

Article

40

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

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Article 4 of the CRC states:

"Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention."

Do minimum sentences apply to juveniles?

The Supreme Court of Appeal rules "No"

Judgment in *Brandt v S* (case 513/03, Supreme Court of Appeal) was handed down on 30 November 2004, and can be regarded as the most significant judicial advance in the child justice sphere since the abolition of whipping by the Constitutional Court in *S v Williams* 1995 (3) SA 632 (CC). The appeal involved the manner of application of section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997, more commonly known as the minimum sentencing legislation, to juvenile offenders convicted of serious crimes.

After convicting the 17-year old accused of murdering a defenceless elderly neighbour, the trial court imposed a life sentence in terms of section 51(3)(a) of the above-mentioned legislation, after finding that no substantial and compelling circumstances were present to justify the imposition of a lesser sentence. ►

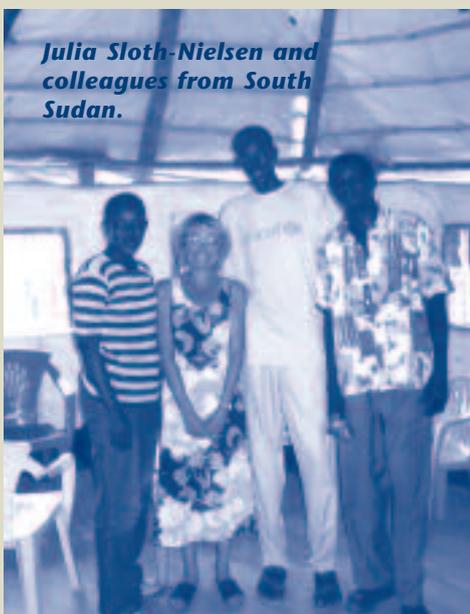
EDITORIAL

Welcome to the first edition of Article 40 for 2005, which marks the 10th anniversary of South Africa's ratification of the UN Convention on the Rights of the Child. While having nothing new to report on developments relating to the Child Justice Bill, we remain hopeful that the significance of this anniversary might provide the necessary impetus for parliamentary deliberations to resume, or even for the Bill to be passed!

However, despite no movement on new child justice legislation, criminal justice practitioners are continuously busy and active in the child justice sphere, as evidenced by our articles from the NPA and the Johannesburg Reception Arrest and Referral Centre. It is encouraging to note the ongoing developments in the management of children in trouble with the law and we urge all our readers to continue their good work in this regard.

Likewise, in Africa, child justice reform is burgeoning and we feature an article on the development of child law in South Sudan.

We also urge all child justice practitioners who consider their work to be innovative or an example of good practice to submit articles to Article 40. We hope that we serve as an ideal medium through which developments and news around child justice can be disseminated to all role-players and stakeholders.



Julia Sloth-Nielsen and colleagues from South Sudan.

The minority decision in the lower court had followed the precedents set in *S v Nkosi* (2002 (1) SACR 135 (W)) and *S v Blaauw* (2001 (2) SACR 255 (C)). In both instances, the courts saw section 51(3)(b) (and not section 51(3)(a)) as the primary section governing the imposition of sentence upon a youthful offender aged 16 or 17. This had the necessary implication that a court was **not** obliged to impose a minimum sentence, unless satisfied that the circumstances indeed justified the imposition of such a sentence. With section 53 (1)(b), there is no reference to *substantial and compelling circumstances*. The express wording of the section only requires a court to justify a decision to impose a prescribed sentence upon an offender aged 16 years but under 18 years at the time of commission of the offence by entering its reasons on the record.

Faced with competing interpretations of the relevant legislation, Ponnan AJA referred to section 28(2) of the Constitution, providing that a child's best interests are of paramount importance in every matter concerning the child. In the learned judge's view, this section gives the clearest indication that child offenders are deserving of special attention, and more so in the sphere of sentencing. Noting that the traditional aims of punishment have to be reappraised and developed to give effect to the spirit and purport of the Constitution, Ponnan AJA referred to reintegration, resocialisation and re-education as additional penal objectives relevant to juvenile sentencing.

