

ARTICLE 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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Article 44

A variety of dispositions ... and other alternatives to institutional care shall be available ...

Structural interdicts and child justice – a big-stick approach...

Prof Julia Sloth-Nielsen

The recent case of *S v Zuba and 23 similar cases* (cases no CA40/2003 and 207/2003, Eastern Cape Division, judgment handed down on 2/10/2003) holds considerable promise for the development of child justice. With the Parliamentary process to finalise the Child Justice Bill almost concluded, implementation will be at the forefront of advocacy and lobbying efforts for the foreseeable future. The

possibility of litigation aimed at securing structural interdicts, as described in this article, seems to offer a novel mechanism to ensure enforcement of the Bill's provisions should provinces or national government fail to put measures in place to give effect to the various aspects of the legislation which have been designed to protect children in conflict with the law.

The *Zuba* cases arose because of the absence of a reform school in

the Eastern Cape Province. The children in respect of whom an application for review of sentence was launched had all been sentenced to placement in a reform school, but had instead been committed to prisons and police cells. They had spent inordinately long periods of time waiting to commence serving the actual sentence imposed. The reform schools in the Western Cape had refused access to children from outside the province owing to the

absence of an agreement on inter-provincial billing, and the only other reform school available was in Mpumalanga. Previously, in *S v Z en vier ander sake* (discussed in vol 2: 1999 of *Article 40*), strong views had been expressed by the bench about the fact that numerous children in the Eastern Cape had been held in prisons for lengthy periods awaiting transfer to a reform school. Since then, nothing had evidently changed.

The court in *Zuba* accepted that the procedure to be followed once a reform school sentence had been imposed was for the probation officer to forward the application for a designation to the Provincial Education Department, which, in turn, could request a place at the Mpumalanga facility. The decision would then be taken by the Mpumalanga Department of Education in conjunction with the facility itself. The Eastern Cape Department of Social Development would bear responsibility for making any transport arrangements. When the matter was first placed before the Eastern Cape High Court in June 2003, orders were issued releasing 25 juveniles from custody, on the basis that their sentences had lapsed or were about to lapse (an order made under section 291(1) of the Criminal Procedure Act lapses after the expiry of two years). The heads of the Eastern Cape Provincial Departments of Education and Social Development were also ordered to compile a report within one month detailing –

- the total numbers of children awaiting transfer to a reform school in the province;

- whether a designation had been made and, if not, why not;
- the total numbers of juveniles sentenced to reform school annually in the province, based on the last five years' statistics;
- what steps the Department of Education was taking to secure placement options for sentenced juveniles in the province; and
- when the Department of Education envisaged establishing a reform school in the province, and the timetable for this.

The Department of Education filed two reports following the initial order. The Department said it lacked the required statistics, and

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that it planned to begin establishing a reform school during 2004. The court in *Zuba* was of the opinion that the reports did not comply sufficiently with the requirements of the original order.

The Department of Social Development failed to respond to the first order altogether. This, the court subsequently hearing the case said, was completely unacceptable.

Both the lack of details in the Department of Education's answer and the complete failure of the Department of Social Development to respond, led counsel in *Zuba* to request the court to structure a 'more detailed and focused order in respect of the state of juvenile justice in the province and how the

authorities plan to improve it' [par 19 of the judgment]. In particular, it was suggested that the short-, medium- and long-term plans for reform schools in the province; the identity of the task team working on the plans; and the anticipated implementation dates, should be the subject matter of regular reports to the Judge President or the Inspecting Judge of Prisons until the reform school was actually established. A postponement of the case was also requested, so that the matter would continue to serve before the Court until satisfactory completion of a reform school.

The two questions the *Zuba* court had to address were first, whether the court had the jurisdiction to

review sentences that were competently imposed but could not be carried out owing to administrative difficulties, and second, whether it had the jurisdiction to make the orders related to reporting that

counsel had requested.

With respect to the first issue, it was argued by the Director of Public Prosecutions that sentences which, on the face of it, are regular and competently imposed, may not be overturned on review. A civil action would be more appropriate, it was contended. In response, the court held that the review procedure is aimed at seeking justice, and that courts now have the express constitutional mandate to remedy constitutional infringements with appropriate remedies that are just and equitable (see section 172(1)(b) of the Constitution). The focus of the courts, it was held, should not be on technicalities, but on remedying injustices and miscarriages of justice. Justice is not served when

EDITORIAL

This edition contains a wide range of topics pertaining to child justice and this is indicative of the ongoing activity in this field.

We highlight the *Zuba* judgment that was handed down in the Eastern Cape and note that it contains interesting developments that could affect State delivery in the future.

The issue of young sex offenders is the theme for two articles contained in this edition. Anneke Meerkotter discusses section 9 of the draft Sexual Offences Bill dealing with consensual sexual acts with children. Of particular concern is how to manage consensual sexual acts between children

below a particular age. Then we give an overview of a very interesting workshop convened by the Open Society Foundation dealing with the management of young sex offenders, as well as the content of programmes for this particular category of children in conflict with the law. A part of this workshop was a presentation given by Ann Skelton on developments in the Child Justice Bill that directly affect young sex offenders, and she provided a good indication of what awaits service providers in this field.

