

CHILD JUSTICE

Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America

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1. Introduction

At present the management of South African children who come into conflict with the law falls largely under the provisions of the Criminal Procedure Act.¹ This Act, governing the criminal process from arrest to conviction and the imposition of sentence, deals with children and adults alike, and does not recognise the special needs of children or the need to protect their rights, as articulated in international instruments and the South African Constitution. A limited array of special provisions concerning the criminal procedure for children are to be found in the Criminal Procedure Act 51 of 1977.

During the early 1990s there was a strong drive to reform the way in which children were dealt with in the criminal justice system. Both civil society and the state acknowledged that the creation of a separate juvenile justice system was an essential element in improving the way in which children are treated who fall foul of the law.²

A project committee was established in 1996 by the South African Law Reform Commission (SALRC) to draft legislative proposals for a new justice system for children in South Africa. The SALRC project committee completed its proposals in 2000 with the production of a *Report on Juvenile Justice*

after a lengthy consultation process, and the production of several interim documents. Sloth-Nielsen describes the proposed legislation that resulted as being ‘premised on an approach consistent with international principles, such as those contained in the United Nations Convention on the Rights of the Child. The draft Bill proposes a range of new provisions designed to constitute a separate procedural system for children charged with offences. The proposed legislation will apply to all children aged below 18 at the time of commission of the offence, and to children of 10 years or above.’³

The SALRC offered a number of factors that influenced the decision to improve the existing system for dealing with children accused of crimes in South Africa. The first of these factors is the intention to further the realisation of children’s rights. The call for the recognition of children’s rights had also found its way to the Constitutional Assembly after the transition to democracy, resulting in a specific clause in the Constitution of the Republic of South Africa (108 of 1996) dealing with children. The clause grants children particular rights and protections, over and above those afforded to them as citizens within the Bill of Rights as a matter of course. Section 28 of the Constitution creates a ‘mini-charter’ of children’s rights, giving constitutional weight to certain key rights as contained in the United Nations Convention on the Rights of the Child (1989). Notably, several principles relate to children in the criminal justice system. Section 28(1) (g) states that every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under Sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years, and (ii) treated in a manner, and kept in conditions, that take account of the child’s age. The provisions of Section 28(2) require the consideration of the child’s best interests in all matters affecting the child and are relevant in the criminal justice context, as is the constitutional establishment of 18 as the age at which childhood ends.⁴

In addition, subsequent to the transition to democracy, South Africa has signed and ratified a number of international instruments and treaties which relate directly or indirectly to children’s rights. The United Nations Convention on the Rights of the Child,⁵ the African Charter on the Rights and Welfare of the Child⁶ and a number of other international instruments

relevant to juvenile justice have also influenced deliberations and policy-making regarding juvenile justice in South Africa, in particular the drafting of the Child Justice Bill.⁷

The SALRC thus saw the draft Bill as giving effect to the constitutional guarantees for children accused of crimes. The objectives clause at the outset of the proposed Bill emphasised the procedural rights of children as contained in Section 35 and Section 28 of the Constitution, particularly regarding pre-trial detention and sentencing.

The drafting process of the Bill was also strongly influenced by the notion of restorative justice. The SALRC saw reconciliation, restoration and harmony as being at the heart of African adjudication of disputes and the proposed objectives clause explicitly linked the indigenous concept of *ubuntu* to the values underpinning the juvenile justice system, thus Africanising international principles by emphasising family and community.⁷

A third rationale emphasised in early writings was the need to legislate for diversion, the practice of channeling children away from the criminal process to programmes and community-based interventions. Hitherto, diversion occurred at the discretion of the prosecution. Centrally, the Bill proposed by the SALRC devoted an entire chapter to the regulation of diversion, establishing the principle that diversion must at least be considered in each case before the matter proceeds to trial. In addition, diversion was provided for on a series of levels, indicating that more intensive programmes should be reserved for more complex cases. A signal feature, too, was the inclusion of a range of new diversion options, designed to supplement and extend the list of possibilities presently available. The intention to create a sound legal framework for the expansion and regulation of diversion was frequently referred to as an influential consideration.⁸

