

# Article

# 40

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

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## **Article 40(2)(b)**

*Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

*(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians*

## *Developing a child justice system through judicial practice*

*by Julia Sloth-Nielsen, Research Fellow, Children's Rights Project*

In the absence of the enactment of the Child Justice Bill, the courts have made great strides in setting benchmarks and laying down standards to further a child justice system that is more compliant with child rights. *S v Kwalase* (aims and objective of sentencing), *S v Zuba* (structural interdict imposed to compel the provincial departments of Education and Social Development to provide a reform school for the province), *S v Petersen* (requiring the mandatory provision of pre-sentence reports prior to the imposition of a custodial sentence) and *Brandt v S* (non-application of minimum sentences to children aged below 18 years) are cases in point.<sup>1</sup>

The latest judicial pronouncement comes from the Northern Cape

Province (per Lacoek, J) in *S v M* (Case No. 435/04 and 237/04, judgment delivered 11/11/2005). As occurred previously in *Zuba* and in an unreported case involving two girls in Gauteng, the issue was two accused (a girl and a boy) "who became the sad victims of the lack of youth reform centres or like institutions" in the province. Both were incarcerated in De Aar prison pending their transfer to a youth centre, but since there was no such facility in the province, the authorities were dependent upon the willingness of youth centres elsewhere in the country to accommodate the Northern Cape juveniles. They remained

# EDITORIAL

*In the October 2005 edition of Article 40 we highlighted various initiatives undertaken by the government, in particular the Department of Social Development, in moving towards a new child justice system. In this edition, the Department of Social Development features again in the article on minimum standards for diversion. These minimum standards, commissioned by the Department, will go a long way towards achieving a fully functioning diversion system that protects children's rights and that can provide equal and consistent treatment of children who are diverted from the criminal justice system.*

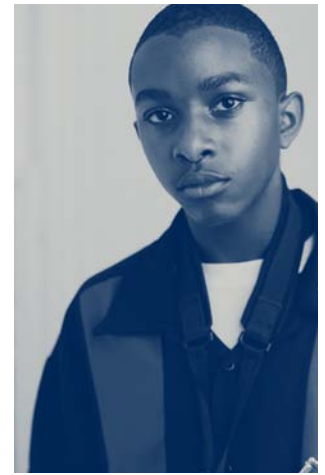
*However, it is unfortunate that, despite these pro-active steps by the government, South Africa is still in the invidious position of not having separate legislation for children in trouble with the law. In reality, the effect of this is that children's rights in terms of the Constitution and international law are being violated and that they are at risk of serious harm. In the absence of a separate child justice law, the courts are the only avenue open through which justice can be achieved, as is evident from the two case notes contained in this edition.*

*These two cases involve the constitutional principle that the detention of children should be a last resort and for the shortest appropriate period of time. In both instances, the courts handed down judgments that ensured that the principle was given effect even though not yet domesticated in our statute law.*

*It is highly undesirable that the only way in which children in trouble with the law can be protected is through litigation, and these cases illustrate the dire need for the Child Justice Bill to be enacted. However, it must be noted that the courts in these two matters need to be congratulated for enhancing the growing body of legal precedents that have consistently protected the rights granted to children by the Constitution and the UN Convention on the Rights of the Child.*

*Finally, Article 40 takes this opportunity to wish all its readers a safe and happy holiday season.*

in prison, however, and at the time of this special review, had effectively served sentences of 15 and 19 months respectively in an adult prison. (Details concerning the nature of the offences and circumstances of the accused, such as whether they had previous convictions, are rather scant, but M was convicted of housebreaking with intent to steal and theft, whilst S was convicted of theft. On the face of it, they would not have attracted prison sentences of this duration had they been adults.)



Following a written request by the Centre for Child Law of the University of Pretoria (with the agreement of the Directorate of Public Prosecutions (DPP) in the Northern Cape), the judges dealt with the cases by way of urgent review.

## ***“It is shockingly inhumane ...”***

Judge Lacock had harsh words for the government's inaction in providing alternative remedies. “This state of affairs, to say the least, is shockingly inhumane, worthy of the strongest possible expression of this court's antipathy. It requires no stretch of the imagination to realise what dangers – both physical and psychological – these youngsters have been exposed to in an adult prison. We sincerely trust that the provincial government of the Northern Cape and the Department of Correctional Services will comply with their constitutional responsibilities by immediately providing the necessary facilities to accommodate convicted juveniles,” he said.