Referring to the Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child, the judge stated that the rules and guidelines set out in these instruments lay the foundation for juvenile justice to be (newly) approached from a children's rights perspective. The most significant principles underlying a children's rights philosophy include the injunction that detention must be considered only as a last resort and for the shortest period of time (article 37(b) of the Convention on the Rights of the Child and section 28(1)(g) of the Constitution), the principle of proportional and individualised responses to offending, and the emphasis on preparing the child offender for his or her return to society where detention has been deemed necessary.

Upholding the conclusions reached in *Nkosi* and *Blaauw*, the Supreme Court of Appeal determined that sentence should be imposed under section 51(3)(b) where an offender is aged below 18 years. Thus the fact that an offender is aged below 18 but over 16 at the time of the offence automatically confers a discretion on the sentencing court, which is then free to depart from the prescribed minimum and to impose sentence in accordance with ordinary sentencing criteria.

The judgment is to be welcomed not only for the lucid and careful reasoning in support of the finding that the provisions of Act 105 of 1997 do not require the imposition of prescribed minimum sentence on offenders aged below 18 years, but also because of the general remarks about the nature and objectives of sentencing where child offenders are concerned. Building on *dicta* in a similar vein in *S v Kwalase* 2000(2) SACR 135 (C), the Supreme Court of Appeal has affirmed that the criterion of the best interests of the child, and the principle that detention should be used only as a last resort, now have a central role in determining sentence. ●



A children's law reform process in *South Sudan*

South Sudan covers an area of about 640 000 square kilometres, largely in the Nile basin, bordering Kenya, Uganda, Chad, Central African Republic, Democratic Republic of Congo, Ethiopia and of course the Northern, government-held region. A peace treaty signed with the North in January 2005 heralds the end of two decades of war, and holds the promise of the beginnings of renewal and development for the estimated population of 7,5 million people. As part of the peace process, considerable law reform is under way (including the drafting of a constitution), and children's law reform is an area of priority.

South Sudan is arguably the most under-developed region in the world, with one in four newborns dying before the age of five, one out of every five children suffering from moderate to severe wasting, and only one in 50 children finishing primary education. The enrolment rate in primary school is the lowest in the world, being only 20% of children. Around three times as many boys as girls go to school. One in nine women die in child-birth, and most girls are married by the age of 15. The population of South Sudan is the youngest in the world, with 21% of the population aged under five. There is no birth registration system, and there are exceptionally high prevalence rates of malaria, acute respiratory infection and diarrhoea.

Julia Sloth-Nielsen was invited to visit the drafting committee in April 2005, and share experiences on law reform from a Southern African perspective. It seems that there is much benefit to be derived from starting with a clear policy concerning needs and priorities,

captured in statutory form. For a start, establishing a birth registration system and introducing a compulsory registration drive may over time improve children's access to health care and education. Addressing parental responsibilities through the lens of equality may ultimately lead to enhanced women's rights – under customary law women have no rights to their children. The progressive introduction of a minimum age of marriage may slowly increase the exceptionally early age at which most girls experience their first pregnancy – this can be as low as 11 years of age.

As regards juvenile justice, reforms in this sphere are a key objective of the drafters. The intention is to build a model around restorative justice practices, centred on diversion. The Penal Code of 2003 introduced a minimum age of criminal responsibility of 10 years, with a rebuttable presumption of incapacity applying to children aged between 10 and 14 years. Considerable debate is currently under way as to whether that minimum should not now be raised.

As regards sentencing, the 2003 Penal Code contains a few provisions which directly concern children. First, the death penalty is prohibited for those younger than 18 at the time of commission of the offence. Secondly, the use of imprisonment as a sentence is prohibited for those aged below 16. Instead, section 67 provides for a referral to a reformatory school for a period of between two and five years. However, at present no such institutions exist, and it is suggested that it would be preferable for the new Children's Law to focus on the development of non-custodial options, such as diversion and probation, before devoting scarce resources to the development of institutions. Whipping remains a penalty (not only for children, but for all offenders) applied both through the Penal Code and in tribal courts. This is clearly a matter of concern, and as a contravention of the minimum standards set by international law, should be prohibited in the Children's Law.

