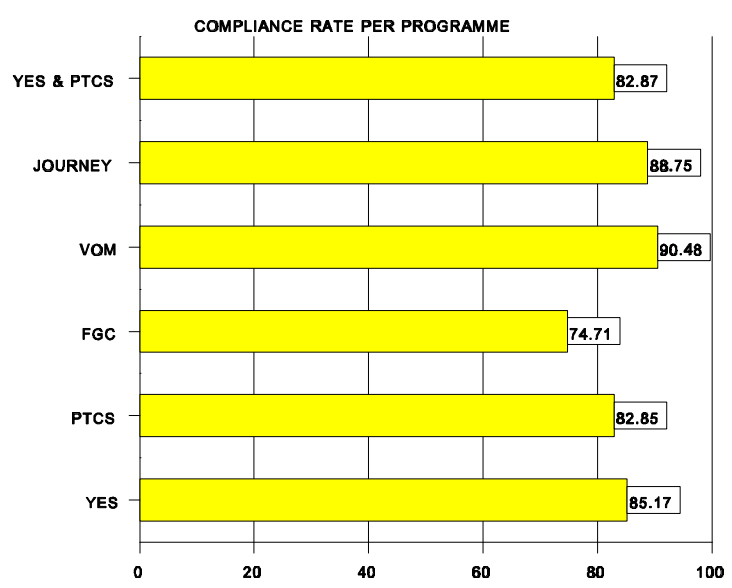


to cases of possession of narcotics or other illegal objects or substances. If the offences profile is cross tabulated with gender, 63% of males were charged with shoplifting and theft, and 89% of females with the same offences. Males comprised 74.1% of the group and females 25.9%. This distribution does indicate a slight over-representation of females as estimations, based on conviction figures, indicate that females are responsible for between 12.5% to 13.5% of crime.

The race profile of the total group shows over- representation of White and Coloured participants, presumably at the cost of African participants. One does however have to allow for such factors as the regional distribution of population groups, the availability of diversion services in different areas and the availability of assessment services.



The compliance with the diversion programmes is surprisingly high and can to a certain extent be described as abnormal. Figures 9 shows the compliance rate of six programmes. Except for FGCs, the compliance rate of all the programmes is above 80% and in some cases closer to 90%. Two possible but not mutually exclusive explanations can be forwarded for this trend. The first is that the programmes are very



effective and that the participants are indeed committed to complying with the conditions of the withdrawal. The second is that the majority of cases are selected for diversion because they show a high potential for

success and compliance with the programme they are being referred to. This “selection for success” strategy is not without problems and may in the long term create unrealistic expectations about diversion programmes³¹. Compliance rate is also not the best indicator of success as the real impact of a programme can only be tested through longitudinal studies. A limited follow-up study done in 1994 showed a recidivism rate of less than 10% over 12 months³². A further study with a larger sample group appears to support this figure although this is based only on preliminary findings³³.

The overview impression of diversion statistics can be summarised as follows:

- the total number of diversion cases is comparatively low in relation to the number of children charged and convicted
- formal diversion programmes are primarily located in the larger metropolitan areas
- NICRO remains to be the primary provider of formal diversion programmes
- first time property offenders form the majority of diverted cases
- there appears to be a slight over-representation of White and Coloured as well as female participants in the programmes.
- the compliance rate with programmes appears to be exceptionally high and the recidivism rate in the first 12 months after the programme is estimated to be under 10%.

6. Feed-back from interviews

³¹ Muntingh, L.M.: A critical review of diversion p.46, 1995.

³² Kok, J, An evaluation of the Youth Offender Programme, 1995.

³³ Muntingh, L.M.: Diversion recidivism Study - Forthcoming

The feed-back from the interviews is structured according to the themes outlined in the interview schedule and the subsequent individual questions that were formulated. Where appropriate and useful, responses were categorised and frequencies with which certain responses were noted are presented in tabular format. Due to the fact that not all questions, as noted in the interview schedule, were posed to all respondents, the frequencies will not always add up to the number of respondents. It is also the case that respondents could identify more than one variable in response to a question and these frequencies would then add up to more than the number of respondents.

(A) Views on juvenile justice and juvenile offenders

Respondents were first asked whether juvenile offenders (7-17 years) should be treated differently from adult offenders. The purpose of the question was two-fold in the sense that it should focus the respondent's attention on juvenile justice, and get a basic understanding of what the respondent's orientation is towards the topic.

The majority of respondents were of the opinion that juveniles or children should be treated differently from adults in the criminal justice system. The reasons for this position are summarised in the following:

- to prevent children receiving a criminal record
- to allow for the comprehension and judgment ability of children as recognised by the Constitution
- to limit their exposure to the criminal justice system
- to allow for specialised services in the criminal justice system to children
- because children do not fully understand what happens in a criminal court
- because the court has to allow for socio-economic conditions of the child.

Three respondents (from Mpumalanga) were of the opinion that there should be no distinction between the treatment of children and adults in criminal matters. Two of the responses are significant of the attitude of the prosecutors:

I feel that the youth criminal should be treated in the same way, no sweet talk and babying.

No, some of the children are real criminals; there are some who are often here in court. If the child is illiterate, it is of no use to give him another chance, he does not understand it and does not appreciate it. His attitude is different if he has some education. But in general they do not care what happens to them.

A third group of respondents indicated that based on certain conditions there should be differential treatment of children in the criminal justice process. The conditions set included the age of the child, the nature and seriousness of the offence, the number of previous offences and the *modus operandi* followed in the commission of the offence.

From the above summarised responses it is clear that there is no common understanding amongst the sample group of fundamental issues relating to juvenile justice and that directly opposing views are held by practising prosecutors. It should be noted that all the W-Cape respondents were either of the opinion that children should be treated differently or that certain conditions should apply for them to be treated differently. These conditions refer to the seriousness of the crime and the number of previous offences. The Mpumalanga respondents clearly held the most conservative views on this question.

The next question raised was whether South Africa requires separate legislation for juvenile offenders. The majority of respondents indicated that separate legislation is required although they did so for different reasons which included the following:

- to provide for children in need of care
- to provide more sentencing options
- to streamline the criminal justice system
- to treat the child as a child in the justice system
- to encourage the use of the Children's Court.

Two respondents indicated that they were of the opinion that separate legislation is required but that they are unsure of what such legislation should encompass and aim to achieve.

Following from the first question, the minority view was that special or separate legislation is not required as there should not be any distinction between the treatment of children and adults.

The third significant group of responses were those of respondents who stated that separate legislation is not required as the current legislation is sufficient. This group did however indicate that there are substantial practical problems in the application of current legislation. One response is typical of this viewpoint:

The legislation that we have is good but it needs to be practised and that requires infrastructure. For example, the Child Care Act is good but the resources to apply it is scarce. Section 29 (Correctional Services Act) is another example of where the resources are insufficient. We need places of safety but that cannot be achieved through legislation. I suppose what one can look at other legislation, such as education, to ensure that cooperation between different departments is ensured. One aspect that can be improved, is to build controls into the legislation to check that the process flows smoothly and correctly.