Latest statistics are provided by Lukas Muntingh, as it is always useful to see what is

actually happening on the ground in relation to children coming into contact with the criminal justice system. This provides a means of measuring how children are managed within the present system and where improvements need to be effected.

Finally, international developments are examined in an article on juvenile justice indicators that were developed at a recent conference hosted by UNICEF in New York.

We wish all our readers a happy and safe holiday season and hope that 2004 sees the enactment of the long-awaited child justice legislation.

offenders wait for unreasonably long periods for their reform school sentences to be put into effect.

With regard to the second question to be determined, the court reviewed the nature and purpose of the structural interdict requested by counsel, defining it as 'a remedy that orders an organ of state to perform its constitutional obligations and report on progress in doing so from time to time' [par 38]. The remedy has been accepted as legitimate in a number of cases, most notably in the Constitutional Court in the Treatment Action Campaign¹ case. The court in *Zuba* expressed the view that this remedy was particularly suited to a country committed, as ours is, to the values of accountability, responsiveness and openness in a system of

democratic governance [par 39].

'In this case it would be appropriate because the subject matter of this litigation is the "core business" of the courts, the effective implementation of the sentences imposed on juvenile offenders. In addition, the superior courts are the upper guardians of minors. That too would serve as a strong justification for the assumption of a supervisory jurisdiction in a case such as this.' [par 39]

In the event, the structural interdict was not imposed, because the relevant departments (Education and Social Development) consented to file the required reports – the big-stick approach was ultimately not required. The *Zuba* case was nevertheless postponed and remains on the court roll. The departments mentioned above will have to reappear on the return date

for the court to consider their plans, and the possibility remains that the court will continue to monitor progress until a reform school is indeed established in that province.

The scope and potential of the structural interdict remedy in achieving gains for child justice implementation should be apparent from the above case. From delivery of probation and assessment services to sufficient provision for secure care, from ensuring timeous preparation of pre-sentence reports to adequate access to legal representation, not forgetting guarantees of an equitable spread of diversion and sentencing options, it must be concluded that failure on the part of government to implement these aspects of the child justice system properly could, in future, be enforced through litigation.

¹ 2002 (5) SA 721 (CC).

Managing and treating young sex offenders: What action for government and civil society?

This workshop, held on 17 and 18 November 2003, was hosted by the Open Society Foundation and had two purposes: the first was to examine the content of programmes for young sex offenders and the second was to look at the management of these young offenders. It was intended to be a follow-up to the workshop hosted by the UNDP Child Justice Project in 2002 on young sex offenders that identified this particular group of young children in conflict with the law as being in need of special attention. Various presentations were made, some of which are highlighted here.

Dr Uli Meys spoke on intervening with and managing young sex offenders based on an international literature review. He noted that, internationally, young sex offender work began in the 1980s, when it was discovered that 20% to 30% of sexually abusive behaviour was committed by persons under 18 years and that over 50% of (incarcerated) adult offenders had offended before the age of 18 years. However, despite the introduction of intervention programmes internationally (over 300 in the USA), the assessment of success has been lacking. Establishing the success of these interventions is made difficult by the lack of control groups. However, some studies of

established programmes over five-year periods show that recidivism rates are between 5% and 14%.

Young sex offenders differ from adult sex offenders. They appear to respond to cognitive behaviour and relapse prevention interventions. Intervention should begin with an assessment of the child, specifically to determine children at high risk and the needs of the particular child. Then certain themes that are necessary for intervention programmes for young sex offenders can be identified. The ideal programme would incorporate all of these factors and some of these include the following:

- Accountability and accepting responsibility for behaviour;
- identification of patterns or cycles of offence behaviour;
- ability to interrupt cycle;
- victimisation in the history of the offender;
- understanding the consequences of offending behaviour;
- reduction of deviant sexual arousal;
- sexual education;
- identification and expression of feelings;
- appropriate level of trust in relating to adults;

- role of substance abuse in functioning;
- need for relapse prevention; and
- stress management, impulse control and risk-taking behaviour.

It was noted that reassessment following intervention is important, irrespective of the length of the intervention programme – whether it is a 20-week programme or five-year programme.

Reassessment must examine whether the child can be discharged from the programme, whether follow-up is necessary and whether the child needs more intensive treatment. The follow-up should be court mandated and deal with monitoring and therapeutic issues.

Prof Andy Dawes then discussed adolescent sexuality and appropriate development. He noted that adolescent sexuality is not very well explored in the South African context. However, it has been shown that it is common in the US and UK for early adolescents to engage in sexual play and mutual arousal. He informed the participants that the Child, Youth and Family Development division at HSRC has a number of projects aimed at issues relating to young sex offenders. One of these looks at the scale of the problem of child sexual

abuse and identifies some of its causes. These include adolescent sexuality and abuse in the sociocultural context, as well as interpersonal and interfamilial factors.