A visit to the prison at Rumbek – the town designated as the future capital of South Sudan – revealed that approximately one third of the 50 prisoners incarcerated on the day of the visit were children, most of them seemingly street children. This is evidently a new phenomenon, and the presence of children in prison was not expected. But, with the ending of the conflict, the return of exiles and demobilisation, including demobilisation of child soldiers, together with a likely increase in urbanisation as peace-keeping forces and development aid workers arrive, it can be predicted that there may be a growth in the number of displaced children on the streets. The need for a comprehensive children's statute which includes a systematic response to juvenile justice is therefore obvious. ●

The worst forms of child labour - children used by adults to commit offences

The international community adopted the ILO Convention on the Elimination of the Worst Forms of Child Labour (No. 182) in 1999. It has been hailed as the fastest ILO treaty to enjoy widespread international approval: 151 ratifications are already in place. South Africa was active in the drafting of the ILO Convention and one of the first countries to ratify it in 2000. Whilst the terms of the Convention itself determine some of the identified categories that are now internationally recognised as constituting the worst forms of child labour (such as slavery, debt bondage, child trafficking and child prostitution), member states may also include country-specific practices which are considered harmful to the health, well-being or morals of children.

Over the period since ratification of ILO Convention 182, South Africa has drafted a Child Labour Action Programme (CLAP)¹ and certain areas of concern, as well as categories of children involved in various forms of labour, were identified for concerted action in terms of Convention 182. CLAP was provisionally adopted in 2003 by most government departments (including the departments responsible for provincial and local government, water services, justice, policing, prosecution, correctional services, social development and education), as well as a wide range of organisations in civil society, including organised business, labour, non-government community-based and faith-based (or religious) organisations. The leading department for the implementation of the CLAP recommendations is the Department of Labour.

CLAP includes the identification of three particular groups of children felt by stakeholders to be victims of the worst forms of child labour in this country:

- children recruited into prostitution
- children who are victims of trafficking for labour exploitation, and
- children who have been used by adults to commit offences.

With the Child Justice Bill 49 of 2002 as a backdrop, CLAP identified specific action steps concerning children who are used by adults to commit offences. Recommendation 56 and 57 propose that where children commit crimes, the diversion of such child offenders away from prison should be the preferred option. Where appropriate, CLAP also recommends that

criminal prosecutions of children should be converted to children's court inquiries, after conviction. As far as adults using children are concerned, CLAP proposes that an important element of investigation and prosecution should be locating and prosecuting adults (or sometimes other children) who are using the children to further their own criminal intentions, or who are benefiting from the children's illegal activities.



The rapid assessment phase concluded that there was a dearth of concrete information on the extent to which children are used by adults to commit offences.

In what is evidently a world first, two pilot projects aimed at addressing the situation of children who are used by adults to commit offences are in the process of being designed by the Children's Rights Project of the Community Law Centre (University of the Western Cape), who have been contracted by the programme *Towards the Elimination of the worst forms of Child Labour* (TECL) for this purpose.² The pilot projects are to be premised upon preceding studies, which will be conducted in three phases.

The first phase, which commenced in January 2005 and was concluded in March 2005, was a rapid assessment. This phase included the development and application of a topic-specific questionnaire, drafting of a report on the results of initial stakeholder consultations, an analysis of the information received or discovered to date, and a literature survey, which included an analysis of relevant existing quantitative research data and a description of relevant qualitative research findings. The rapid assessment report concluded with recommendations for sites for possible implementation of the pilot project for this sector. From a large variety of suggested locations, four sites were recommended where the next stage, a baseline study, will be conducted. Finally, the rapid assessment report gave initial suggestions on how the project could be implemented, i.e. what possible programme content was envisaged.

The rapid assessment phase concluded that there was a dearth of concrete information on the extent to which children are used by adults to commit offences. Although all respondents

to the questionnaire that was circulated, bar one, indicated that this was a real phenomenon that occurred in relation to children in trouble with the law. It was also apparent that the information that was provided to the researchers was largely anecdotal and based on the respondents' personal experiences as there are no dedicated record-keeping procedures for reflecting that a child accused of the commission of an offence had been used by an adult to commit the offence in question. No suitable statistical information could be found, either at national or local level,³ to indicate the overall extent of the problem, or to assist in identifying 'hot spots' where the recruitment of children for criminal activity was particularly prevalent.⁴

It was also clear from the initial study that there was no identified procedure⁵ or process for following up any reports received to the effect that children had been used by adults to commit an offence. Further police investigation does not appear to occur, and the adults are not brought to book through criminal prosecutions. Probation officers do not seem to have an appropriate mechanism for taking matters further when the involvement of an adult is revealed to them. It seems that the children concerned are taken through criminal justice processes,⁶ rather than being identified as victims. The rapid assessment report notes that children being required to testify at a subsequent criminal trial against the adult perpetrator appears to be uncommon, and seldom occurs. Furthermore, only one of the respondents indicated that use was made of referrals to the Children's Court (the welfare option), on the basis that, where a child is being used as an instrument of crime, such circumstances might also indicate that the child is in need of care and protection.