A further pressure on the SALRC at the time of its formulation of the proposed legislation was the concern in South African society about the high levels of crime. The public were increasingly expressing the need for a system of justice which deals effectively with serious violent criminals. This demand shaped the process of law reform and is evidenced by provisions in the draft Bill that allowed for children charged with serious, violent offences to be tried in a criminal court at a higher jurisdictional level and to be imprisoned both during the awaiting trial period and as a sentence. Expungement of

criminal records was also limited, to the extent that serious and violent offences were excluded. Although these features were not envisaged by the Commission in the early stages of the investigation, the realisation grew, as the investigation unfolded against a backdrop of the rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labeled and treated as criminals, the Bill needed to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crimes.⁹ The effect of these considerations was that the final draft of the Bill exhibited a number of provisions that clearly provided for a balance between the rights of children and the interests of society. An example in point relates to the criteria for detention of children after appearance in court, insofar as it was proposed that a child may be remanded to a prison when, amongst other possible reasons, there is a substantial risk that a child may cause harm to other children in a welfare facility.¹⁰

Criminal law reformers were at the time raising concerns about the fact that crime control approaches were gaining ground in South Africa over the protection of human rights, and therefore children's rights.¹¹ South African policy- and law-makers had in recent years begun to embrace a number of international trends relating to crime control. The *Report on Juvenile Justice* cites concepts such as 'zero tolerance' and the 'broken window approach to policing' that had found their way into policy debates about crime prevention and management in South Africa. It referred to the fact that minimum sentences were now a part of our law, having been ushered in by the Criminal Law Amendment Act 105 of 1997 (although the SALRC was mistakenly of the view that this would be only a temporary measure). The Prevention of Organised Crime Act 121 of 1998 was mentioned as a further example of Parliamentary endeavours to demonstrate to the public that the country had an armoury of legislation to deal with the country's crime problem.

The drafting process culminated in the development of the Child Justice Bill 49 of 2002¹² which was introduced into the parliamentary process in 2002, and debated by the Portfolio Committee on Justice and Constitutional Development in 2003. After the general elections of 2004, Parliament busied itself with other legislation, and the Child Justice Bill has not been reintroduced.

However, embarking on a groundbreaking law reform process of this nature provides many opportunities for ‘getting things right’. It also provides the space to reflect on how things have been done in other parts of the world, and by reflecting on lessons learned from older or more mature systems, we have the opportunity to choose which paths we wish to follow and which ones to avoid.¹³ South Africa is a new democracy and, as such, its criminal justice system as a whole has seen major reform since the transition to democracy. As highlighted by the SALRC in 2000, a range of new legislative amendments have signalled a perceptible shift towards a crime control model.¹⁴ These included, in addition to those referred to above, new anti-terrorism laws; the establishment of the Scorpions; the incorporation of the International Criminal Court Treaty into South African law; and tougher parole regulations. There was a downscaling of the national crime prevention strategy in favour of a more direct crime control mode of operation which saw the introduction of campaigns such as ‘operation crackdown’ and ‘zero tolerance’ search and seizure operations.¹⁵

This paper seeks to examine some debates that have shaped the contours of the Child Justice Bill in Parliament. It reflects upon these against the backdrop of legislative and policy trends in juvenile justice in the United States. It concludes by raising questions about the appropriateness of deviating significantly from the proposals originally put forward by the SALRC and attempts to locate the future of the Child Justice Bill in the current socio-political context.

2. Parliamentary consideration of the Child Justice Bill

As Skelton details,¹⁶ the public hearings on the Child Justice Bill which took place in 2003 were followed by extensive consideration of its provisions by the Portfolio Committee on Justice and Constitutional Development. The deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development (hereafter the Portfolio Committee) followed in March, August and September 2003.¹⁷ During the course of these deliberations the legal drafting team from the Department of Justice and Constitutional Development was asked to make numerous changes to the Bill. However, no

new Bill reflecting these issues was ever publicly issued, and thus the Child Justice Bill, as introduced, remains the official version. Also, no new or amended provisions were ever put to the vote in the Portfolio Committee.