Noting that the sentences imposed were not inappropriate, the court held that a misdirection did occur in that the sentencing officer had failed to establish prior to sentence whether the accused could be accommodated at a youth centre. The court was therefore at large to interfere with sentence, and “since M and S are suffering from a grave injustice by no fault of their own, [the court regarded it] as [its] constitutional duty to exercise its jurisdiction in such a way as to end this travesty of justice.” Noting that the severity of the sentences already served far outweighed the severity of the original sentences imposed, the sentences of the accused were substituted with the term already served.

## ***A clear statement***

This case is noteworthy for the strong and clear language used to express the court's disquiet at the turn of events, and the failure of the government to take timely steps to resolve what was obviously an unenforceable sentence. There is in reality no excuse for detaining children, who have been deemed to be worthy of alternative placement, in prison. Further to this, it is now 10 years since the release of the (1996) Inter-Ministerial Committee report on reform schools and the launch of the transformation process for this sector. Perhaps the time has come for a proper audit of children in prison awaiting transfer to reform schools, and a class action suit to ensure that the constitutional principle of deprivation of liberty as a matter of last resort is adhered to. ●

*1 These cases are discussed in, inter alia, the September 2003, April 2004 and May 2005 editions of Article 40.*

# New book outlines innovations in programmes for youth at risk

by Louise Ehlers of the Open Society Foundation for South Africa

Since 1999, the Open Society Foundation for South Africa (OSF-SA), through its Criminal Justice Initiative (CJI), has focused on promoting sound legislation and human rights in the context of the criminal justice system and crime prevention. In its work with children in the criminal justice system it has sought to institutionalise legal and policy frameworks that will protect their rights. To this end, OSF-SA has provided funds to various initiatives that develop and pilot diversion and reintegration programmes for youth at risk. These initiatives vary as to when and where they intervene, what strategies they use, and how they interpret the concepts of restorative justice and diversion.

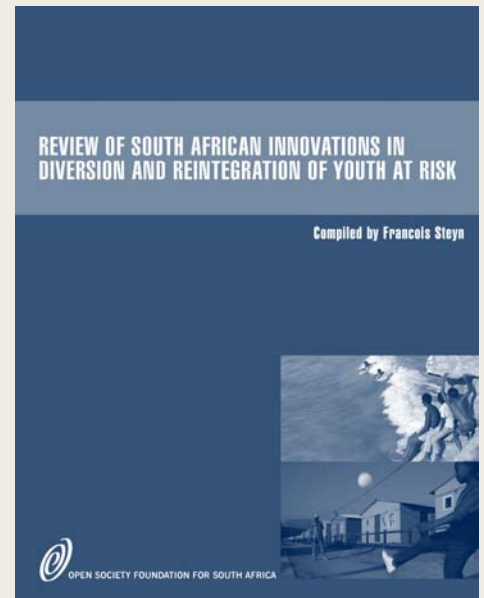
In 2003, OSF-SA asked the Centre for Health Systems Research & Development, in collaboration with the Centre for Development Support and the Department of Criminology at the University of the Free State, to review the programmes of 12 selected initiatives that provide youth diversion and reintegration services in South Africa. The purpose of the review was to look at the various innovations these programmes had introduced, profile each model, study how it affected its intended beneficiaries, and provide an easy reference to a range of programmes for those working with youth at risk.

## Aims and objectives

The aims of the review were as follows:

- To describe the approach, strategies, activities and tools used by each programme.
- To identify what was unique about these programmes so as to be able to replicate them.
- To compare the programmes' theoretical perspectives and the ways these were put into practice.
- To identify key themes and good practices in working with youth at risk.

- To assess the monitoring systems of each programme and record significant findings.
- To undertake a costing exercise for each programme.
- To reflect on existing South African policy for youth at risk and the international instruments that South Africa has ratified, and examine how the various programmes align with these.