In short, the rapid assessment study highlights the dire need for a co-ordinated and targeted programmatic response to the phenomenon of children who are used by adults to commit offences. Turning to the recommendations for programme design emanating from the rapid assessment investigation, it has become obvious that the lack of common vision regarding what the desired intervention should be is a primary issue that must be addressed. Consequently, one concrete proposal is that a protocol for the management of children and adults involved in the matter under discussion needs to be developed, agreed inter-sectorally by relevant role-players such as police and social workers, and then applied at the pilot sites. Such a protocol will outline the responsibilities of police, social workers, diversion service providers, staff at detention facilities, prosecutors and judicial officers when any one of them is faced with an indication or report that a child has been used as an instrument in criminal activity.

A further activity proposed in the rapid assessment report is the development of generic prevention tools, possibly to be applied in schools and other settings where children might be at risk of being recruited into criminal careers by older youth or adults. It is unclear at this stage whether these tools will be stand-alone interventions, or whether they will mesh with existing crime-prevention activities of various government and non-government agencies.

The four sites proposed in the rapid assessment report were Pretoria (Sunnyside), Westbury in Gauteng, Mitchell's Plain and Khayelitsha in the Western Cape. The next phase will be the development of a baseline study in each of the selected candidate sites, centrally to inform the ►

final choice of sites (which must be narrowed from the four recommended in the rapid assessment phase, to two where the pilots will eventually be implemented). The baseline study will assist in narrowing the precise target area of the intended pilot – be it a suburb, magisterial district, police precinct, or suchlike. Also, the baseline study will elicit information to assist with the design of the pilot project material. This phase will run from May 2005 to August 2005.

In the final choice of the project sites, criteria such as the prevalence of the problem, the likely reach of the pilot to specified numbers of children over the designated period, and the need to focus on areas where some resources are already in place (as the pilot projects have limited funding available) will be explored. However, the most critical factor is probably going to be the willingness of state officials at local level to work together to make the intervention a success. Thus, a key aspect of the baseline study will be the exploration of service delivery levels, the extent of cooperation between various role-players in the juvenile justice system, to examine where weak links exist and how these could be strengthened, and to investigate what strategies and mechanisms should be built into the design of the pilot projects.

While the baseline study is under way, a dedicated consultation process with children will be undertaken to explore the nature, causes and extent of children being used by adults to commit offences. This (largely separate) child participation study will relate broadly to the suggested pilot sites that have already been identified. The plan is to focus on children presently in detention awaiting trial in a range of places of safety, secure-care facilities and prisons that accommodate children in trouble with the law who may have been previously resident in the specific neighbourhoods and suburbs under consideration. Children on diversion programmes who come from those areas will also be included in the child participation study, and children from local schools in areas considered to be high-risk areas for the recruitment of children into criminal activities will also be surveyed. For the purposes of this project, efforts will concentrate particularly on children who are used as instruments during housebreaking and robbery, and where they are recruited to deliver and trade in drugs as forms of exploitative child labour.

The intention is that the implementation of these pilot projects will commence after August 2005 at the respective sites.⁷ It must be conceded that there are not inconsiderable challenges posed by exploring the

intersection between child justice and child labour, particularly given the context of gangsterism that prevails in many communities (including some of those selected for the baseline study). These cannot be resolved at this premature stage of the project, and it remains to be seen how the issues will develop. The acid test may well be whether role-players and local-level actors in the criminal justice system agree or can be persuaded to 'buy into' the conceptual starting point that children used by adults to commit offences are victims of the worst form of child labour. ●

Copies of the Child Labour Action Plan and the Rapid Assessment Report referred to in this newsletter can be obtained from:

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Any information from international sources that could be of assistance, as regards actual programme interventions or in respect of other qualitative or quantitative studies concerning the use of children by adults to commit offences, would also be gratefully received.