Another view from this group is that separate legislation may create a system that is over-regulated and too rigid. The fear was also expressed that such legislation may create loop-holes and this may not always be to the benefit of the children. As an example of this, S 29 of the Correctional Services Act regulating the detention of children awaiting trial in prisons, was used to illustrate the point.

In view of these responses, the question was put to the respondents what the aims, purposes and principles of such legislation should be. Naturally only those respondents who were of the opinion that such legislation is indeed required, responded.

The responses can be categorised in two broad groupings, those relating to the aims or desired results of such legislation; and those which regard such legislation as a resource to guide decision making. With reference to the first category (aims and desired results) the following summarise the responses:

- to change the behaviour of the child
- to emphasise preventative work with children in trouble with the law
- to provide education and training to the child
- to prevent the child from being convicted and receiving a criminal record
- to prevent the imprisonment of children
- to establish a more child friendly system that involves proper assessment.

One response from a W-Cape prosecutor is perhaps the best summary of these views:

It should almost be more like the Children's Court. The social worker should do a proper

background report. I think we are often too hard with the children and the way in which they are exposed to the criminal justice system is not always desirable. The entire approach should be different with the aim of getting through to the child and changing his behaviour.

The other group of responses to this question centred around legislation providing guidelines as well as making more options available to prosecutors and magistrates. Particular concern was expressed regarding sentencing options for juvenile offenders. It was clear that the application of current sentencing options did not achieve the desired results. One prosecutor made it clear that the abolition of whipping left a huge gap in the sentencing basket. The need for programmes for juvenile offenders described in the law was also expressed.

From these responses it was clear that at least some prosecutors and magistrates are currently looking towards future legislation to guide them more actively in decision-making. Current sentencing options are too vague and leave a lot to the individual magistrate to design in terms of the sentence. The problem is exacerbated by the lack of infra-structure in the majority of jurisdictions.

To conclude this field of questioning, the respondents were asked if they were familiar with the IMC and NCPS Policy Recommendations regarding diversion, and if so, what their views were on it. Of the total group only one respondent indicated that she had seen these documents but has little knowledge of them. It is indicative that the two major policy documents that will regulate not only diversion but the criminal justice system where it concerns children, is not known by the majority of respondents who make decisions regarding children on a daily basis.

(B) Knowledge and understanding of diversion

Respondents were first asked what they understand under the concept “diversion”. The key concepts in the responses are summarised in the following table. Please note that respondents could list more than one key concept and the numbers will therefore not add up to the number of respondents:

Table 6 Key concepts in respondents understanding of diversion

	Key concept	Frequency
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It is a procedure whereby the case is taken out of the criminal justice process	7
It is aimed at preventing conviction/Preventing that a child receives a criminal record	4
It is a second chance/It is an alternative procedure	4
It is aimed at rehabilitation	2
It encourages the child to take responsibility	1
It is based on restorative justice principles	1
It is aimed at educating the child	1
It is a soft option	1

In terms of the respondents' understanding of diversion, the aim of diversion is to provide an alternative to the conventional criminal justice procedure and prevent conviction and thus receiving a criminal record. The other concepts noted, except for one, were all in support of this notion. Only one negative response was noted and this was characteristic of this particular respondent. To the other respondents it was clear that diversion, or at least what they understood it to be, holds certain advantages that the current criminal justice system did not provide. In summary it can be said that all the respondents had a basic understanding of diversion although it was clear throughout the interviews that some respondents had in fact very limited knowledge of the issue. In one instance the concept and procedure of diversion first had to be explained to the respondent before the interview could be conducted. Once this was done, the respondent was very positive about it and immediately identified the need for such a service in her jurisdiction.

Respondents were subsequently asked if they regarded diversion as a realistic and workable option in South Africa. The majority of respondents (11) stated unconditionally that diversion is a realistic and workable option in South Africa. It should be noted that the majority of these responses came from the W-Cape where infrastructure and systems are better developed than in the other two provinces. Another seven respondents indicated that they regarded diversion conditionally as realistic and workable. The conditions they stated related to the following:

- that some children are involved in gangs and are thus not suitable for diversion
- that infra-structure for diversion programmes, as provided by NICRO, is not available in

their area

- that it is suitable only for first offenders
- that it is suitable only for literate people
- that the children still have to return to their communities and families and that is often where the cause of the problem lies.

Consistent with her previous responses, one respondent (from Mpumalanga) stated that she did not believe that diversion is workable or realistic and that all cases should be prosecuted. Another respondent, from the Northern Province, explained that she has never seen diversion in action and was therefore unsure regarding its work-ability.

Following from these questions, the respondents were asked to name, in their opinion, the advantages and disadvantages of diversion. These are listed in Table 7 below.

Table 7 Advantages and disadvantages of diversion identified by respondents

ADVANTAGES		DISADVANTAGES	
Description	Freq.	Description	Freq.
There is another system for children to be handled by the courts	3	There is a gap i.t.o. programmes for recidivists	3
Equips the child with education and training	3	Programmes and infra-structure not yet widely accessible and available	3
Child does not receive a criminal record	2	Parents' involvement often limited	2
Strong crime preventative function	1	Information system is lacking in order to trace recidivists; prevent misuse of system	2
Children receive professional services	1	It is idealistic and will only work in exceptional cases	2
Encourages parental and community involvement	1	It involves extra work	2
Early identification of problems with the child and family	1	Wider variety of programmes should be available	1

It gives the child another chance	1	No real disadvantages	1
Takes some of the workload from the prosecutor	1	Community service placement may say we are referring too many cases	1
		Children in gangs presents a problem	1
		It does not have the same punitive component as a sentence	1

The fact that more disadvantages than advantages were identified should not be interpreted that the majority of respondents were negative about diversion; the contrary is in fact true as described above. Of the group only two respondents were negative about diversion and persisted in replying that diversion is “idealistic and will only work in exceptional cases”. The two strongest advantages identified were that there was now a system which is able to handle children separately and providing different options, and that diversion has a strong educational and training impact. The fact that the child does not receive a criminal record scored a surprisingly low frequency.

In terms of the identification of disadvantages, the respondents did not restrict themselves to the theoretical issues surrounding diversion and identified a number of practical problems with diversion. Three key issues were identified namely: the lack of programmes for recidivists, serious offenders and children involved in gangs, the availability and accessibility of programmes, and the lack of a proper information system to trace cases in order that recidivists are identified or to prevent that cases slip through the net.

(C) The suitability of diversion

A substantial proportion of the interview schedule was aimed at getting to a closer description of what the guidelines, criteria and requirements are under which a case will be considered for diversion. In view of this, the respondents were under which circumstances they would consider a case to be diverted. A variety of factors were named and these are listed in Table 8. The frequency with which these were mentioned is also indicated in the table. These should be interpreted as factors influencing a decision favouring diversion.