## Targeted initiatives

Various programmes from the following organisations were chosen for the review:

- National Institute for Crime Prevention and Reintegration of Offenders (NICRO)
- Educo Africa
- Noupoot Youth and Community Development Project (NYCDP)
- Big Brothers Big Sisters of South Africa (BBSSA)
- Diversion into Music Education (DIME)
- President's Award for Youth Empowerment (TPA)
- Outward Bound Trust of South Africa (OBT)
- Restorative Justice Centre (RJC)
- Othandweni Street Youth Programme
- Ekupholeni Mental Health Centre
- National Peace Accord Trust (NPAT)
- South African Young Sex Offenders Programme (SAYStOP)
- Khulisa Child Nurturing Services

The review process culminated in a book entitled *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*, that focuses specifically on locally developed diversion and offender reintegration models. It also extracts learning and 'good practice' to inform future work both in South and Southern Africa. The book was officially launched on 9 September 2005 in Cape Town. ●

Should you wish to obtain a copy, please contact Louise Ehlers at [louise@ct.osf.org.za](mailto:louise@ct.osf.org.za) or telephone her on 021 683 3489.

# Minimum standards for diversion programmes

by Lukas Muntingh

## Introduction and background

In the December 2003 issue of *Article 40*, a short report was given on the development of minimum standards for diversion programmes. The development of the standards was prompted by the provisions of the Child Justice Bill and researched and executed by NICRO following a commission by the Department of Social Development.

Since the first formal diversion programmes started in 1993, there has been a proliferation of diversion programmes with no standards to guide programme design and delivery. 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, the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other relevant international instruments.
- Maladministration and mismanagement of resources.
- Inappropriate and poor programme content.
- Poor monitoring and evaluation.
- Inappropriate matching of children to programmes.
- Lack of capacity within service provision agencies.
- Lack of skills among service providers.

The minimum standards for diversion programmes must be suitable to the South African context, and therefore need to 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

The objectives of the project were to develop standards that regulate the following:

- The infrastructural, administrative and managerial requirements of diversion programmes.
- 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.
- The operational management of diversion programmes.
- The monitoring and evaluation of diversion programmes.



- The minimum requirements for diversion programme service providers.
- Diversion programme outcomes primarily relating, but not limited, to the following:
  - life skills programmes testing
  - pre-trial community service
  - victim/offender mediation
  - family group conferencing
  - adventure-based education and eco-therapy programmes
  - programmes for young sex offenders
  - programmes focusing on drug offences
  - various court-mandated good behaviour orders.

## Methodology

In broad terms, the project followed the following process:

- The project design was finalised with a panel of experts. To ensure that the project was correctly conceptualised, a one-day workshop was held with some 20 experts in the child justice field.

- Two desktop research projects were commissioned to investigate local and international literature and engage experts on standards and standards development. Subsequently two sets of draft standards covering organisational standards and programme outcome standards were produced, as well as a literature review on “what works and what doesn’t” in intervention programmes with youth at risk.
- Broad consultation with stakeholders on the draft standards was done through six regional workshops across the country. The emphasis was placed on engaging practitioners, as national experts had already been consulted extensively in the previous stages.
- Based on the inputs from the regional workshops, the standards were revised to produce a second version.
- The second version of the standards was used to assess six selected organisations currently engaged in diversion in order to make a comparison between reality and the standards. These organisations are involved in providing a one-stop centre service, life skills programmes, a sex-offender programme, a restorative justice programme, and a rural diversion programme.
- Based on the six assessments, the final adjustments were made to the standards.
- The final report was submitted to the Department of Social Development in March 2005.

It should be emphasised that “minimum standards” does not mean standardisation of content and structure. The minimum standards therefore allow for a dynamic and open interpretation, and in most instances also for progressive compliance. This also means that there may be different routes to complying with a particular standard, depending on the size and characteristics of the organisation.

Throughout the development and consultation process two thematic questions were repeatedly addressed:

- **Desirability:** Is this standard desirable? Do we want this standard? Is it a good standard to include? Will this standard protect children (or any other stakeholder)?
- **Feasibility:** Is this standard feasible? Can it be implemented? What would it take to implement it?

The standards that made it into the final version are therefore considered to be both desirable and feasible based on the consultations with stakeholders during the various stages of the project.

### **The standards**

A total of 95 standards emerged from the project covering the two categories of organisational requirements (65 standards) and programme outcome requirements (30 standards). Whilst the number of standards may sound daunting, the testing of these standards, as mentioned above, has already confirmed that there was full or partial compliance with many of the standards in the selected six organisations. The standards were developed as minimum standards to ensure the protection of children, not as industry benchmarks of best practice which organisations should aspire to. In other words, these are the absolute minimum requirements to ensure that children’s rights are not compromised when they participate in a diversion programme. These minimum standards were found to be both desirable and feasible through the extensive process of research and consultation with stakeholders.