After the elections in April 2004 there has been an inexplicable delay in the further processing of the Bill. Despite the fact that the Bill was at an advanced stage of the Portfolio Committee deliberations, and notwithstanding the fact that it continues to appear on Parliament's agenda, no further discussions have occurred in Parliament since September 2003. The final content likely to be included in the Act when it is finalised can also not be predicted with certainty. Nevertheless there are a number of observations that can be drawn from the deliberations that have taken place regarding the Bill in the Portfolio Committee hearings and debates thus far. A range of themes have emerged from the nature and content of the debates and a few of these, discussed below, form the substantive part of this paper.

Age and childhood

The issue of age has theoretically always been a crucial one in South Africa. Commencing with age thresholds linked to the determination of criminal capacity and various legal rules linked to its proof, the age of 14 has been a key cut off point since reception of the Roman Dutch law into South African law. Essentially, the rule provides for a rebuttable presumption that a child below the age of 14 lacks criminal capacity, unless the State proves beyond reasonable doubt that the child in fact possesses such capacity. Case law has spelt out that the closer the child is to the threshold age of 14, the less weighty the rebuttal evidence would have to be, whilst the closer the child is to seven years (the age of commencement of criminal capacity), the more evidence would have to be adduced to secure a conviction.¹⁸

Again, the age of 14 has in more recent times provided an important limit in statutory law regarding the pre-trial detention of children in prisons. As detailed extensively elsewhere,¹⁹ amendments to Section 29 of the Correctional Services Act (8 of 1959) in 1994 to limit drastically the ability of judicial officers to authorise the pre-trial detention of children in prisons introduced the age of 14 as a threshold for determining the minimum period of detention before first appearance in court (24 hours in the case of children aged below 14, as opposed to the usual 48-hour period applicable to children

aged over 14 and to adults). The re-amendment to this section effected in 1996 to give courts a defined discretion to once again remand children to await trial in prison retained the 14 year old barrier, justified by recourse to the constitutional and international law principle that detention must be used only as a measure of last resort. At the time of writing, it remains legally impossible to detain a child aged below 14 in prison while awaiting trial.²⁰ It was argued then that the numbers of children aged below 14 coming into the child justice system were low, and that they could be adequately accommodated elsewhere (for example in places of safety).

Wishing to avoid the confusion that might result from a proliferation of a variety of age thresholds, and in view of the fact that the age of 14 had to all intents and purposes become a reasonably established determining threshold between older youth and children of more tender years, the approach of the *Report on Juvenile Justice* was to retain this age as a distinguishing factor in a number of areas. [It must be borne in mind that the actual establishment of the true age of a child is, and will continue to be, a thorny issue in a developing country where access to birth records is not always possible, and where the lure of more lenient treatment in the child justice system is frequently exploited by older persons who hold themselves out to be younger than they are. This makes it doubly undesirable to place the requirement upon the system as a whole to have to differentiate a variety of age groups for different purposes.] Key amongst these was in relation to the rebuttable presumption of criminal capacity, which the *Report on Juvenile Justice* and original Child Justice Bill retained (subject to raising the minimum age from 7 years to 10 years) in relation to pre-trial detention in adult prisons and also in relation to the imposition of any prison sentence.

As noted by Skelton, however, this simple scheme has by all accounts become a lot more complex. She points this out in relation to the prohibition of pre-trial detention in prisons of children aged below 14 – a ban which has been in place for a full 9 years, with few reported problems.²¹ She says:

The Portfolio Committee has shown reluctance to accept this complete ban. With regard to the pre-trial detention of children below 14 years of age, the reason has been made explicit by the Portfolio Committee:²² it is that they fear that there will not be sufficient appropriate

alternative secure facilities to accommodate such children. The Portfolio Committee therefore proposes that children will only be detained in a prison if there is no suitable secure care facility within a reasonable distance from the court. Stressing the importance of the physical provisioning, the Portfolio Committee further proposes that this should be a temporary measure, to be reviewed by Parliament within two years of the Bill being passed 'with a view to establishing whether the factual situation in respect of the availability of suitable placement facilities warrants the continued application of those provisions and, if necessary, every two years thereafter'.²³

Again on the issue of age thresholds, she reflects on the tendency to single out 16 and 17 year olds for different treatment, a trend which began with the law on minimum sentences,²⁴ but which she observes has been very much in evidence during the debates on the Child Justice Bill.