Table 8 Circumstances under which a case will be considered for diversion

Description	Frequency
Less serious offence (for example shoplifting, theft, malicious damage to property)	20
First offender	8
Mitigating personal, home and social circumstances	7
Parents are present and have positive/cooperative attitude	3
Low value of property and limited number of items stolen/damaged	2
Opinion of victim favours discontinuation of prosecution	2
Attitude of accused positive and cooperative	2
Accused not involved in gangs	1
Probation officers report recommends diversion	1
Accused is planning to plead guilty/ takes responsibility	1
Violence not involved/ not dominating factor in offence	1
Special background factors to offence, for example child used by adults	1

From the above table it is clear that the offence is the most important factor when considering a case for diversion and it apparently outweighs any other factor. It is however possible, and it has been shown in other research³⁴ that there are exceptional circumstances under which children charged with serious offences are in fact diverted.

³⁴

See Muntingh (1997) Statistical review of YES programme, NICRO Occasional Paper No. 11, NICRO, cape Town.

Of the twelve variables listed by the respondents, six were directly related to the offence and six were related to extra-judicial or social factors. However if the frequencies are divided according to these two categories, offence related variables were mentioned 33 times and extra-judicial factors 16 times. It is noted that some of the offence related variables do overlap or are very closely related but they are separated for the purpose of analyses and to keep the data “closer” to the responses. The fact that extra-judicial or social factors received such a low rating is regarded as significant and supports the notion that, firstly cases are not truly individualised in their totality, and secondly, that judicial and specifically prosecutorial interests remain dominant in the decision-making process and thus placing the interests of the child as secondary.

With these responses as background the respondents were asked to identify the factors that influence their opinion the strongest when assessing a case for diversion. A summary of the responses are provided in Table 9.

Table 9 Most important factors influencing prosecutors’ decision to divert

DESCRIPTION	FREQ.
Offence (seriousness, pre-meditation, violence, method)	9
Age of accused (more likely to divert if under 16 years)	5
Opinion and involvement of parents favourable and cooperative	4
Mitigating personal, family and social circumstances	4
Opinion of victim favours discontinuation of prosecution	3
Accused shows positive and cooperative attitude	2
Accused is first offender	2
Accused shows remorse, planning to plead guilty	2
Gang involvement	1

The above table confirms the information presented in Table XXX in that the offence remain the most

important factor when considering diversion. It is however important to note that other extra-judicial factors appear to have moved up in the ranking and specifically the age of the offender, the opinion and involvement of the parents and general personal and social background information. It appears then that in the decision-making process an initial presumption in favour of prosecution is made based on the offence which is then assessed by means of the variables noted above.

The information gathered and/or supplied to the prosecutor by the probation officers and investigating officer are however not only used to divert cases but also to confirm the presumption in favour of prosecution. In order to assess this, the respondents were asked to list specific extenuating or aggravating circumstances that will affect their decision to divert a case or not. These are listed in Table 10.

Table 10 Specific extenuating or aggravating circumstances

EXTENUATING		AGGRAVATING	
Description	Freq.	Description	Freq.
Child has positive attitude, shows remorse, cooperative	3	Child involved in gangs	5
Parents are present, interested, cooperative	3	Child has previous record	5
Poor socio-economic conditions	2	Child exhibits violent behaviour at school or home	3
Attend school	2	Child has negative attitude, uncooperative	2
Child experiencing problems at home	1	Family/Parents not interested	2
Age (under 16 years)	1	Child was diverted in the past	1
Child has psychological problems	1	Pre-meditation involved in crime	1
Offence is minor		Value of or damage to property high	1

Gang involvement and a history of previous offences appear to weigh the heaviest against a child charged with a criminal offence, whereas a positive and cooperative attitude exhibited by both the child and the parents can strongly influence the decision to divert. From the information presented in Table 10 as well as the previous two it appears that there is not necessarily a consistent and common set of criteria applied by the prosecutors interviewed. From these three tables it appears that information relating to the crime has diminished in importance and other social and extra-judicial factors increased in importance.

From the responses it was significant that very limited references were made to probation officers' reports and the issue was followed up with the respondents. The Probation Officers' report is intended to play a key role in the decision-making process as it is the primary source of extra-judicial or social information. Pre-trial probation services are not established in all jurisdictions and these are thus excluded from the analysis. The responses are only from those prosecutors who are currently or had in the past worked with probation officers in a pre-trial setting. It should also be noted that even where such services are in place, not all children are assessed by a probation officer. The respondents were asked to what extent they take the probation officer's report and recommendation into consideration when making a decision. Six of the eleven prosecutors assisted by probation officers indicated that they give great weight to their recommendations and usually agree with it, although they may occasionally differ with it. One respondent stated that she very seldom agrees with the probation officer's recommendation and does not really regard it as important. Four prosecutors indicated a mixed response, stating that although they regard their contribution as important there are some problems or issues. These related to the following:

- there is often a long time delay before the report is available due to the fact that there are too few probation officers assigned to the area
- the probation officers are not experienced in making recommendations
- the probation officer does not read the docket properly and recommends too serious cases for diversion
- probation officers who are from a disadvantaged community are more sympathetic than those from higher income communities.

The same group of respondents were asked if they are of the opinion that the probation officers make realistic and reliable assessments. Eight of the eleven responded positively and explained that if they have problem with the recommendation or if the probation officer is unsure about something, they discuss the case. Two respondents (from Mpumalanga) were of the opinion that the assessments are not realistic nor reliable, and singled out African probation officers whom they said do not go deep enough into the detail of the case.

(D) Diversion and due process

Diversion raises a number of due process concerns and these relate specifically to the right of the accused to a

fair trial which is waived in order to participate in a diversion programme. The accused furthermore has to admit responsibility for the offence before he or she may be admitted to a diversion programme. It is obvious that an accused may admit responsibility for an offence for the wrong reasons, ie. to stay out of the court process and get the case finalised³⁵. The admissibility of such an admission as evidence in a further trial should the case be referred back to court due to non-compliance, has, to the knowledge of the author, not been tested in a South African court. The chances are however good that such an admission of guilt will not be accepted. A further factor in the due process debate is the degree to which coercion or perceived coercion is exercised in getting the accused to take responsibility for the offence. If the options are spelt out as “*You can go to court and prove yourself there*” or “*Just say that you did it, attend the programme and the whole matter is over and done with*”; these are not really choices to be exercised.

The respondents were asked how they deal with there issues and the feed-back was varied; in some cases indicating a thorough understanding of the issues and interests at stake and in other instances a fairly roughshod treatment of the accused’s rights or complete negation of the potential problem. One response summarises to a great extent the complexity of the issue:

It is a problem because the state determines guilt without the court. If the accused comes to us beforehand and says what he did and if there is anything that we can do to help, it is different. The prosecutor also needs to find out for what the accused is admitting guilt; what was the extent of his involvement in the crime. The prosecutor has to ensure that the person is in fact guilty.