Some of the standards are very specific and detailed, thus contributing to the high number, while others are more open-ended. Where there is an existing standard in place, reference is made to that standard in order to avoid duplication, for example the duties and obligations in terms of the Non-Profit Organisations Act.

### **Organisational standards**

The standards relating to organisational requirements cover the following areas:

- |                                       |   |
|---------------------------------------|---|
| • Legal structure of the organisation | • Performance appraisals                |
| • Governance arrangements             | • Grievance procedures                  |
| • Financial systems                   | • Psychological debriefing              |
| • Business plan                       | • Programme environment and safety      |
| • Record-keeping                      | • Overnight and away-from-home care     |
| • Profit                              | • Drugs and controlled substances       |
| • Code of conduct                     | • Protection of children's rights       |
| • Working agreements                  | • Promotional material                  |
| • Recruitment procedures              | • Equipment                             |
| • Disciplinary procedures             | • Premises where programme is conducted |

(continued on page 6)



### **Organisational standards** (continued)

- Generic knowledge requirements of facilitators
- Additional knowledge requirements of facilitators working in wilderness programmes
- Additional knowledge requirements of facilitators working in restorative justice programmes
- Additional knowledge requirements of facilitators working in therapeutic programmes
- Additional knowledge requirements of facilitators working in sex-offender programmes
- Additional knowledge requirements of facilitators working in substance abuse programmes
- Additional competencies
- Service level agreements between government and service providers

As will be noted from the above, many of the standards relate to good organisational management practices; in many instances the standard essentially compels the organisation to formulate clear policy on issues. Not clarifying important issues creates uncertainty and risk in organisations and should be avoided.

### **Programme outcome standards**

The standards relating to programme outcomes cover the following areas:

- Post-arrest assessment and assessment prior to trial
- Programme design and delivery
- Restorative justice programmes
- Sex-offender programmes

### **The importance of sound programme design**

The research confirmed that proper assessments after arrest and prior to programme participation are an essential requirement to ensure that the child is placed in the appropriate programme. The research also confirmed the original assumption that programme content should not be standardised, but rather that standards for programme design need to be developed. This is perhaps best summarised in the following:

- The more clearly and accurately the focal social problem is defined,
- the more clearly and precisely the needs of the target group can be assessed,
- the more appropriately the programme is designed to address the needs,
- the more effectively the programme is delivered and implemented,
- the more the short- and medium-term outcomes are achieved,

↳ the greater the long-term impact is likely to be.

(Source: Louw in Dawes and Van der Merwe, 2005)

The standards therefore place the emphasis on ensuring properly designed interventions in which the assumptions, objectives, activities and targeted behaviour are clearly articulated, as opposed to prescribing content or even particular outcomes. In short, the standards require methodological rigour.

The programme outcome standards were strongly influenced by what was identified in the literature review on what works and what doesn't in intervention programmes with young offenders and children at risk. Research done locally and internationally presented important guide-

lines with regard to risk and resilience, but also confirmed the importance of matching children and programmes. The most important requirement of any organisation in the diversion field is possibly that it must thoroughly understand its own programme. A service provider (and its programme facilitators) must be able to respond to and satisfactorily answer three questions:

- What is it that you are trying to achieve with this programme?
- Why are you approaching and performing this task in this particular manner?
- How are you monitoring outputs and outcomes?

### **The way forward**

The real challenge lies in making these standards work now that their feasibility has been confirmed by stakeholders across the country. Admittedly, it may be expected that not everyone and probably most current service providers will not comply with all the standards. It was not within the scope of this project to investigate the implementation of the standards, but based on the experience and knowledge gained, some suggestions can be made as to how the process may be taken forward.