Prof Dawes then looked at preventing child abuse by adolescents and identified some key steps that should be investigated and implemented:

- Introduce school programmes to educate youth towards more gender-sensitive attitudes;
- improve neighbourhood monitoring and support for children;
- reduce the proportion of marginalised male youth with time on their hands; and
- examine tertiary prevention – assess offenders carefully and concentrate on those who are likely to be high-risk children.

The next session was dedicated to an overview of the programmes offered in South Africa at present, namely Childline KZN, SAYStOP and the SPARC programme offered by the Teddy Bear Clinic.

Childline KZN offers programmes aimed at young sex offenders to interrupt the development of sexually aberrant behaviour and develop life skills. Childline mainly uses a cognitive behaviour approach in its interventions. The interventions run for approximately two years and sessions are held either on a weekly basis or every two weeks, depending on the age grouping. While these sessions are usually held as group sessions, individual sessions are also conducted at least once, or more if the need arises. Some of the themes covered in the intervention are defining sexual offences, self-awareness and self-esteem, taking responsibility for actions, relapse prevention and cognitive restructuring.

Childline's assessment procedure alone usually takes between six

and 12 weeks. It involves obtaining information from various sources with the permission of the child, and the assessment process is usually team-based.

Childline undertook some empirical research into the life experiences of child sex offenders in order to help plan for treatment and develop more effective management strategies. The research involved 25 adolescent offenders and 54 victims, and showed the following results:

- The most vulnerable victim age group is eight years and younger;
- 40 victims were female;
- 31 victims were exposed to penetrative sexual acts;
- the adolescent offenders knew 92% of the victims;
- 12 offenders committed offences at the age of 13 years and younger; and
- all adolescents were abused and tried to cope inappropriately with their distress.

The Teddy Bear Clinic started as a medico/legal clinic in 1986. From 2000 it extended its services to offer therapeutic interventions, child witness court preparation programmes, forensic assessments and juvenile offender programmes in 2001.

The Support Programme for Abuse Reactive Children (SPARC) originally consisted of a ten-week course, with sessions run for one and a half hours at a time. The programme has now been extended to 12 weeks. The programme caters for children between the ages of six and 18 years, and the content is then modified according to age. The sessions are flexible and the programme's duration might extend to 12 weeks if necessary. In addition, if during the course of the programme a child who is at particular risk is identi-

fied, then he or she receives individual interventions. The content of the programme focuses on psychotherapy and cognitive behaviour modification. Some of the themes covered include sex education, cognitive restructuring and empathy training. All the children that pass through the programme are followed up on after three months and then again after six months.

The SAYStOP presentation looked at the fact that the organisation, formed in 1997, partners with the State in so far as the service providers (ie facilitators of the programme) are probation officers in the employ of the Provincial Department of Social Services. These probation officers are then trained by the SAYStOP project and after the training they continue to receive mentoring services and follow-up site visits to assist them in their facilitation.

The diversion programme consists of ten sessions, usually held once a week for two hours at a time. These include sessions such as victim empathy, crime awareness and relapse prevention.

At the end of the content session, two small group discussions took place – the first on the development of minimum standards for young sex offenders and the second on the development of assessment strategies that allow for placement in appropriate programmes.

The minimum standards group looked at desirable standards for programme content and identified core generic themes of any diversion programme, which include the following:

- Good assessment;
- insight into wrongdoing and consequences of the act;
- acceptance of wrongdoing and taking responsibility;

Managing and treating young sex offenders: What action for government and civil society?

- understanding reasons for referral;
- restorative component;
- future plans for relapse prevention;
- sexual education;
- social skills;
- family/caregiver involvement;
- outcome assessed at end of programme;
- follow-up time periods to be determined and outcomes assessed here as well;
- follow-up component to be court mandated; and
- standardised reporting protocol for monitoring child's progress.

The assessment group first looked at a definition of assessment and came up with the following: 'A child- and family-centred rational process that is user- and child-friendly, during which information is gathered that forms a holistic evaluation of child, family and context (including the context of the crime and impact on the victim), that highlights challenges and strengths and provides a plan/framework for intervention.'

The group identified certain questions that need to be asked in developing an assessment, namely:

- What information is needed?
- Who or what is the source of this information?
- How is the information obtained?
- When should the information gathering occur during the assessment process?
- Where does the assessment take place?

- Why is there a need for the assessment of this child?

Both groups stressed that these discussions were aimed at a high level of achievement and termed their requirements as being the 'Rolls Royce' model. They acknowledged that the results of their discussions may not be practical at the moment in the South African context.

The second session of the workshop focused on management issues relating to young sex offenders. A very informative presentation was delivered by Ninnette Eliasov, who, having done a literature review, focused on examples of management systems and provided potential systems for South Africa – despite being based on American models. The literature review revealed two factors that work in managing young sex offenders:

- Interagency co-operation; and
- a range of psychological and cognitive behavioural interventions supported by policies targeting the culture of violence.