In some jurisdictions all children are appearing with legal representation provided by Legal Aid and this obviously limits the potential for compromising due process rights. It was however noted by a number of the respondents that counsel often encourages their clients to admit guilt or involvement in order to be eligible for

³⁵ For a more detailed description of the due process debate see Skelton A.: Diversion and due process in Muntingh L.M.: Perspectives on Diversion, NICRO research Series Nr 2, Cape Town, 1995.

diversion although the client's involvement in the offence is questionable. Overall there does not appear to be a uniform method of handling due process concerns and it is apparent that at least some prosecutors try to avoid problems as best they could but that these methods may in themselves create new issues. Two responses from prosecutors in the Western Cape is indicative of the different procedures followed in different jurisdictions:

1 We explain to him the possibility of diversion and then ask him how he is planning to plead. On the one hand it is true that you take a right away but on the other hand you help him. A decision is made based on the available information and you cannot criticise the prosecutor if he handles in good faith based on the information and still makes a mistake.

2 The child has to admit before the option of diversion is presented to him. Diversion also has a punitive component so it is not as if he walks away. He also gets the opportunity to state his case. The child also does not know what the recommendation of the probation officer is, so he cannot come in here with preconceived ideas.

The second response appear to be more balanced in terms of the rights of the accused and the interests of the prosecution. The second procedure outlined also limits the potential for coercion or undue pressure.

Some prosecutors were very brief in their explanations, such as the following:

I do not regard this (due process concerns) as problematic. If he denies involvement, he must go to trial, if he admits, he can be diverted.

The use of specific terminology also appear to be important, at least for some prosecutors, as indicated in the following response:

There will be no diversion if the child intends to plead not guilty. Whatever is said to the child happens behind closed doors at the social worker or at the prosecutor and that is privileged information. We ask the child about his "involvement" with the crime and the terms "guilty" or "innocent" are not used.

In contrast to the above description the following indicates a substantially different approach:

If he says that he is not guilty he must go to court. He has to sign an admission of guilt form before he can attend the programme. Although that will probably not hold in court

if the case goes back; we have not had to use it.

In general it appears that prosecutors comply with the broad requirement that the accused has to admit involvement in the crime or admit guilt or states that he is planning to plead guilty. The more problematic aspect is the timing of the presentation of diversion as an option and secondly the quantity and quality of information available to the accused (and his or her parents) when they have to make a decision regarding admission of involvement in the crime and indicating a willingness to participate in diversion. In view of this, the respondents were asked if they were of the opinion that the accused and his or her parents have the necessary information at hand to make a decision regarding the acceptance of diversion or not.

Eight of the 13 prosecutors who responded to this question indicated that not the accused or their parents do have sufficient information nor do they fully understand the criminal justice process in order to make a fully rational decision. Some respondents explained that they go to great lengths to explain the process to them and that other safe guards are built in or at least suggested such as legal representation. The following responses are indicative of this approach:

No they cannot (make a well informed decision). There are still people who do not understand the system even if you explain it to them in detail. The right to legal representation is explained to them by the police, probation officer, prosecutor and court and that should enable them to reach a better decision, if they take legal representation. Legal representation is a problem with street children - they often refuse it. The law should in fact prescribe that legal representation is compulsory if no guardian or parent can be found.

and

We try to explain to them as thoroughly as possible. One should also remember that diversion is (intended) for the not so serious offences and the potential damage in terms of compromising rights is thus less. Once they have admitted to the offence, we impress upon them and their parents that a crime has been committed and that the child must work to correct this.

Two prosecutors (from the W-Cape) explained that they make a point of assessing the state's case critically in order to ensure that children are not diverted if there is a possibility that they may be acquitted in court. One of these respondents went further to say that she explains the state's case to the parents and that they can

then make a decision based on that as well as additional information.

From the responses it is clear that there are at present too many uncertainties regarding the legal and constitutional requirements when diverting a case and that different prosecutors are reacting differently in order to limit potential due process risks, if they are indeed concerned about it.

(E) Guidelines for the diversion of criminal cases

In order to conclude the discussion on guidelines and criteria for diverting cases, a number of questions were asked of the respondents. They were asked:

- to formulate guidelines for diversion
- to assess a fictitious case presented to them
- on their position on diverting second time offenders, sexual offences and adult offenders.

These questions were asked specifically to see how the responses relate to previous responses in terms of consistency. From the responses the following guidelines emerged:

- The offence should not be too serious
- Repeat offenders should be handled with circumspection before being diverted
- The child should show relative stability such as staying at home and attending school
- The child must be able to benefit from a diversion programme
- The parents must be present at court and there must be clear indications of parental involvement in the upbringing of the child
- All children under the age of 16 years should be considered for diversion and those over the age of 16 should be properly assessed before being diverted
- The motivation for the offence should be clearly established
- Home circumstances should be properly assessed
- If diverted, a decision has to be made regarding the appropriate programme or combination of programmes
- The child has to admit to the charge.

There appear to be a fair degree of consistency compared with earlier responses, although it is apparent that the respondents did not have a clear set of guidelines at hand which they apply. Reference should be made

here to the guidelines laid down by the Western Cape Attorney General in a recent circular to all prosecutors. These guidelines relate primarily to certain offences excluded from diversion and these are: treason, murder and attempted murder, culpable homicide, rape and attempted rape, indecent assault, sodomy, kidnapping, assault, robbery, arson, possession of illegal firearms, drug dealing. Property offences involving a value of more than R 3000.00 are excluded as well as any crime against the person where there was serious bodily injury. Although these guidelines provide some direction, they by no means encourage prosecutors to individualise cases and approach them in a holistic manner. In the formulation of guidelines for diversion it is required that the interests of the justice system and the interests of child and youth care, are integrated. A number of respondents commented specifically on the role of the Attorney General in formulating guidelines and it was fairly mixed. Some were of the opinion that such guidelines make it too rigid and do not allow the accommodation of the specific needs of the individual accused nor the community. Other respondents were of the opinion that guidelines should be prescribed in legislation and discretion should be limited. It was also stressed that decision should be made in consultation with welfare services. At the time of the interviews guidelines have been provided by the Attorneys General of the Western Cape and Transvaal but not Venda. . The net result is that courts in the Northern Province was at that stage regulated by two Attorneys General, ie Venda and Transvaal.

In order to test the application of guidelines and criteria as formulated by the respondents, a fictitious case was put to them. The case was formulated in such a way to assess the role of age, background information, life style stability, race and the role value plays in determining case result. The respondents were then asked not to immediately make a decision on diversion or prosecution but rather to formulate questions that they would ask in order to come to a decision on the case. The case was described as follows:

A 17 year old is arrested for house breaking and theft. At the time of his arrest he had in his possession a portable CD player (value R450.00). His parent (mother) is present at court and confirmed that he is attending school although irregularly and that he is two years behind. As far as could be established this was his first offence. He is one of four children of whom the mother is the sole supporter. They stay in the local township where circumstances can at best be described as conducive to youth crime. He is the only accused in the case and was alone at the time of the offence. According to his statement he admitted to the offence and explained that he wanted to sell the CD player as his mother does have enough money to support them.