The Portfolio Committee has indicated an intention to exclude diversion on a charge of rape for 16 and 17 year olds,²⁵ and has decided that there shall be no automatic right of appeal for 16 and 17 year olds.²⁶ The Bill as introduced did not treat this category of children differently from 14 and 15 year olds. The reason for the approach of the Portfolio Committee on this issue seems to be that the members of the committee, basing their views on what they believe to be public opinion, are more comfortable to accept special protection for young children if they can show that they are protecting the public from older children who commit serious offences. This approach is not altogether a surprise, and although it is not the ideal, the Portfolio Committee has not gone so far as to say that 16 and 17 year olds should be tried as adults.²⁷

Furthermore, the Child Justice Bill as introduced into Parliament did not allow for minimum sentences for children. Indeed, members of the SALRC project committee on juvenile justice had lobbied strenuously against the application of the minimum sentences legislation to children when Act 105 of 1997 was debated, basing their arguments on constitutional and international

law principles, and with some success.²⁸ The legislation did not apply to persons aged below 16 years, and in respect of 16 and 17 year olds, a separate sub-clause suggested that although 16 and 17 year olds were included in the ambit of the Act,²⁹ the sentencing procedure for them was different from that provided for adults.³⁰ Their constitutionally-based opposition was confirmed when the Supreme Court of Appeal in *Brandt*³¹ gave a favourable interpretation of the applicable clauses, holding that prescribed minimum sentences as drafted in Act 105 of 1997 do not apply to 16 and 17 year olds.

Skelton records that at the second round of deliberations on the Child Justice Bill, the Portfolio Committee decided to graft the minimum sentences law (as it applied to 16 and 17 year olds) onto the Bill. She opines that if this were to be entrenched in the final version of the legislation '(t)his would be a major departure from the original vision [of the project committee], and would be an affront ... to the children's rights principle, enshrined in the Constitution, that children should not be detained except as a measure of last resort, and then for the shortest period of time.'³²

Finally, as regards age, Skelton remarks that the Portfolio Committee has indicated an intention to remove the age of 14 years as a lower limit on sentencing of children to imprisonment in relation to certain serious offences.³³ She suggests that the apparent decision to allow children below the age of 14 years to be imprisoned, albeit in narrowly defined circumstances, is not linked to issues of institutional capacity (as the numbers concerned are very few), and concludes that this therefore provides a clear indication of the Portfolio Committee's principled view that the imprisonment of very young children must be possible where exceptional and heinous offences have been committed (such as in the notorious *Bulger* case).³⁴

As will be shown in the next section, there are numerous reasons to be cautious about the introduction of a range of distinct age categories governing various aspects of the procedure applicable to children in conflict with the law (allied to exceptions to such ages as are determined). Not the least of these is the trend observed in North America that any age threshold set can take on a political flavour, with successive manoeuvres to score points by lowering these limits in response to public demands to be tough on crime.³⁵

Individualisation versus the regulation of discretion

An important conclusion drawn by Skelton³⁶ is that the Parliamentary process has to a considerable extent abandoned the individualised approach to decision-making – which lay at the heart of the SALRC proposals – in favour of regulated or structured decision-making.³⁷ By way of example, she says: ‘the Portfolio Committee has chosen to link diversion to schedules of offences. The Bill as placed before Parliament did contain schedules of offences, but the main intention of the schedules as devised by the original drafters had been to place limits on the use of imprisonment. Instead, the Portfolio Committee has built a tight regulatory framework based on the use of these schedules. With regard to diversion, for example, the Portfolio Committee has directed that the system should allow for petty offences as listed in schedule 1 to be diverted informally by a prosecutor, those in schedule 2 to proceed to a preliminary inquiry where consideration will be given to diversion, whilst certain serious offences listed in schedule 3 are to be rendered “not divertable”.’ By contrast, the SALRC proposals were centred on assessment of each individual child as a preface to consideration of all of the social and other factors surrounding the child and the commission of the offence.