Assessing the current situation against the standards seems to be a logical point of departure for service providers. This will indicate the most urgent and common development needs. The next step could be the development of capacity on the most critical aspects to ensure that children's rights are not violated and that the most critical issues are addressed within a reasonable period. A possible third step could be a rolling review mechanism to ensure that accredited organisations continue to comply with the standards. ●

# ***The new law on juvenile justice in The Gambia***

*by Marie Saine, LLM Student, Centre for Human Rights, University of Pretoria.*

## ***Introduction***

The National Assembly of The Gambia in June this year enacted the Children's Act 2005. This Act incorporates all laws relating to children, including child justice administration. It was enacted to strengthen the legislative and institutional framework relating to the protection of the rights of children in The Gambia in line with its international obligations under the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. The new Act also repealed, in its entirety, the Children and Young Person's Act (CYPA) which had regulated juvenile justice administration since independence. The new law is innovative and revolutionary in many respects.

## ***Definition, age of criminal responsibility and age determination***

The Act defines a child as a person under the age of 18 years and the age of criminal responsibility is 12 years. This is in compliance with the recommendations of the Committee on the Rights of the Child to increase the age of criminal responsibility from seven years. This provision also removes the common law rebuttable presumption of *doli incapax*. The Act further provides that the Court may undertake an inquiry if in doubt of the age of a child, including allowing the Court to take medical evidence. The presumption made by the Court shall be conclusive evidence of the person's age. This will provide some protection to children who do not know their exact age or have no birth certificate as proof of their age.

## ***Guiding principle***

The Act also provides that the best interest of the child shall be the paramount considera-

tion of any court, institution, person or other body in determining any question concerning the child. It also provides criteria and guidelines which must be considered in determining what is in the best interest of the child.

## ***Specific rights of a child in trouble with the law***

### ***Detention rights and duties of the police***

When a child is arrested by the police, he/she must immediately be taken to the Children's Court (the Court). If this is not done, the child must be released on bond or on his/her own recognisance or into the custody of his/her parents or responsible person unless the offence is a serious one or his/her release is not in his/her best interest. If the child is detained by the police, the period of detention must not exceed 72 hours without having been brought before the Children's Court. The judge will then make an order for the release of the child on bail or for the child to be remanded in a secure home if it is not in the child's best interest to be released. However, the child has a right to appeal to the High Court against the order.

Detention must be used as a measure of last resort and for the shortest possible period of time. Therefore, alternative measures such as close supervision, placement with a family member or in an educational setting or a home approved by a social welfare or probation officer must be utilised by the Court.

A child must not be detained for more than six months for very serious offences and not more than three months for any other offence whilst awaiting trial. During this period, he or she shall be given all the care, protection and all necessary individual assistance including social, educational, vocational, psychological, medical and physical assistance.

### ***Other rights***

The child must be separated from adult detainees when in custody and a female child detainee must be under the custody of a female officer. The child also has the right to family contact including the presence of parents or guardians during interview at the police station.

The right to be presumed innocent, respect for his/her fundamental rights and the right to be provided with other due process rights are also



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guaranteed. The child also has a right to legal representation at the state's expense if he/she is not able to afford one. The child's right to privacy must be protected throughout and no information about him/her that will identify him/her must be published.

### **Implementation of the rights**

The Act requires that a child in trouble with the law be dealt with by the child justice system according to the procedure specifically established for children. It also requires cases to be disposed without using formal procedures. The latter should be explored only as a matter of last resort.

### **Trial procedures**

Where a case is brought before the formal justice system, the proceedings must be informal by way of an inquiry and the environment conducive to enable the child to participate in the proceedings. Parents or guardians, social workers, probation officers and the legal representative must be present during the inquiry. The proceedings must also be held *in camera* and the Court is restricted from using certain terminology like 'conviction' and 'sentence' as used in the ordinary courts. Instead, the Court must substitute them with 'proof of offence against the child' and 'order' respectively.

If the child is tried jointly with adults or for a very serious offence like treason in the ordinary courts, the trial court must consider the child's age and the provisions of the Children's Act regulating juvenile justice.

### **Application of sentencing provisions**

The Children's Act requires a social worker or probation officer to prepare a pre-sentencing social background report which shall be considered by the Court before making an order for sentence. It is mandatory and the Court must, where necessary, adjourn the case to obtain the report.

Provision is also made for various non-custodial orders which the Court can impose on the child. This list may not be exhaustive but serves as a guide for judges. However, the Court can also make detention orders in some circumstances but it shall be as a matter of last resort when there is no appropriate alternative order.