The items listed in Table 11 are formulated as questions or as issues that need to be followed up with the

child, mother, probation officer or investigating officer. The questions or issues are ranked based on the frequency they were noted by the respondents.

Table 11 Questions and issues formulated by prosecutor with regard to fictitious case

ISSUES OR QUESTIONS	FREQ.
School attendance: Why irregular? Why behind? Behaviour at school?	9
What are the home circumstances like? (Finances)	4
Will he commit another offence in order to survive? Is it acceptable to steal if you are hungry?	3
What his behaviour like at home?	3
What is his relationship like with his mother?	2
Does he show any remorse? Is he willing to cooperate?	2
Would he be able to attend a diversion programme? Can he be monitored where he stays?	2
What is the opinion of the victim?	2
Does he have a history of previous offences	2
Does he understand that he did wrong?	1
If he was not arrested, what are the chances that he would commit another offence?	1
What would he have told his mother about the extra money he sold the CD player?	1
Was he prepared to be arrested?	1
What would his reaction be if he was the victim?	1
Are there any other ways in which he can contribute to the household income?	1
What was his modus operandi when committing the crime?	1
Were there any people in the house when he went in?	1
What is his mother's attitude?	1
Was the CD player returned to the victim?	1
How many burglaries have there been in that area lately?	1
Was it a residential or commercial property that was burgled?	1
What is the area like he lives in?	1

The questions should be seen against the background that a fair amount of information was already given in

the case description. Nonetheless, it is interesting to note that issues around school attendance scored the highest frequency. It is assumed that school attendance is regarded by the respondents as a good indicator of life style stability, potential to change and willingness to improve. Very few of the questions centred around the crime itself and these related to the modus operandi followed, occupation of the premises, type of premises and burglary trends in the area. The other questions formulated can be broadly categorised around the following themes:

- home circumstances and behaviour at home, especially relationship with mother and mother's attitude
- moral issues around the offence such as remorse, stealing for survival, acceptance of responsibility
- the position and interests of the victim
- suitability and practicalities of a diversion programme.

The fact that such a wide variety of questions were formulated but not with the same frequency is indicative of the manner in which cases are assessed by prosecutors and how decisions are made. The range of questions and different frequencies also indicate the influence of the individual prosecutor on the assessment process. Based on this, it is concluded that greater standardisation to ensure consistency is required.

The respondents were subsequently asked whether they regard this case as a strong or weak candidate for diversion based on the available information. Of the group, 54% indicated that the case was a strong candidate for diversion, 23% that it was a possible candidate, and 23% that it was a weak candidate for diversion. All in all it appears that 77 % were inclined to divert the case.

In contrast to the fairly lenient approach to the above mentioned fictional case, the respondents regarded sexual offences in a serious light and all the respondents indicated that they would only under exceptional circumstances divert sexual offence cases, if at all. The exceptional circumstances that were referred to included the following:

- if the offender himself was a victim of a sex crime previously and is consequently exhibiting psychological problems
- if the victim and offender are acquainted or the families know each other
- the offender is exceptionally young and 12 years was more or less indicated as the cut-off age

- there was no or very limited violence involved in the crime.

It should be noted that sex crimes include a wide variety of offences such as indecent assault, statutory rape, rape and sodomy. The circumstances listed above should be seen against this background and will in all likelihood apply to the lesser sex offences such as indecent assault and definitely not rape. A number of respondents indicated clearly that if there were strong signs of violence used, that the offence was committed by a group and that the offender(s) was older than 16 years, the case would not be considered for diversion regardless of other factors.

With regard to diverting children who are repeat offenders, the respondents were divided in more or less three equal groups. The first two groups indicated either a categorical yes or no. Some of the respondents indicating that they would divert repeat offenders did however state that there is a need for a programme for repeat offenders. The third group explained that under certain conditions would they divert repeat offenders. Naturally the offence as well as other background information forms part of these conditions but the prominent condition that transpired was that the child should not previously have been on a diversion programme. This is at least an indication that the prosecutors have a degree of confidence in the therapeutic and educational value of the diversion programmes.

Although this research project is primarily about juvenile offenders, the respondents were asked on their view regarding the diversion of adults. The majority (75%) were not opposed to diverting adults in principle but made it clear that this would only happen under special circumstances. The assumption is that the accused is an adult and should therefore know the difference between right and wrong as well as the implications of an unlawful action. Some of the special conditions that were mentioned included the following:

- driving under the influence of alcohol and the blood alcohol level is marginally over the legal limit
- the accused is a student and a criminal record would have severe consequence in terms of future employment
- there are diagnosed psychological problems or instability
- it is a first, non-violent offence
- the value of the property is low
- the crime was committed in order to survive economically
- the crime was possession of a small quantity of narcotics such as one stop dagga.

From the above it is clear that the criteria applied to adults is substantially more stringent than for children

and this is understandable. Some respondents expressed their misgivings about their Attorney General's willingness to divert drunk driving cases as it undermines basic law enforcement, especially if the amount of public education that has been invested on this issue is taken into consideration.

(F) Limitations to diversion

Apart from the disadvantages to diversion listed above, respondents were asked to identify limitations. The aim was to focus more on policy issues and how prosecutors felt that diversion only provided a limited solution to certain problems.

A number of issues were raised and some of these related to practical matters such as limited human resources, especially relating to the number and availability of probation officers. The shortage of probation officers often led to lengthy delays in the finalisation of cases and some prosecutors noted that they often have to wait 4 - 6 weeks for a probation officer's report. Logically this undermines one of the key aims of diversion, namely to make swift decisions that have maximum impact and limit the exposure of the child to the criminal justice process.

Another practical problem that was raised which impacts on policy and procedure, is the inadequacy of the information systems used. When cases are not properly recorded or cannot be traced, there is a strong possibility that cases slip through the net and are not properly monitored. This also creates problems in terms of identifying recidivists as was noted earlier.

A number of the respondents indicated that they require more information and training on diversion in order to be better informed about different programmes as well as the effectiveness of these programmes. The need for a wider variety and more specialised programmes was also expressed. In overview it does not appear as if the respondents regarded diversion as structurally problematic or limited, but rather identified aspects that would facilitate or enhance the use of diversion in courts.

(G) Regulated and unregulated diversion

In the course of the interview numerous references were made to guidelines for diversion, either formulated by

prosecutors or by the Attorneys General. Consistency in decision-making has thus far proved to be problematic due to the wide discretionary powers of the prosecutors and the fairly individualised criteria that they apply when selecting and assessing case for diversion. In view of this the respondents were asked if it is necessary to regulate diversion through legislation.

Only two respondents indicated that regulation in any form would not have the desired result and forwarded different reasons for this. The first explained that it would complicate matters unnecessarily and the second explained that the prosecutor's discretionary powers are required to adjudicate on those cases that fall in the so-called grey area. Another two respondents explained that it would be better if such regulation is done, in more detail than currently, by the Attorney General. The remainder of the respondents indicated that regulation through legislation would be desirable as it would give specific details on what cases should be diverted under what circumstances. The following response is typical of this view:

Yes, I would like to know if I am doing the right thing and doing it in the right way. The law should say what can be done and what not. The law should also give clarity on liability in the case of injury or loss.