1 Child Labour Action Programme Draft 4.10 dated October 2003.

2 Regarding its programme in South Africa, TECL is essentially an executing agency for key elements of the Child Labour Action Programme (CLAP), as partner to relevant government departments, regarding identified obligations that government departments have committed to in terms of the CLAP.

3 The issue as to how many children are co-accused with adults could be regarded as a possible indicator that the adults were using children in the commission of crime. This question formed one of the research questions tackled by Muntingh in his study of available quantitative data relating to child justice (Muntingh L (ed) Children in conflict with the law: A compendium of child justice statistics 1995-2001, unpublished study commissioned by the Community Law Centre, University of the Western Cape, 2003). Only data from one site were available, namely from the Stepping Stones one-stop child justice centre in Port Elizabeth. This data indicated that over the period January to March 2002, 983 arrested children appeared at the centre, and of these, 109 were co-accused with adults. It was concluded that between 9 and 13% of the children in this district are co-accused with adults. The co-accused children tend to be involved in more serious offences (61% were co-accused for property offences, 33% for offence against the person, and the remainder for victimless offences). The age profile recorded showed that older children (aged 17) tend to be co-accused with adults rather more often than younger children. However, the fact that children are co-accused with adults does not necessarily entail that the adults used the children in the commission of the offence.

4 The absence of adequate qualitative data on children who are victims of being exploited by adults to commit offences can be linked to the overall inadequacy of available statistics on the number of children arrested nationally each year, the number who are not prosecuted, and the overall number of children diverted. Only disaggregated conviction statistics for offenders aged under 18 years are available, as well as detailed data on children who are awaiting trial in prison or are sentenced and in prison.

5 For instance, the police standing orders do not appear to require any specific course of action when it is claimed that adults are using children to commit offences.

6 Which may include ultimately having any criminal charges withdrawn and being referred by the prosecutor to attend a community-based diversion programme, or may entail prosecution, conviction and the imposition of sentence.

7 The implementing agency to drive the pilot process has not yet been formalised.

Centre offers **quick assessment** of **juvenile offenders**

by *Thelma van der Berg*



The aim of the Johannesburg Reception Arrest and Referral Centre (RAR) is to do an assessment of children under the age of 18 years who are in conflict with the law, in order to decide on the correct disposition of the case, as well as to be of assistance to the court. The Centre's overall objective is for these children to be assessed as soon as possible after their arrest.

In order to meet this aim, the assessment process must concentrate on the age of the child, the child's social circumstances and his or her motivation for the offence committed. In addition, the focus of the Centre is such that it aims to achieve the following:

- To ensure the rights and safety of all children in conflict with the law and abide by the UN Convention
- To assist courts with an appropriate assessment and decision-making regarding the correct disposition of the case, such as diversion, conversion, criminal prosecution, or referral for preventative services
- To do a developmental assessment of the child within a child-friendly environment
- To ensure that the child is not discriminated against on the grounds of race, gender, ethnic or social origin, sexual orientation, disability, religion, culture or language
- To ensure that the parents or guardians are traced and informed of the child's arrest
- To inform the child of his rights and also his right to legal representation
- To keep records of each child assessed in order to prevent duplication and to establish if the child has been arrested previously
- The best interests of the child are of paramount importance
- To deliver an effective service to the child, family and court.

The RAR Centre also strives to provide an effective service to the child at the various points where he or she comes into contact with the criminal justice system, such as at the police station and during the assessment. The services that are rendered at these sites include the following:

At the police stations

- Locate guardian
- Establish age of the child
- Monitor the circumstances in which the child is detained.

At the assessment

- Ensure that each and every child that is in conflict with the law, is assessed by a probation officer
- Ensure the involvement of child, guardian, complainant, and if possible the inspecting officer and prosecutor in the decision-making process.

The Centre also places the utmost importance on the monitoring of the child through the criminal justice process and requires that the probation officer should be aware of every stage of the process, in order to be of assistance to the child, the family, as well as the courts. The probation officer should also monitor the child's progress if he or she is referred to programmes, as well as monitor and evaluate these programmes on a continuous basis.

Some statistics from the RAR Centre

January	Children in new cases	Children in old cases	Total number of children	Diversions	Withdrawn after diversion	In custody
2001	366	543	980	172	51	308
2002	261	672	933	207	55	385
2003	327	634	961	264	67	404
2004	277	568	845	268	35	280
2005	240	474	714	199	75	259

The use of expert evidence in the sentencing of children

*Joan van Niekerk, National Coordinator,
Childline South Africa*

Diversion conditions and sentences given to children who have committed crimes present an enormous challenge when one considers article 40 of the United Nations Convention on the Rights of the Child which recognises “the need to treat an accused child in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”¹.