She stated that what South Africa should strive for is a conceptual framework around best practices. There are two possible models, the first seeing child sexual abuse as a community health problem (the public health model) and the second being based on an ecological approach, namely health promotion and social capital – neighbourhood cohesion in the area where the child lives. In addition there is the need for an operational system – national co-ordination and interagency co-operation, for example through NGOs, CBOs, parents, residents,

schools and youth clubs.

The workshop finished with two small group discussions on the development of appropriate organisational systems and developing minimum standards for training and ongoing therapist support.

Suggestions were that therapists should be professionals accountable to structures like their organisations and certified boards. Training topics should look at themes such as assessment, sexuality, gender bias, legal issues and children's sexual development. Support for therapists and programme facilitators should include regular debriefings and signs of fatigue should be given attention to and addressed.

As far as organisational systems are concerned, the group identified the appropriate role-players, including the criminal justice system, therapeutic service organisations, the various Departments of Social Services, probation officers and research centres. There should be an external co-ordinating body that meets regularly, paying particular attention to a proper audit of services. In addition, it was stressed that there needs to be the promotion of intersectoral accountability across government and civil society organisations.

The workshop provided a balanced forum where information was shared with participants and issues were discussed among them. The depth of engagement was of a high level and many issues and questions were raised that increased insight and directed a strategic approach to this specific area of child justice.

DEVELOPING MINIMUM STANDARDS FOR DIVERSION

Introduction and background

Formal diversion programmes were started by NICRO in 1993 and since then there has been a rapid expansion of such programmes within NICRO, as well as programmes provided by other organisations, including government. While this is regarded as an extremely positive development on the one hand, it should also be acknowledged that in such an unregulated environment there are real risks, especially to the children being served by these programmes. The risks broadly relate to the following:

- Infringing upon the rights of children as stipulated in the Constitution and the UN-CRC, African Charter on Children's Rights and other relevant international instruments.
- Maladministration and mismanagement of resources.
- Inappropriate programme content.
- Poor monitoring and evaluation.
- Inappropriate matching of children to programmes.
- Poor programme content.
- Lack of capacity within service provision agencies.
- Lack of skill in service providers.

In light of the above, the National Department of Social Development has commissioned the NICRO National Office to implement a consultation and research project with a view to developing minimum standards for diversion pro-

grammes suitable to the South African context. That means that standards must be attainable, developmental and empowering, while simultaneously not compromising the rights of children and the quality of services rendered to children.

Objectives of the project

- I. To develop standards to regulate the infrastructural, administrative and managerial requirements of diversion programmes.
- II. To develop standards to regulate the knowledge and skills requirements for programme operators and facilitators in terms of the levels of diversion programmes as set out in the Child Justice Bill.
- III. To develop standards to regulate the operational management of diversion programmes.
- IV. To develop standards to regulate the monitoring and evaluation of diversion programmes.
- V. To develop standards that regulate the minimum requirements for diversion programme service providers.
- VI. To develop standards that regulate diversion programme outcomes primarily relating, but not limited, to the following:
 - A. Life skills programmes testing
 - B. Pre-trial community service
 - C. Victim offender mediation
 - D. Family group conferencing
 - E. Adventure-based education and eco-therapy programmes

- F. Programmes for young sex offenders
- G. Programmes focusing on drug offences
- H. Various court-mandated good behaviour orders.

Current status of the project

NICRO, together with UMAC and the Open Society Foundation, is managing the project and, after some initial delays, it is now back on track. The first phase of the project commenced in March 2003, with a focus group discussion between a panel of youth justice experts to interrogate the assumptions around the development of diversion in South Africa and the risks related to the non-regulation of this sector.

The project is currently in its second phase and NICRO is in the process of contracting researchers to undertake focused research around best practice (both nationally and internationally) in diversion and youth services, as well as standards development and setting.

Once the data from the above research has been analysed, the findings will be used to form the basis of a broader consultation process with stakeholders in the youth justice sector, as well as the testing of the resulting recommendations at a number of pilot sites.

The project will culminate in the production of a draft manual or guidelines for the implementation of minimum standards for diversion services in South Africa.

Where should we go with age of consent legislation in South Africa?

Anneke Meerkotter



In September 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings to elicit views on the Criminal Law (Sexual Offences) Amendment Bill. The South African Young Sex Offenders Programme (SAYStOP) made a supplementary submission on the Bill to illustrate the way the issue of consensual sexual acts with children under the age of consent has been dealt with in other jurisdictions.

Introduction

'Age of consent' provisions essentially criminalise **consensual** sexual acts with a child below a set age. The purpose of such provisions is to protect children from sexual abuse and exploitation by adults. At the same time, such provisions try to determine the age at which children should ideally start engaging in sexual behaviour. For the majority of countries, the age of consent is 16 years of age. Where the age of consent is not 16, more countries have 14 or 15 as the appropriate age than those that have 17 or 18 years of age. Since consensual acts are criminalised, certain age of consent provisions have included defences or limitations to address situations where the provisions might unfairly criminalise someone.