Legislating for diversion is obviously not as easy as it may sound. It is not only the interests of the child that should be served but also those of the justice system and the community. In addition, such legislation should not only lay down criteria on which cases are eligible for diversion but should also ensure that specific procedures are followed, and that systems and infra-structures are in place to allow for such procedures to be followed.

(H) Levels of diversion

It was explained to the respondents that at present most diversion takes place at prosecutorial level and whether they are of the opinion that this should continue or that one should work to expanding diversion to police station level or even street level.

More than 55% of the respondents were of the opinion that delegating the authority to divert to the police would not be appropriate. Different reasons were forwarded for this, such as the entire approach of the police, corruption in the police and ensuring consistency. The following responses describe these views:

No, not at police station level. There is a clear difference between the police and the prosecutors. The police are only interested in getting a prosecution whereas the prosecutor tries to look at the case more objectively.

I am a bit cautious about that. Docket preparation is an important component of in the criminal justice system and diversion at that level may open the door even further for corruption. We know from experience that there is a lot of corruption in the police, especially in the way in which dockets are prepared. In all honesty I would have to say that I am disappointed in the police.

The opposing view was that it is not essential that the court or the prosecutor decides on what cases are diverted. It was also admitted that some form of diversion is already taking place at police station level where the police may decide that a matter can be resolved at that level and it does not proceed to court. The possibility of diverting cases at police station level was attractive to some respondents as it would lessen their case loads. Another view was that diversion could be done at police station level but then it should not be the police on their own who makes the decision and that they should be assisted by a social worker or probation officer to ensure balance and accountability. One Northern Province respondent explained that the police is in contact with the community and if they receive the necessary training and apply certain guidelines, there is no reason why they cannot divert cases.

(I) Suitability of diversion programmes

The prosecutors were asked whether they are satisfied with the current diversion programmes and if these programmes suit their needs. It was really only the W-Cape prosecutors who could respond although some of the Mpumalanga prosecutors have had some experience of diversion programmes. In the Northern Province at Pietersburg the respondent explained that they were in the process of designing a programme.

In general there was a fair degree of satisfaction with the programmes currently in operation although a significant number of respondents indicated that they would like to see a wider variety of programmes available to the courts. Three respondents admitted that they in fact had very limited knowledge of the programmes in their jurisdiction and were thus not able to give any clear opinion on them.

It was clear from the interviews that the majority of the respondents, including the W-Cape, did not have an intimate knowledge of the various programmes that NICRO or other service providers offered. The expressed need for a wider variety programmes confirmed the suspicion that prosecutors are looking for offence specific programmes, for example a programme for shoplifters.

In terms of problems that were identified with regard to the programmes, the most important noted was feedback and information flow between the programme administrators (primarily NICRO) and the prosecutor's office. It should be stressed that this problem was identified in only three jurisdiction of which two were in Mpumalanga. Problems relating to information systems have been noted earlier in the report.

(J) Suggestions and proposals for change

Towards the end of the interview, the respondents were asked if they had suggestions or proposals for change that would enhance or facilitate the use of diversion. The majority of proposals or suggestions related to improving infrastructure and systems such as increased personnel, speeding up process, increased number of courts, improved information systems and improved support services. Other suggestions included putting legislation in place, providing training and capacity building and increasing availability of diversion programmes.

(K) NGO and Community Involvement

To date NICRO has been the primary provider of formal diversion programmes and in this context the question was put to respondents what they would like to see as the role of NGOs and CBOs in diversion. The responses are summarised in Table 13

Table 13 Role of NGOs and CBOs

DESCRIPTION	FREQ.
Provide follow-up services and monitor child	4
Involve community in caring for youth (preventative services)	4
Provide more diversion services	3

Assist state social workers in addressing problems	1
Address needs of children not suitable for diversion	1

7. Conclusions

By way of conclusion, each of the sections will be dealt with and general and/or significant point highlighted. Based on these recommendations will be made.

The first significant trend that emerges is expected in terms of the research design and respondents were selected specifically with this in mind. In general, the respondents from the W-Cape had a more comprehensive knowledge of diversion, both on a theoretical as well as a practical level. It was also the impression that W-Cape prosecutors were in certain regards more liberal in the application of diversion criteria than prosecutors from the other two provinces. Through NICRO's as well as the Attorney General's efforts in the W-Cape, diversion has become more established in the W-Cape, especially in the urban areas. Furthermore the establishment of assessment centres in the Cape metropole supported by staff from probation services as well as NGO involvement, facilitated the establishment of diversion in the regional juvenile justice system. In contrast to this, the Northern Province has to date not seen any formal diversion programmes nor has there been any significant training of justice administrators in diversion. It was only very recently that the Northern Province has employed a substantial number of probation officers to establish, amongst other services, an assessment procedure at local courts. The situation in Mpumalanga is similar and formal diversion services, on a small scale, are limited to the Nelspruit and Evander areas. Despite NICRO's presence in the area for more than two years, the number of diverted cases has remained low. System and procedure development as well as infra-structural short-comings appear to hamper the widespread establishment of assessment and diversion services.

The second general trend that emerges is that where assessment services, provided by probation officers or social workers, are readily available. The number of diversion cases increase

dramatically. In this regard it should be stated that in order to protect the interests of the juvenile and render the necessary protection as guaranteed in the Constitution, it is absolutely imperative that each and every child arrested, is assessed by a probation officer or social worker as soon as possible, ie. within 24 hours.

The third, and most important observation, is that the wide discretionary powers afforded to prosecutors are applied in the absence of proper policy based guidelines, resulting in the inconsistent diversion of cases. It is therefore concluded that the powers of the prosecutor are too wide and are in need of curtailment. Such curtailment should however be aimed at increasing the use of diversion and balancing the scales in terms of the presumption in favour of prosecution.

There at present limited, if any, possibility for the review of diversion cases. This leaves a serious gap in service rendering and one of the results is the differential experience children have of the criminal justice system. To leave the decision to divert or not to individual prosecutors (with or without guidelines) is regarded as not satisfactory if the aim is to render a balanced and just service to juvenile offenders. The discretionary powers of the prosecutor need to be limited in order to attain the best possible service in terms of equality and certainty. In this regard two options are possible. The first being codification which would essentially strip the prosecutor from all discretionary powers. The second, and more practical, is the establishment of a review mechanism before cases reach trial stage. Such a mechanism, in whatever form, needs to be multi-disciplinary in approach and specifically empowered to address juvenile justice and child care matters.

(A) Views on juvenile justice and juvenile offenders

Even on basic issues relating to the administration of juvenile justice there was not consensus amongst the respondents, and views ranging from treating arrested juveniles exactly the same as adults to treating all juveniles in a manner similar to current Children's Court inquiries, were recorded. The majority view was however that juveniles should be treated differently from adults, and that cognizance should be taken of their age, mental capacity and ability to make decisions.