Professionals called to give evidence that can assist in this decision-making process are frequently challenged by the resultant responsibility to present objective opinions based on their assessment of the child. This can sometimes prove to be difficult when one is called either by the defence or by the prosecution, and both may hold diametrically opposing views as to how the child should be dealt with. There is, therefore, the need to make some provision for a neutral expert witness in these instances, whose expertise will be appropriately respected by both parties.

Assessment

Assessment is a process rather than a single event in time – and taking this into account is even more important when assessing children whose growth and development have not yet reached an adult stage and whose changes may be rapid and also strongly influenced by context and caregiver.

It is therefore essential that an in-depth psycho-social assessment of a child takes place over time, and to include the collection of collateral information from as many contexts in which the child has some place as is possible. Information should therefore be gathered from the child, parents or caretakers, school teachers if the child is in school, as well as other adults and significant others in the life of the child. In one instance in which I was asked to assess a child and present a pre-sentence report with recommendations, some of the most significant information about the child’s capacity for empathic relationship came from a younger sibling.

Information as to the child’s developmental history and capacity for change and development can also be collected through historical documents and



oral accounts of events. Early school reports or reports from other professionals involved in the child’s life can give information, inter alia, about the child’s potential or failure to develop according to potential.

It should also be noted that assessment and intervention (treatment) are intertwined processes, and although separate cognitively, an in-depth assessment that includes an assessment of the child’s (and family’s) capacity and motivation to engage in a treatment process requires some testing of treatment interventions prior to their presentation in court.

The degree of resilience – the ability to “bounce back” after experiencing adverse circumstances – is a relevant issue to track and where possible reinforce. Some children experience multiple adversities during childhood, and yet retain the potential to progress and develop into responsible adulthood. For some children multiple adversities destroy or significantly limit a child’s ability to respond to and benefit from attempts to promote healing and development. Studies on resilience do appear to indicate that a single relationship that is positive, supportive and affirming

(but not necessarily parental) can make the difference between losing the capacity to develop into responsible adulthood or deteriorating into a later childhood and/or adulthood of continuing anti-social behaviour.

Assessing psychological and emotional abuse and its impact on the child

Concepts of sexual and physical violence and their impact are somewhat easy to convey and explain as opposed to psychological and emotional abuse and their complex effects on child development. Psychological and emotional abuse are more subtle and may leave no physical marks upon the child. Many children, in an effort to survive emotional abuse, may learn to conceal their psychic pain behind a façade of confidence and even defiance. Getting behind this façade may take time – and may require persistent but gentle efforts to establish sufficient rapport and trust with the child to reveal the hurt inner self.

The psychological abuse may include:

- Constant denigration and belittling, either through insult or through ignoring the child's presence or emotional needs for love and affection. This has a marked impact on self-esteem and self-confidence.
- Exploitation: The child is used to meet the needs of his or her caretakers, for example drawing the child into a conflict between parents and forcing the child to take sides. Being close to one parent or caretaker therefore creates a sense of disloyalty to the other. It is thus less stressful to relate

to neither, leading to relationship and social deficits which, if not addressed, have a marked negative impact on adult relationships.

- Corrupting or mis-socialisation: The child is encouraged to develop socially unacceptable interests, appetites and behaviour. Street children are often allegedly used by adults to commit crimes from which the adult benefits and in which rewards for the child are minimal and may meet only short-term and immediate needs for food/drugs. Caretakers/parents/other exploiters either do not understand or else do not respond to the age-appropriate needs of the child, or simply act in their own interests and thus expose the child to age-inappropriate information and tasks.
- Unreliable and inconsistent parenting: When contradictory and ambivalent demands are made of the child, and parental support or care-giving is inconsistent and unreliable, and familial stability is denied to the child, the child learns that adults in his/her world are unreliable and not to be trusted.

The impact of such abuse is various and complex and the child's responses would include the development of various psychological defence mechanisms, for example, dissociation, disengagement and apparent detachment.