There are certain restrictions on punishment to be imposed on a child offender irrespective of the offence committed. The death sentence and corporal punishment are prohibited and a child cannot be sentenced to imprisonment in an adult prison. Any order of a custodial sentence must be to a detention centre, which means a national rehabilitation centre where the child can be rehabilitated and re-trained.

### **Duration of cases**

The right to a speedy trial is guaranteed especially where the child is in detention. Trials not completed within 12 months must be struck out irrespective of the charge. The Act also requires the Police Child Welfare Unit to be responsible for investigating child offences as well as probation and social workers to play an active role in the whole process.

### **Institutions**

#### **Children's Court**

The Act establishes a separate court exclusively for children which shall be staffed permanently with first-class magistrates assisted by two other

*The death sentence and corporal punishment are prohibited and a child cannot be sentenced to imprisonment in an adult prison.*

persons of proven integrity from the community. The Court shall have jurisdiction to hear all criminal cases affecting children, except the offence of treason and where the child is jointly charged with adults. The Court shall where possible, sit in a different building from those used by the ordinary courts and all proceedings must be *in camera*.

#### **National Rehabilitation Centre**

The Act also makes provision for the establishment of rehabilitation centres. They shall be used to detain children while awaiting trial or serving their custodial sentence with the purpose of rehabilitating and training them. These centres have a separate wing for girls. To protect the well-being and rights of the child, there shall be a Committee of Visitors mandated to carry out regular periodic inspections of these centres in order to monitor the state of the facilities and the children therein. The centres shall also provide after-care services for the children.

#### **Conclusion**

To conclude, The Gambia's new Children's Act provides a more comprehensive approach to child justice administration in line with international standards. It also provides extensive protection of the rights of children in trouble with the law throughout the justice process. In addition, it requires minimal use of formal justice procedures and promotes the use of alternative means to deal with children. The Act also emphasises the important roles to be played by social welfare and probation officers, parents and the police. Therefore, the challenge is on the State to ensure that resources needed for implementing the new juvenile justice law are provided in order to fully realise the protections it guarantees for children. ●



# Children used by adults to commit crime (CUBAC)

by Cheryl Frank

## **Background**

Following South Africa's ratification of the International Labour Organisation (ILO) Convention 182 on the worst forms of child labour, as well as the ILO Minimum Age for Admission to Employment Convention (1973) the Child Labour Action Programme (CLAP) has been provisionally approved by government. A technical assistance project to the Department of Labour, called Towards the Elimination of the worst forms of Child Labour (TECL), then commissioned the investigation and design of three pilot projects aimed at addressing the worst forms of child labour in South Africa.

CUBAC is the focus of one of these pilots. A range of activities has been undertaken in preparation for the piloting of a project to address the problem, which will begin in 2006 in Mitchell's Plain and Mamelodi. The project included a child consultation study which was completed in 2005. Below follows a summary of some of the findings of the study.

## **The child consultation study: Methodology**

Altogether 541 children were consulted during the study. This number included 420 children that were awaiting trial in Secure Care Facilities (SCFs), i.e. Mogale, Leseding and Jabulani Centres in Gauteng and Bonnytoun and Horizons in the Western Cape, as well as 121 children in a secondary school, i.e. Westbury Secondary School in Gauteng.

In total, 41 focus groups were held, each involving an average of 14 participants. Given the fact that the intention of the research was

child consultation, the group discussions focused on obtaining the opinions and views of children rather than facts relating to their individual experiences of CUBAC.

The average age of the children in the sample was 16 years. A total of 492 males (91%) and 49 females (9%) participated in the focus group discussions. The females were all from the school group.

## **Findings of the study**

### ***Children's engagement in economic activity and use of money earned***

Nearly a third (32,9%) of the total group described themselves as never having done anything for money, stating in most cases that they received money from their caregivers. This also means that of the total group, two thirds (67,1%) had in the past engaged in some activity that earned them money.

In terms of illegal activities, just over 30% of the total group, and 38% of the SCF group, reported engaging in illegal activities to obtain money. In contrast, only 2,5% of the school group reported engaging in such activities to earn money.

### ***How children get involved in crime***

Prior to asking children about their views in relation to CUBAC, the researchers explored views and beliefs about how children get involved in crime in the first place. The following issues were raised by the groups.