As with regard to the regulation of juvenile justice administration, the views were more divergent. The fact that the administration of juvenile justice is currently regulated by several pieces of legislation was not identified as a specific problem although the view was expressed that streamlining of the system is required. A further significant need identified in terms of future legislation, related to sentencing and it was clear that current legislation does not provide sufficient guidance in this regard to the courts. The over-utilisation of postponed sentences were identified as a major frustration and future legislation should give much more guidance to courts in the sense that the law should provide a comprehensive “sentencing menu” to the courts.

More specifically related to diversion, the need for infra-structural resources was clearly identified as the accessibility of diversion is directly affected by the early assessment of the juvenile and the availability of programmes. To these respondents it was clear that it will be of little use if the law lays down certain standards but there is no system and resources available in order to comply with the law.

(B) Knowledge and understanding of diversion

There was a fair degree of consensus that diversion refers to “taking the case out of the system” and that this usually takes place at a pre-trial stage. This view supports the point made earlier of a presumption in favour of prosecution and that consideration for diversion is not something to which all cases are subjected. In terms of this construct then, the scales are tipped in favour of prosecution from the start and only then, and not for all cases, are the weights loaded to measure the chances of diversion. The overall impression is that diversion is something “special” and not procedure and to this extent diversion exists in most jurisdictions as a special component alongside the formal and conventional criminal justice system

Nonetheless, the majority of respondents viewed diversion as a realistic and workable option in the South African context. This is however not an unconditional view and numerous points were raised in this regard, ranging from legal requirements to infra-structural support and capacity expansion.

In general the prosecutors from the W-Cape had a deeper but not necessarily sufficient understanding of diversion, its aims and purposes. The approach remains, as expected, a strongly judicial one. The express individualisation of cases and a multi-disciplinary approach to cases still appear to be problematic concepts. The treatment of problematic cases, such as children with gang affiliations, present particular problems as

they are considered to fall outside of the framework to be considered for diversion but current sentencing options are hardly regarded as satisfactory.

(C) The suitability of diversion

As stated above, diversion remain to be a “special” option and based on responses it is clear that the offence plays the key role in this regard. It appears that if the charge falls outside the normal scope of diversion guidelines, formalised or un-formalised, there is little, if any, chance that the case will be diverted. Extra-judicial circumstances will then have to be indeed extraordinary before such a case will be considered. Factors that would count in favour of the child to be diverted related to his or her attitude and the attitude of the parents. Negative factors such as gang involvement, previous criminal record and violent behaviour, were identified. It was also significant that if the child was diverted in the past that would count against him or her and this is normally referred to as “moving up the ladder of possible sanctions”.

To generalise, diversion was viewed as suitable for first time (minor) property offenders who show remorse and are willing to cooperate and have the support of their parents.

(D) Diversion and due process

Most respondents were aware of the fact that diversion does present some due process problems but were on the other hand fairly glib about it. To date diversion programmes and their administrators have been fortunate in that no lawsuits have been instituted but this possibility should not be left out of sight. The general approach seem to be that because the child is benefiting from diversion, ie. there is no criminal conviction, it is in acceptable to bend the rules. More alarming is the lack of controls or cross checking mechanisms to prevent that a child is subjected to undue and invasive controls developed through the conditional withdrawal of criminal charges. It was also acknowledged by respondents that the decision to divert is often based on limited information, either on the side of prosecutor or on the side of the parents or guardians who have to give their consent. The role of defence counsel in encouraging clients to admit to offences in order to benefit from diversion should not be under-estimated.

(E) Guidelines for the diversion of criminal cases

The guidelines that were formulated by the respondents conformed strongly to those that were mentioned in relation to the suitability of diversion. When the topic was discussed in more detail by means of specific questions regarding particular offences and a fictitious case, the responses were varied and it was clear that there is wide range of perceptions and criteria in terms of the cases suitable for diversion. The questions formulated in response to the fictitious cases discussed, is a good example of this. The emphasis placed on school attendance and related matters is somewhat perplexing as poor school attendance can just as well be a symptom of something else.

The range of would-be questions as well as the number of questions receiving low frequencies showed that whilst broad guidelines may be in operation, it does not necessarily mean that they are sufficiently substantiated with detailed indicators on how such a variable may or may not affect the outcome of the case.

It appears then that based on whatever broad guidelines may exist that prosecutors formulate their own more detailed questions that would then in their opinion yield the information upon which they base their decisions.

(F) Limitations to diversion

Limitations to diversion identified related more to practical and infra-structural problems than to theoretical issues. Training, information and capacity building was also considered to be some of the major stumbling blocks preventing a wider use of diversion.

From the interviews it should however be deduced that the major limitation to diversion at the moment is the guidelines and criteria applied by prosecutors. These are fairly limiting in themselves and when combined with the inherent conservatism of the justice system, they indeed ensure that a limited number but very compliant children are in fact diverted. The prosecutors should however not take sole responsibility for this. The guidelines formulated by diversion programme administrators were fairly conservative from the outset and these have now become strongly associated with diversion in general. Diversion will only become more widely used if these guidelines are reworked with the aim to provide the benefit of the services to a wider group of clients or alternatively that sentencing for juveniles are regulated in such a way as to make the benefit of the diversion programmes more widely available to this group.

(G) Regulated and unregulated diversion

The majority of respondents indicated that some form of regulation is required. Whether this should be done through legislation or by the Attorney general remains a matter for debate. It was however clearly stated that any form of regulation should contain more detail. Even where guidelines are currently in place through the AG's office, the scope of discretionary powers still remain very wide which places prosecutors in a precarious position. Furthermore, the fact that there is no single coherent legislation that regulate juvenile justice complicates matters further in that prosecutors themselves are not always sure that they are "doing the right thing" as verbalised by one of the respondents.

(H) Levels of diversion

The majority of respondents were of the opinion that diversion at police station level would not be a workable option as it may create more problems than what it is attempting to solve. Corruption in the police and the approach of the police were cited as the primary reasons for this view. In contrast, a number of respondents explained that it is not essential that prosecutors make this decision and that the police or an NGO is capable of doing it, provided that there is an accountability mechanism built into the procedure.

(I) Suitability of diversion programmes

Most of the respondents who have had some or extended exposure to diversion programmes, especially in the W-Cape, had a surprisingly superficial knowledge of the programme content. Although they were satisfied with the programme results, it was clear that the diversion programme contents was something of which they had limited knowledge. The need for a wider variety of programmes was also expressed, especially relating to specific offences. In the view of the author, offence specific programmes are as a rule not a good point of departure as it firstly continues to label and stigmatise the child. Secondly, it assumes that the offence is the only symptom of the child's problematic behaviour. The offence may be a symptom of another problem which was preceded by a number of problematic but not necessarily illegal events.