In terms of section 9(1) of the Sexual Offences Bill, the commission by any person of any consensual act of penetration with a child between the age of 12 and 16 years is an offence, with the only defence being that such child had been deceptive about his or her age in terms of section 9(2). Under the Sexual Offences Act, consensual intercourse with a minor under the age of consent is currently prohibited in terms of

SECTION 9 OF THE CRIMINAL LAW (SEXUAL OFFENCES) AMENDMENT BILL

- (1) Any person who commits an act which causes penetration with a child who is older than 12 years of age, but below the age of 16 years is, despite the consent of that child to the commission of such an act, guilty of the offence of having committed such an act with a child and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.
- (2) It is a defence to a charge under subsection (1) if:
 - (a) it is proved on a balance of probabilities that such child or the person in whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of 16 years.
- (3) The provisions of subsection (2) do not apply if:
 - (a) the accused is related to such child within the prohibited incest degrees of blood or affinity; or
 - (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.
- (4) Any person who commits an indecent act with a child below the age of 16 years is, despite the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a child and is liable, upon conviction, to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment.
- (5) It is a defence to a charge under subsection (4) if:
 - (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence; and
 - (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
 - (c) it is proved on a balance of probabilities that such child or the person in whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence, and the accused reasonably believed that the child was over the age of 16 years.
- (6) The provisions of subsection (5) do not apply if:
 - (a) the accused is related to such child within the prohibited incest degrees of blood or affinity;
 - (b) such child lacked the intellectual development to appreciate the nature of an indecent act; or
 - (c) such child was below the age of 12 years at the time of the alleged commission of the offence.
- (7) A person may not be charged under this section if a marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

section 14(1) of the Act. Section 9(1) of the Bill extends this prohibition to any act of penetration and is gender neutral.

One defence relates to the situation where the sexual act was in fact not one where a child was exploited by an adult. This defence could be available to an accused of the

same age or maturity as the 'victim'. The Bill limits this defence that the offender is under 16 years of age in terms of section 9(5) to an accused who committed a consensual indecent act with a child under 16 years of age in terms of section 9(4), provided that the age of such accused did not exceed that of the child by more

than three years. This defence was originally also available in the Sexual Offences Bill to an accused who committed an act of penetration, but it was removed from later versions of the Bill. If the rationale for providing a defence to an accused under 16 years of age is to avoid criminalisation of non-coercive teenage experimentation,

is there any reason for excluding such defence from section 9(2)? The key issue is that of consent. Magistrates, prosecutors and social workers decide to what extent the defence is an excuse for sexually aggressive behaviour or a valid defence that avoids criminalising harmless sex-play.

The issue around age of consent legislation and the extent to which a defence should be provided for a child accused has been approached in various ways by different countries:

Comparative provisions

The Australian Capital Territory in Australia, in section 92E of the Crimes Act of 1900, criminalises sexual intercourse with a young person under 16 years of age and provides a defence **if consent was present**, the child was over ten years of age and the accused was not more than two years older than the accused. This defence applies to sexual intercourse and indecent acts, while section 92P limits the extent of the defence by defining those situations where consent would not be deemed to be present. This would, for instance, be where the consent is caused by the infliction of violence or threat thereof on the person or a third person; by the threat to publicly humiliate or disgrace the person; by the effect of intoxicating liquor, drugs or medication; by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given. The Act specifically provides that the absence of resistance to the sexual act should not be equated with consent to such act.

Issue of consent

The South African Sexual Offences Bill does not go to the extent of defining consent for the purpose of section 9. For a defence to be available to a child accused, it is submitted that there should be a clear indication that actual consent was in fact present.

The exact age difference between the accused and the victim that should be present for a defence to apply, differs slightly between various jurisdictions. In addition to limiting the age difference between the two parties, some jurisdictions have also added other conditions before the defence would be available, for example that the accused must not have been in a position of authority over the victim, for example where he/she was the babysitter.

In terms of the Tasmanian (Australia) Criminal Code Act of 1925, the age of consent is 17 years, and in cases where a person had sexual intercourse with someone under the age of 17, consent could only be a defence if the person was 15 years or older and the accused was not more than five years older or the person was 12 years or older and the accused was not more than three years older.

Section 321 of the Western Australian Criminal Code provides for sexual offences against a child who is 13, 14 or 15 years of age. Section 321 was inserted in the Code in 1992 and amended in 2002. In terms of this section it is an offence to sexually penetrate a child, to incite or encourage a child to engage in sexual behaviour, to indecently deal with a child, to encourage or incite a child to perform an indecent act, or to indecently record (tape) a child. The section, however, provides for a lesser sentence in cases

where the offender is under the age of 18 years and the child is not under the care, supervision or authority of the offender. It is further a defence that the accused believed on reasonable grounds that the child was over 16 years of age and the accused was not more than three years older than the child. A proviso attaches to this defence, namely that the child may not have been under the care, supervision or authority of the accused person.