She cites three possible explanations for the Portfolio Committee’s approach. First, the use of complex schedules to regulate judicial decision-making has characterised previous law reform undertakings in relation to bail and the minimum sentences legislation, and are therefore part of the ‘work method’ of this Portfolio Committee. Second, politicians appear to believe that this will make the public safer, or at least feel safer. The third reason she provides is that of a lack of faith in functionaries in the criminal justice system, such as the police, the prosecution and the judiciary. All of these sectors are undergoing transformation, leading to a possible fear that inexperienced personnel will not use their discretion wisely, thus the tendency to centralise their decision-making through a more peremptory style of law-making. It is concluded that ‘the offence-based channelling of cases will undoubtedly result in children who may have been candidates for pre-trial diversion ... being swept into the child justice court for trial.’³⁸

Recognising that this may entrench the development of what has been characterised as a bifurcated system – entailing ‘soft treatment’ (such as

diversion) for the majority of children and ‘hard treatment’ (such as lengthy imprisonment) for a small number of others – the conclusion can be drawn that the end result may not be so very different from the position in the USA with the bifurcation that prevails there in respect of juvenile and adult court jurisdiction. This point is elaborated further in the next section as well as in the final part of this paper.

Separation of children from adults

The objective of separation of children from adults in the criminal procedure was a key purpose of the drafting of separate child justice legislation in the first place, and it has been asserted that this is indeed required by the UN Convention on the Rights of the Child.³⁹ The overall question posed in the SALRC’s first *Issue Paper* was how to develop a model for the adjudication of disputes (including courts) that was consistent with international standards, yet economically attainable and practically feasible in a developing country (characterised by deep rural and urban differences) with a shortage of both fiscal and human resources.⁴⁰ Fifty-one per cent of magistrate’s courts are situated in rural areas and where there is only one magistrate. It was obvious that the concept of separate or specialised courts in each jurisdiction would pose numerous practical problems. A particular dilemma concerned the issue of children who are co-accused with adults, and the *Issue Paper* raised the point of whether the ideal of a differentiated court system for juvenile accused could be achieved through compulsory separation of the trials of adults and children, or whether the inevitable duplication of trials, and evidentiary difficulties that might be occasioned for the prosecution, rendered obligatory separation undesirable or unworkable.

The proposals in the subsequent *Discussion Paper* and the final Report⁴¹ centred chiefly on formalising to a greater degree the structure of the courts that are presently unofficially known as ‘juvenile courts’; that is, providing for the designation of a criminal court at the district court level. This court would be called the ‘child justice court’ and would, it was suggested, be staffed with more specialised personnel. Trials on more serious matters involving children would then be referred to regional and High courts,⁴² as is the current practice. From this it was clear that no separate courts were envisaged for children who, for reasons relating to the seriousness of

the charges, would be tried by courts above the level of jurisdiction of the proposed child justice courts.

However, it seems that the SALRC sought to adhere to the philosophy of separate treatment for children by employing other means. Fulfillment of the objective of 'separation' is especially evident in a provision which obliges any court other than a child justice court (in other words a regional or High court) hearing the case of an accused child to apply the relevant provisions of the proposed juvenile justice legislation, including the sentencing provisions. It has been argued that this proposal appears to be designed to avoid the possibility of a charge being leveled and that trials in superior courts above the level of the (district) child justice court would constitute 'transfers' out of the juvenile justice system for children charged with serious offences, as in the USA and Canada.⁴³

This provision was supplemented by features that tended to support the idea that, since most specialisation would be available at the lower court level, children should ideally be tried in the district courts wherever possible. A provision was included to the effect that, where a decision had to be made as to whether a district or other court should have jurisdiction in a particular case, preference must be given to the retention of the jurisdiction of the district court.⁴⁴ The fate of this provision is now dubious, however.

Further, the *Discussion Paper* and *Report on Juvenile Justice* proposed a presumption that where adult persons are co-accused with children, the trials would be heard separately unless an application for joinder had been successfully made.⁴⁵ There was therefore a general premise (or presumption) that the trials of adults and juveniles would ordinarily be separated, with exceptions allowed only upon application.