(J) Suggestions and proposals for change

The suggestions and proposals for change made by the respondents related primarily to system development, capacity building and the provision of necessary infra-structure. In each of the jurisdictions where the research was conducted it was clear that there are unique requirements and each of these need to be assessed in order to develop a suitable model for that area. For example, the Tzaneen area is surrounded by numerous rural villages and it is often children from these villages that are arrested for shoplifting in the town central business district. In this environment the conventional NICRO YES programme (running over six weeks one afternoon per week) is not practical as transport and cost of transport immediately present a problem. In the rural environment other models of diversion need to be developed that are compatible with traditional structures. Some of the existing diversion programmes such as VOM and FGCs lean themselves more towards this environment.

(K) NGO and Community Involvement

The respondents were fairly vague on the envisaged role of NGOs and CBOs in diversion but were positive in terms of the contribution that these organisations can make. They saw follow-up service and monitoring of the child as the primary function for NGOs and CBOs as the children usually have to return to the (often crime conducive) communities from where they originate without any support or follow-up service.

There are at present limited inter-sectoral involvement in juvenile justice on ground level, except for a number of specific localities and situations. A more continuous and sustained involvement of government departments, NGOs and other structures of civil society are required in order to address broader issues concerning juvenile justice at local level. To a certain extent diversion is the end of a process and signals the moment when the child's behaviour became visible to law enforcement agencies. Juvenile crime prevention is however not only achieved through diversion and a more holistic and longitudinal approach is required that will ensure community and inter-sectoral involvement.

8. Recommendations

In view of the above, recommendations regarding the administration of juvenile justice and specifically diversion are made. These recommendations are made in line with the policy documents referred to in the Introduction advocate the institutionalisation of diversion in the South African criminal justice system. Some of these recommendations are obvious as they relate to problems that have been identified in the past by other researchers and role-players. Nonetheless, these are made again in order to provide further support for the development of a juvenile justice system in South Africa.

1. The administration of juveniles in the criminal justice system is currently regulated by a number of pieces of legislation such as the Criminal Procedure Act, Child Care Act and the Correctional Services Act. This naturally leads to confusion and in some cases leaves gaps in system. Apart from minor variations in legislation and some cosmetic changes that have been made, the majority of children are still essentially treated as adults in the criminal justice system, especially when their cases are referred to Regional Court. It is at this stage not regarded as sufficient that diversion exists as an option alongside the system. Diversion should be an integral part of the system and each and every case should be assessed accordingly. It is therefore recommended that one system be established through which all arrested children will pass and that the principles and safeguards in the administration of juvenile offenders, as stated in international as well as local instruments, be applied consistently and comprehensively. In essence there should be at least one point in the system through which all children must pass which is followed by very precise and subsequent steps.

2. Following from the above it is further recommended that the necessary infra-structure be put in place in order to comply with constitutional as well as policy guidelines and requirements. In order to achieve this, it is recommended that a policy of diversification and specialisation of personnel is adopted. The needs of children are special and thus requires appropriately trained personnel when dealing with them. From the point of arrest through to sentencing it is required that the people working with children and making decisions on their future need to be trained to do so in line with policy and legislative

requirements. Juvenile justice is a field of specialisation in law and practice and it would therefore be erroneous to assume that all officials in the system are capable of providing a service of the required quality. Especially in urban areas such diversification and specialisation can be achieved with minimal additional expenditure. In rural areas where the case load may not justify the full-time allocation of staff to juvenile cases, it is recommended that staff are trained to a standardised level of competency in dealing with juvenile cases.

3. The envisaged legislation should not only lay down the rules and regulations but should in itself be a resource to guide decision-makers. Sentencing of juveniles provides a good example of this problem. Current sentencing options are too wide and too open, resulting in the over-utilisation of postponed sentences. Sentencers need to be given guidance here in order to design an effective sentence that will suit the needs of the child, the community and the justice system. Similarly with diversion legislation should state clearly what the possibilities are and how these can be combined with one another.
4. Legislation should not only lay down rules, regulations and guidelines but should be formulated in such a way that it complies with policy objectives. For example, under Zimbabwean law every convicted offender eligible for a prison sentence of six months or less, have to be considered for a sentence of community service and if community service is not handed down, clear reasons have to be stated to justify the custodial sentence. Similarly, the law has to do more than provide sentencing or diversion options, it has to compel decision-makers to utilise policy-compliant options unless there are exceptional circumstances.
5. Decision-making in the administration of juvenile justice seem to be problematic for two reasons. Firstly, there is a presumption in favour of prosecution by prosecutors and secondly, that the offence (or charge) carries too much weight at the cost of other (extra-judicial) variables. These two problems arise from the fact that the entire future of a juvenile case hinges upon the discretion of the prosecutor to prosecute or not. The decision to prosecute or divert is just one of several options that will impact on the child's

life. Furthermore, there are not sufficient controls in place to assess this decision within the broader context of the child's life, which is what the decision-making process is actually about. It is thus concluded that the prosecutor in the current system is not ideally placed nor adequately trained to make this decision. It is therefore recommended that a new mechanism be established that will make a decision on not only prosecution or diversion but that will also be able to activate other services should such be required. This mechanism should be holistic in approach and multi-disciplinary in orientation. In this regard it is recommended that this mechanism should take on the form of a Juvenile Court Magistrate which is supported by an inter-sectoral committee.

6. Following from the above, it is recommended that local inter-sectoral juvenile justice committees be established with the following basic aims:
 - to monitor trends in juvenile crime and delinquency
 - to coordinate services
 - to ensure quality control in service delivery
 - to monitor the treatment of juvenile offenders
 - to initiate the development of appropriate services
 - to ensure the accountability and transparency of all decision-makers.
 - to identify and act on training and capacity building needs.

7. The success or failure of any system is largely dependent on information as decision-making is based on available information and the next step is dependent on prior decisions. In order to administer juvenile justice in accordance with legislative and policy requirements, it is necessary to have accurate and accessible information on every case. In the current system children often "get lost" or slip through because information is either inaccurate or not accessible. In order to provide the correct services and make the best decision, it is vital that the necessary information is available. This is especially the case with diversion where no formal records are kept, save for a register usually kept by the Senior or Control Prosecutor. In terms of providing a comprehensive service, it is vital that recidivists are identified, especially if they were diverted in the past. The

establishment of a proper multi-agency information system is therefore identified as a key priority.

8. In order to protect due process rights it is recommended that every child arrested should at least have access to legal representation if requested. Should the case proceed to trial, representation should be mandatory. Furthermore, those officials making recommendations regarding juvenile cases should be adequately trained and possess a thorough knowledge of juvenile justice and related child care matters.

9. Most diversion programmes are developed by NGOs (often with huge costs) for the benefit of the community with no guarantees that these programmes will be utilised. Similarly, the justice and welfare services have no guarantee on the quality of these programmes. It is therefore recommended that legal status be afforded to these diversion programmes and their developers as well as the providers thereof. This will protect both parties in terms of ensuring quality as well as the effective utilisation of the programmes. On local level this process can be taken further in terms of formalising working agreements and stipulating contractual agreements.

10. Services to diverted juvenile offenders does however not end with the formal diversion programme. The need for follow-up services was clearly identified in the research and it is therefore recommended that the development of such services are identified as a priority by the local inter-sectoral committees.

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