Dissociation as a defence mechanism allows for the person to "engage in necessary activities without being distracted or immobilised by psychological pain" (Briere – 1992, p 38). Abuse survivors may associate relationships with maltreatment and "as a result they may either (a) avoid interpersonal closeness altogether or (b) accept some level of aggression in intimate relationships as normal or appropriate" (Briere – 1992, p 53).

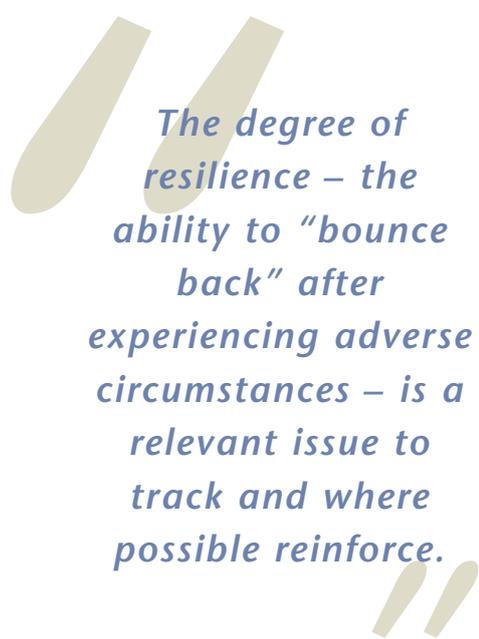
Behaviour and outward appearance may therefore lead the untrained observer to conclude that the child does not care, shows no remorse, and in fact is not "helpable".

Writing and presenting the report

Sometimes professionals are tempted to write lengthy complicated reports, using impressive professional jargon in an effort to impress the court and justice professionals with their expertise and experience. It is sometimes more helpful to submit reports that are simply and clearly written and that are comprehensible to those whose decisions may be based on one's expertise. Although explanations of complex concepts may be sought during oral evidence, the initial reading of the report creates the first impression. Therefore the linking of the observations to the assessment and to the recommendations should be clear and concise.

Conclusion

Criminal justice professionals who deal with child offenders need to adopt a broad view of what constitutes abuse and neglect and how more subtle forms of abuse and neglect may have a pervasive impact on a child's life. When calling for expert evidence in order to assist a just and restorative decision regarding the child's ongoing care, diversion and sentencing options, court officers need to be especially mindful of the fact that sufficient time is required for the assessment process. ●



The degree of resilience – the ability to “bounce back” after experiencing adverse circumstances – is a relevant issue to track and where possible reinforce.

1 Article 40, United Nations Convention on the Rights of the Child, 1989

Children awaiting trial project: Western Cape

by Advocate Bronwyn Pithey



The number of children awaiting trial continues to rise, and while an interim protocol on this issue has been designed and implemented, only short-term solutions in the National Prosecuting Authority (NPA) have attempted to tackle the problem. In his State of the Nation Address, the President urged the rapid reduction of the number of children awaiting trial. Following on this directive, the Sexual Offences and Community Affairs Unit (SOCA) in the National Prosecuting Authority (NPA), together with the Department of Justice and Constitutional Development initiated a project to be implemented nationally with the sole objective of reducing the number of children awaiting trial and prioritising those children awaiting trial in custody (prisons, police cells and places of safety).

The NPA has undertaken to be responsible for ensuring the facilitation, implementation, monitoring and evaluation of this project nationally through its Directors of Public Prosecution (DPP) offices in the provinces. The main stakeholders to be involved in the project include the NPA, the

Judiciary, the Departments of Correctional Services, Social Development and Poverty Alleviation, Justice and Constitutional Development, Education, as well as NGOs and academic institutions.

The Western Cape

The Western Cape DPP office has long been committed to the reduction of the number of children awaiting trial, and continues to support any national initiatives that contribute to this objective. The DPP's office has in the past embarked on a number of its own initiatives in a real attempt to drastically reduce these numbers. All initiatives/programmes have utilised the multi-disciplinary model, incorporating all essential role-players, with the objective of drawing on resources and expertise from the various departments and civil society.

It is envisaged that in the long term the Case Review Teams will adopt a monitoring and evaluating function including children awaiting trial other than those in custody.

While there are a number of mechanisms currently in place to address this issue, such as an effective working relationship between the NPA and the Department of Correctional Services (Western Cape) where the DCS provides weekly statistics on children awaiting trial in every facility in the Western Cape to the Director of Public Prosecution office as well as to the Senior Public Prosecutor at the court where the matter is on the court roll, it was felt that a more coordinated focused intervention was needed.