Age of consent

The Canadian Criminal Code (RS 1985, c.C-46) provides for similar exceptions to that of section 9 relating to teenage experimentation. In terms of section 150.1(1), consent is not a defence where the complainant is under 14 years of age with regard to a charge of sexual interference (s 151), invitation to sexual touching (s 152), or sexual assault (s 271). Where a victim is 12 or 13 years of age, it can however be a defence that the complainant consented, if the accused is 12, 13, 14 or 15 years of age, is less than two years older than the complainant and is not in a position of trust or authority towards the complainant. The Criminal Code specifically excludes the prosecution of youth who are 12 or 13 years of age for acts of sexual interference, invitation to sexual touching or indecent acts, unless such youth was in a position of authority over the victim.

Section 6 of the Finnish Penal Code (Chapter 20), follows a different approach to the issue of age by referring more directly to the issue of teenage experimentation. The section provides that there would not be an offence of sexual abuse where the children are of similar age and mental maturity.



The Finnish Penal Code acknowledges that the difference in mental maturity would also play a role in determining whether there was a vast age difference between the accused and the victim. The Swedish Penal Code specifically limits prosecution in cases where there is little difference in age and development between the offender and the child, to those circumstances where prosecution is in the public interest.

In terms of the Russian Criminal Code, criminal capacity is set at 14 years of age and a child under 14 years cannot be held criminally liable, while a child between the ages of 14 and 16 years has limited criminal capacity. Section 134 of the Criminal Code limits prosecution for sex with a child under 16 years of age, to those perpetrators who are 18 years of age or older.

While setting the age of consent at, for instance, 16 years of age, some countries have acknowledged that children who are older than 16 years of age might need protection as well, despite having consented to sexual intercourse.

The New South Wales's Crimes Amendment (Sexual Offences) Act, No 9 of 2003, seeks to

amend the Crimes Act of 1900. Under the Crimes Act, the age of consent is 16 years. The amendment introduces specific provisions relating to sexual intercourse with a child between ten and 16 years (section 66C) and sexual intercourse with a child between 16 and 18 who is under special care (section 73). Section 73 has struck a balance with regard to the issue of keeping the age of consent at 16 or raising it to 18. While keeping the age of consent at 16, section 72 makes specific provision for those instances where a person has sexual intercourse with a child between 16 and 17 years and between 17 and 18 years of age who is under his or her special care.

To make provision for cases of sexual acts with a child of or over 16 years of age, the Western Australian Criminal Code provides specifically for such cases where the accused was a person in authority, in terms of section 322. A consensual sexual act with a child over the age of consent (16) is therefore legal, provided that there is no relationship of authority over the child.

The Icelandic Penal Code makes it an offence for someone to abuse

another's dependence on him or her to attain sexual intercourse. The Code imposes a harsher sentence where the dependent person is under the age of 18 years.

The age of consent in Norway is 16 years, but their Penal Code provides additional protection to youth between the ages of 16 and 18 years of age where the accused is in a position of authority over that child.

Practical considerations

The United Kingdom has started to deal with more practical considerations around the prosecution of consensual sexual offences. The United Kingdom's Sexual Offences Bill is currently before the House of Lords and defines consent and outlines certain presumptions about the absence of consent. In one NGO submission to the House of Lords it was suggested that, where it is clear that a child under 16 did consent to the sexual act, the Director of Public Prosecutions' consent be attained before prosecution of the case, or alternatively, that separate offences be created for those cases where there has been factual but not legal consent. At the very least, it is argued, actual consent should be a heavily mitigating factor for the defendant convicted of these crimes. These debates came to the fore with regard to whether youth who have sexual relations with one another should be prosecuted, especially where this forms part of teenage experimentation. Since the main aim of the legislation is to protect children from adult behaviour, they submit that a rebuttable presumption could be created that a person under 13 years of age who has sexual relations with a person more than five years older, has not consented.

UNICEF convenes a meeting to develop juvenile justice indicators

by Ann Skelton

In order to improve the availability of data on children's rights within juvenile justice systems, UNICEF convened a meeting of experts to identify a set of global indicators for juvenile justice. The meeting was held in New York from 11-13 November 2003, and Ann Skelton of the UN Child Justice Project was present. She reports back on the meeting:

UNICEF's work on the issue of juvenile justice focuses on reducing the use of deprivation of liberty, through the promotion of diversion systems, restorative justice and other alternatives. UNICEF assists countries to incorporate international standards into national legislation, and to monitor outcomes for children. The indicators that were the subject of the deliberations at the New York meeting are meant to support monitoring of State parties' adherence to the relevant provisions of the CRC, and other international juvenile justice standards, namely the United Nations Guidelines for the Prevention of Juvenile Delinquency [Riyadh Guidelines], United Nations Standard Minimum Rules for the

Administration of Juvenile Justice [Beijing Rules], and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The meeting began with a comprehensive list of 60 indicators, measuring issues such as the availability of prevention programmes, dependence on deprivation of liberty, treatment in detention, and reintegration.