#### ***Factors at home***

Overwhelmingly, the groups noted that factors at home were the cause of children getting involved in crime, and noted a number of issues in the home that could influence this. Poverty in families, issues of parenting and care of children, and family relationships were mentioned by 33 of the 41 groups.

#### ***Peer pressure and the influence of friends***

This was the second factor to be noted by children as influencing their involvement in crime (noted by 30 of the 41 groups). The influence of peers was characterised by the participants as having many subtle and interesting shades rather than just the idea of friends pressuring children into criminal behaviour. For example, this also included aspiring to have similar possessions to peers.

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### *The use of drugs and alcohol*

The use of drugs and alcohol, and particularly what was characterised as addiction, emerged as a significant theme throughout this study. This was raised as the third set of reasons for children becoming engaged in crime for the first time (raised by 29 of the 41 groups). The nature of the influence of drugs especially was characterised in terms of desperation. This was often described by children as the drugs “making” children commit crime.

### *The need to impress people and gain respect*

A fourth set of factors, and a theme that recurred throughout this study was the idea of children committing crime in order to impress others, most often in order to gain respect, or to be seen as being more or better than others. This was raised by 15 of the 41 groups. This was most commonly reflected in behaviour that related to the acquisition of things that are believed by children to offer status and respect. Some of the groups (6 out of 41) specifically noted the need of boys to impress women or girls.

### *The influence of gangs*

This was noted as the fifth set of factors (raised by 13 of the 41 groups) having an influence on children committing crimes for the first time. This was most prominently noted by the groups in the Western Cape, and to some extent in the school group. The nature of gang influence was described as aspirational, where children observe what gangsters have and how they are perceived by the community, and aspire to the same things.

### **How adults are involved when children commit crime**

Children in the focus groups were asked several questions that attempted to determine whether and how adults engaged children in crime. All 41 focus groups provided information that indicated that children being used by adults to commit crime was a common phenomenon.

### *The direct and indirect role of adults*

Overall, the children indicated that adults actively involved children in crime, through direct and indirect means. The direct means (noted by 30 of the 41 groups) involve engaging children as accomplices in the commission of crimes, including committing crimes together, children acting as look-outs, adults taking children to crime scenes, adults over-seeing the commission of the crime and adults paying children for the commission of crime. Children were also used to sell drugs.

The indirect means involved engaging children in criminal activities (described in 32 of the 41 group discussions) such as buying stolen goods, showing children how to commit crimes and providing the means to do so (such as guns). Another level of this aspect was the communication children received from these adults about how easy it was to commit a crime, the kinds of rewards that could be obtained, and the overall characterisation of crime as attractive and positive.

### *How do adults engage children in crime?*

- **Offering rewards or “bribes”:** money, drugs, guns, etc. All 41 groups identified rewards as a means through which adults engage children in crime. The key issue related to the nature of the reward that was offered, which the children in many cases described as

“bribes”. All the groups identified material rewards such as money (29 groups), drugs (21 groups), guns (6 groups) and clothes. In 14 groups, recognition, esteem, acknowledgement and respect were noted as a reward offered.

The issue of drugs particularly emerged throughout this study as a primary means through which adults were engaging children in crime. Even the acquisition of money was often described by children as relating to the acquisition of drugs in order to feed what was described as an addiction.

- **The use of physical violence and threats of physical violence.** Altogether 27 of the 41 focus groups noted the use of physical violence and the threat of physical violence as a means by which adults coerced children into committing crimes. In exploring the nature of violence and threats used, nine groups noted actual beatings and abuse of children, and one of these groups noted that rape was used. Fourteen groups identified threats of violence being used to coerce children to commit crime, with five of these groups specifically noting threats of death, made with a weapon such as a gun or knife. Two groups used terms such as “torture” and “bullying” to describe the experience of children.

At least six groups described a process of deception that related to adults engaging children in criminal conduct. Primarily, this was described as a process where adults would, over time, provide children with things such as money, drugs, clothes and other items. Then, at some stage, they would claim that “these things cost money” and request the repayment of the “debt” in the form of criminal activities.

### *Other behaviour of adults that influence children to commit crime*

A total of 24 of the 41 groups described in some detail other behaviour of adults that resulted in children becoming involved in crime. In most cases this related to the experiences of children in their families, and the actions of family members that were described as “pushing” children to commit offences. These included:

- circumstances in the home, such as poverty, neglect and abuse, which were noted as the most critical of these influences
- children receiving no guidance or examples of appropriate behaviour
- families ignoring or excusing criminal behaviour
- families making children feel guilty for basic needs.