Currently, the NPA is represented on the Child Justice Forum, a provincial-level monitoring committee in the Western Cape. In 2000, the Western Cape Provincial Administration was taken to court by outspoken opposition members of parliament, on the constitutional violation of children's rights. The issue involved 600 awaiting-trial youths detained in the province, some kept for longer than six months in overcrowded and appalling circumstances. In March 2000, a meeting of Provincial stakeholders responsible for the implementation of the system, most notably the South African Police Service, the Departments of Justice, Correctional Services, Social Services and Education, and key non-government organisations, was convened to address this issue. This was the genesis of the Western Cape Child Justice Forum. A detailed planning process was followed to highlight the key problem areas, identifying specific tasks and time frames. This provincial committee oversaw the entire process and, over a five-month period, the number of youths detained was reduced to fewer than 100.

The Child Justice Forum meets once every two months and has proven to be invaluable in identifying any specific problems or stumbling

blocks in the system which are contributing to the high numbers of youths in custody.

A new intervention

Although the above mechanisms exist in the province and, it is submitted, are relatively effective in managing this challenging issue, the development of a formal structure to address the problem of children in custody is necessary. The Western Cape NPA has approached the Child Justice Forum to accommodate this formal structure, to which the Forum agreed, indicating its wholehearted support for the project.

The Child Justice Forum will operate as the Project Oversight Committee (POC) of the Children Awaiting Trial Project in the Western Cape since all the proposed team members are already represented, on the committee. This group has worked together successfully over a long period of time, and has undertaken to meet more frequently to ensure the success of this project. The terms of reference of the POC are to give guidance and support to the Case Review Teams (discussed below), to mobilise resources for the project, manage the project, and to monitor and evaluate the Case Review Teams.

The Case Review Teams (CRT) will be based at a local level (at every magistrate's court), and will be responsible for the screening of all dockets. They will determine the age of the alleged offender, the length of time the case has been pending, the seriousness of the offence, the amount of bail that has been fixed (where relevant), the alternative methods of securing court attendance, the possibility of diversion, plea bargaining and/or any other alternatives. It is

envisaged that in the long term the Case Review Teams will adopt a monitoring and evaluating function including children awaiting trial other than those in custody. The Case Review Teams will consist of a prosecutor (SPP, Control Prosecutor), a senior police officer, Correctional Services (a probation officer and/or an official from a place of safety), a social worker from the Department of Social Development, and the court manager. The core responsibility of the Case Review Teams is to ensure the consistent screening and fast-tracking of child cases, to insist on rapid finalisation of cases, thereby drastically reducing the number of children awaiting trial in custody.

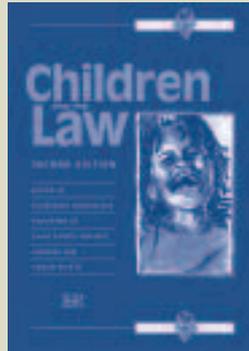
A comprehensive policy guidelines and a mechanisms document for the management of this project are in the process of being drafted and will be accepted by all role-players as the project's guiding document. This document will detail the responsibilities of the CRTs and the reporting/accountability processes of the project, as well as a monitoring and evaluation matrix, including the indicators for success, for example, diversions, plea bargains, bail review procedures, and recidivism. ●

The Western Cape DPP office has long been committed to the reduction of children awaiting trial, and continues to support any national initiatives that contribute to this objective.

NOTICE-BOARD



LHR publishes update on Children and the Law



The 2nd edition of the Children and the Law manual is being published due to a number of changes in policy and legislation over the last six years since the first publication appeared in 1998. Sudeshnee Padayachee says the second edition will provide the reader with an insight into the laws and policies affecting children and will ultimately serve

as a useful resource in understanding both national and international law. This manual will also replace the first edition as each chapter is being updated and two new chapters have been introduced, namely sexual offences against children, and violence against children and woman.

As editor of the manual, Sudeshnee would like to thank all those who have contributed to making the manual possible, especially all the contributors. The manual reflects the law as of November 2004.

The cost of the manual is R130 including VAT but excluding postage, and manuals can be ordered from LHR at (tel) 033 394 9522.



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