The indicators included two types, namely:

- children's status indicators, which quantify the levels of child rights violations or violations of international standards for juvenile justice; and
- protective environment indicators, which reveal the structures in place, and gaps in the pro-

tection environment for children.

The meeting decided early on that its task should centre on reducing the number of indicators from 60 to less than ten. This decision was based on the idea that if countries find the information required too daunting, they are less likely to provide the data when asked for it. It is also important to remember that juvenile justice is just one area of the State parties' obligations under the CRC, and so more than ten indicators per area would be too much for States to cope with.

It was also necessary to be strict about which indicators could be considered 'key' indicators. The data gathered by the indicator should give certain clues about the situation surrounding the information. An example used at the meeting was that in the health sector, the number of women accessing antenatal services is used as a proxy indicator as to how accessible the entire public health system is – it doesn't actually give all the information that you want, but it gives a consistent idea which is useful for comparative evaluation.

The list of 60 indicators was gradually whittled down to nine:

Here they are:

1. Children in Detention

- Total number of children in detention
- Proportion of children in detention in the pre-trial stage, over the total number of children in detention

2. Duration of Detention

- The number of children sentenced to detention for
 - *less than one year*
 - *one to five years*
 - *five to ten years*
 - *more than ten years*
 - *life imprisonment*
- The average length of pre-sentence detention

3. Children coming into contact with the juvenile justice system

- Number of children
 - *arrested*
 - *referred to pre-trial diversion measures*
 - *tried*
 - * *dismissed*
 - * *acquitted*
 - * *convicted and*
 - *sentenced to custodial measures*
 - *sentenced to non-custodial measures*

4. Existence of a juvenile justice system

- Existence of specialised courts and/or procedures and/or dispositions or measures applicable to children
- Ratio per 1 000 arrested children of trained specialised professionals among:

- *judges*
- *lawyers*
- *prosecutors*
- *police*
- *social workers/probation officers*

5. Separation from adults

- Proportion of children in detention who are not separated from adults:
 - *in police cells*
 - *in detention facilities/prisons*

6. Conditions for control of quality of services for children in detention

- Existence of a system guaranteeing mandatory visits by magistrates/judges
- Existence of a system guaranteeing regular visits by external, independent persons and bodies
- Proportion of children not being visited by parents or relatives over the last six months

7. Protection from torture, violence, abuse and exploitation

- Existence of legal provisions prohibiting torture, inhuman and degrading treatment or punishment
- Existence of safe, accessible and child-sensitive complaint mechanisms for children
- The number of reported cases of violations
- Proportion of reported cases followed by penal or administrative sanctions

8. Prevention

- Existence of a national programme for the prevention of juvenile

offending that has at least 3/5 of the following components:

- *Family support services*
- *Community-based programmes for vulnerable groups*
- *Programmes for prevention of drugs, alcohol abuse*
- *Educational support programmes*
- *Involvement of mass media in prevention*

9. After-care

- Proportion of children in detention benefiting from an after-care programme lasting at least six months following release.

There was much discussion about whether developing countries would be able to provide all this data, but it was decided that this information really does amount to the 'basics'. Countries that cannot gather this information would therefore really benefit from UN technical assistance to get them to the stage where they would be able to capture and report this data.

Take a look at the indicators and see how you think South Africa will fare both in gathering data and in being held up for comparison with other states. Some areas will be a challenge!

Professor Jaap Doek, who is the current chairperson of the Committee on the Rights of the Child, was also present throughout the meeting. He said he thought that the indicators would be very useful in doing cross-country comparisons, and in getting an overall idea of how countries are doing, although the Committee will obviously require much more detailed information than that arising from these indicators in the reports of States' parties.

Update on children in prison

By Lukas Muntingh, Nicro

South Africa is currently ranked number four in the world in terms of imprisonment rates, after the USA, Russia and Belarus. As at 31 July 2003 there were a total of 185 217 people in South African prisons, of whom 4 032 (2.2%) were children. Children also constitute 7.8% of all awaiting-trial prisoners in South Africa.

Of the 4 032 children in South African prisons, 2 187 were unsentenced and 1 845 were sentenced. It is indeed cause for concern that there are more children awaiting trial than those who are sentenced. For adults, the split is roughly 72% sentenced and 28% unsentenced.

Despite the Department of Correctional Services' claims that there are no children under the age of 14 years being held awaiting trial in prisons, there were six male children aged between seven and 13 years being held awaiting trial in prisons. The accompanying graph shows the more detailed age profile of awaiting-trial children. The graph shows that 130 children



under the age of 15 years are being kept awaiting trial in prison.