One participant noted, “Mothers don’t know it, but they cause children to commit crime when they say, ‘don’t sit around, go and work for money’.”

#### *Are children coerced or do they commit crime willingly?*

In exploring this question, the groups provided responses to indicate that children were often threatened and coerced into committing crimes (as was noted earlier, 27 of the 41

groups provided information as to the coercive nature of this aspect). However, the groups also noted that children were equally making decisions as to whether they wanted to commit crime. In total, 39 of the groups stated that children often committed crime willingly, due to the nature of the reward expected.

#### *Do children need help, and what should be done to help them?*

The overwhelming majority of groups agreed that the situation of children being used by adults to commit crime was a problem and that it needed to be addressed.

Having dropped out of school, being addicted to drugs and being subjected to coercion appeared to be prominent reasons why children were believed to require help. Some of the responses also indicated a somewhat fatalistic position, namely that help could be given, but would not make a difference and that a life of crime was somehow inevitable.

In answering the question of what should be done to help children, responses ranged from constructive options, such as the importance of resuming education, to the xenophobic “get the Nigerians out of the country”. The majority of suggestions on how children may be helped emphasised education, development, social work services, sport and recreation, and employment. ●

## *The detention of children: giving effect to the law*

In Case No. 15161/2005 (unreported) the Durban and Coast Local Division of the High Court had to deal with the continued violations of the law related to the pre-trial detention of juveniles in Westville Prison. In an application brought on behalf of several youngsters by the South African Prisoners Organisation for Human Rights, against the Ministers of Justice and Correctional Services, as well as the Director of Public Prosecutions, an order was sought to remove several boys aged 13 and 14 years from the prison, and to place them in a local place of safety. An order was also sought directing the head of Westville Prison to separate a particular boy of 15 years from awaiting-trial children of 17 and 18 years, and place him with children of his own age.

Judge President Vuka Tshabalala granted the relief sought, and postponed the case until 16 November 2005 to allow the respondents an opportunity to provide reasons why the order

should not be made final. On the return date, however, the order was made final by Levinson J, as no opposing documentation was filed.

The case is important in several respects:

- It gives teeth to the prohibition on the pre-trial detention in prison of children aged below 14, as provided for in section 29 of Act 8 of 1959, which remains in force.
- The unacceptability of detaining children aged 14 or younger in prisons is obvious from the fact that the order required these children to be moved to a place of safety.
- The principle of separation by age group of those children who may legally be remanded to await trial in detention was given the judicial stamp of approval, in accordance with the constitutional principles of giving effect to the best interests of children, requiring separation of children from those aged over 18 and, perhaps most importantly, the principle that whilst in detention, children should be treated in a manner and kept in conditions that take account of their age.
- It is noteworthy that the order was not opposed by any of the respondents, which is encouraging. It must surely be a signal of executive acceptance of the need to limit juvenile detention in prison. ●

# NOTICE-BOARD



## **News from the UN Committee on the Rights of the Child**

- The Committee on the Rights of the Child has released General Comment No. 7 (2005): 01/11/2005, CRC/C/GC/7. This General Comment is entitled *Implementing Child Rights in Early Childhood*. A copy of this can be accessed at <http://www.ohchr.org/english/bodies/crc/index.htm>
- Day of General Discussion on “Children without parental care”. This was held on 16 September 2005.

The Committee on the Rights of the Child decided at its 37th session to devote its 2005 day of general discussion to the subject of “Children without parental care” in order to improve implementation of the Convention on this topic and identify practical solutions and steps for ensuring that the rights of children living without parental care are respected.

The Committee identified three main areas for consideration:

- What types of legal frameworks are most likely to ensure that the rights of the child are safeguarded before, during and after separation from parents?
- What family support and alternative care policies can be recommended to help prevent and reduce separation and ensure the most appropriate use of alternative substitute care?
- What opportunities exist for increasing the participation of children in measures to keep them in safety with their family, and in other decisions about their care, including those pertaining to removal, alternative care placements, and reunification?

For more information, see <http://www.ohchr.org/english/bodies/crc/index.htm>



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