The offence profile of children in custody (sentenced and unsentenced) shows that if one compares the two major categories, property and violent offences, it is only in the case of 17-year-old children that violent offences constitute a higher proportion than property offences. This profile confirms common

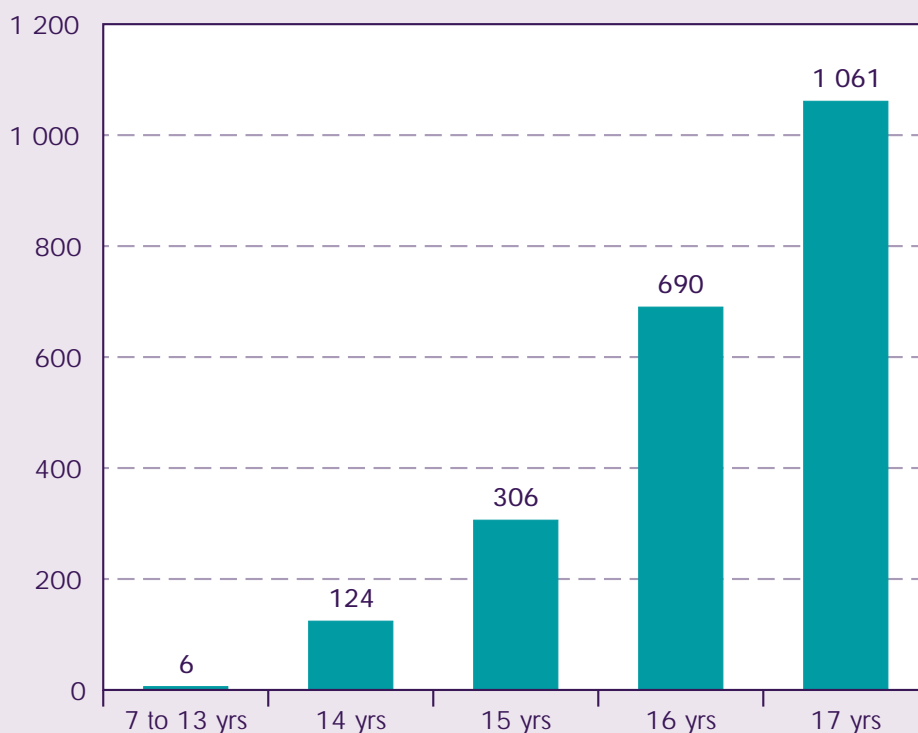
knowledge that many children are in custody as a result of poverty-driven crime.

Conclusions

A number of trends have become clear over the last couple of years regarding children in South African prisons:

Despite numerous efforts, the number of awaiting-trial children continues to increase. Although

Age profile of awaiting-trial children in SA prisons on 31/07/2003



CHILDREN (YOUNGER THAN 18 YEARS) IN CUSTODY PER CRIME CATEGORY: 31 July 2003

	7 to 13 years	14 years	15 years	16 years	17 years
Economical	50.0	48.4	43.7	43.6	39.9
Aggressive	25.0	41.8	38.9	39.9	44.1
Sexual	18.8	7.8	14.0	12.9	11.7
Narcotics	0.0	0.7	0.7	0.6	1.1
Other	6.3	1.3	2.7	3.2	3.2
All Crime Categories	100.0	100.0	100.0	100.0	100.0

there have been interventions that resulted in decreases, these have not been sustained and within months the number of children has reverted to previous levels.

Children are being detained in prisons for primarily for property offences, and not for being violent young thugs.

The number of unsentenced children now outnumbers sentenced children in prison. This is an extremely worrying trend and does not bode well for children in conflict with the law. While

children are being arrested and taken into custody, their cases are not being processed and finalised at an acceptable rate. However, this does not only apply to children.

Children under the age of 14 years are being held illegally in prisons, despite claims from the Department of Correctional Services that there have been no children in prisons under this age since April 2003.

The Department of Justice appears to keep a safe distance from this

problem and it does not appear as if it acknowledges that low productivity in the criminal justice system is the main reason why the number of children awaiting trial in prisons has not been able to come down to an acceptable level. It should, however, be noted that Adv de Lange, chairperson of the Justice Portfolio Committee, did undertake a recent visit to a number of prisons in the Eastern Cape and KwaZulu-Natal, and took action to address the awaiting-trial situation at these prisons.

NOTICE-BOARD



NEWS

- A conference entitled 'Probation 2004 – Reducing Reoffending, Cutting Crime' will be held from 28 to 30 January 2004 at the Queen Elizabeth II Conference Centre in London, the United Kingdom. It is hosted by the National Probation Service for England and Wales. The conference is aimed at persons working with corrections, prisons, community safety, social regeneration and all those involved in strategic planning around criminal justice.

For more information visit
www.livegroup.co.uk/probation2004

- On 17 October 2003, *Government Gazette* No 25565 was issued, in which the Department of Social Development called for comments on the draft regulations regarding the establishment and constitution of a Professional Board for Probation Services. The Minister intends promulgating these regulations in terms of the Social Service Professions Act, No 110 of 1978.



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Editor

Jacqui Gallinetti

Published by the Children's Rights Project, Community Law Centre, University of the Western Cape

Tel: (021) 959-2950/1

Fax: (021) 959-2411

E-mail: jgallinetti@uwc.ac.za

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Layout and design

Out of the Blue Creative Communication Solutions

Tel: (021) 947-3508

Fax: (021) 947-3648

E-mail: lizanne@outoftheblue.co.za