This scheme, designed to 'ring fence' as far as possible the child in the child justice system has not met with apparent Parliamentary approval, on the grounds that it is allegedly cumbersome, burdensome on the prosecution, and administratively liable to cause confusion with multiple dockets, charges sheets and testimony being required. The deletion of the presumption of separation of trials will, however, have the effect that children who are co-accused (alleged to be approximately 15% of all children in conflict with the law) will face trials with adults – in an adult court (district or otherwise). The fact that the provisions of the Child Justice legislation will apply to

children thus being tried (i.e. even with adults in ordinary criminal courts) does not, in my view, ameliorate that position, as the various versions, including those developed by the SALRC, have always provided for fairly onerous incarceration options (as a last resort). Where one-stop child justice centres operate, as in Mangaung and Port Elizabeth at present, the legislature appears to contemplate that children who are co-accused with adults will not benefit from the special conditions and services provided there, as they will be tried in the usual local district courts alongside the adult co-accused. Crucially, too, the Parliamentary deliberations have also seen the removal of proposed requirements related to specialisation amongst child justice court personnel.

The Role of welfarism and the children's court

The role of the (welfare) children's court has only recently begun to assume its rightful place in South African legal literature.⁴⁶ Throughout the 20th century, most juvenile offenders did not come into contact with the statutory system of child welfare nor was their delinquency dealt with in the children's court.⁴⁷ They appeared in ordinary criminal courts.

Louw and van Oosten have asserted that

[I]n practice, however, diversion [to the children's court] has by and large been unsuccessful owing to an apparent under-utilisation ... of the procedures offered by these sections, the restricted range of diversion options offered by them and the fact that they *start* at the wrong *end* in so far as criminal prosecution of child offenders should only be used as a *last* resort.⁴⁸

The advantage of the children's court procedure is that it takes the form of an inquiry, rather than a trial,⁴⁹ and no conviction or sentence is imposed at the conclusion of the proceedings. Further, the procedure in the children's court requires that a full assessment of the child's circumstances be made by a social worker for consideration⁵⁰ at the inquiry by a Commissioner of Child Welfare (every magistrate is automatically a Commissioner). If the child is found to be in need of care, the court may order that the child be placed with his or her parents under supervision, with foster parents, in a children's

home or in a school of industries.⁵¹ A legal nexus between juvenile justice and the children's court exists through the operation of Section 254 of the Criminal Procedure Act 51 of 1977, which permits a criminal trial to be stopped if it appears to the court that the child is in need of care. The child can then be referred to the children's court set up under the Child Care Act 74 of 1983, and any criminal conviction already handed down is deemed not to have been made.

Once subject to an order of the children's court, that order can last up to two years, but can be extended administratively thereafter. In many respects, thus, the South African children's court model approximates the juvenile court jurisdiction of the USA. It carries the hallmarks of closed proceedings, an inquisitorial procedure, the ability to refer a child to programmes or institutional care, and jurisdiction over a wide range of delinquency-related issues, which indeed would bring many South African children (those without proper parental care, those living on the street) within the purview of the Child Care Act. However, Sloth-Nielsen has described how as the IMC process uncovered the ills of, and lack of resources devoted to, the child and youth care system more generally, the lure of a more central role for the children's court in juvenile justice proceedings dimmed rapidly, such that the SALRC concluded – by a rather circuitous route, given earlier advocacy and a temporary surge in interest in the children's court in the middle of the decade – that the place of the children's court in relation to juvenile justice should essentially be no different from current practice.⁵²

3. The evolution of a dedicated juvenile justice system in the United States

Having looked at the evolution of the proposed child justice system in South Africa since 1997 and the proposed changes and amendments to the Child Justice Bill in its original form, it is interesting to reflect on the experiences of a developed country like the United States that has had a dedicated juvenile justice system for over 100 years. The comparison not only provides a clear illustration of the long term impact of certain legislative and policy decisions, but the experiences in the US further serve as a cautionary tale for

politicians and policy-makers who see incarceration and crime control as the panacea for the problems of crime and violence in our society.

This paper does not seek to provide a comprehensive review of the way in which children in trouble with the law are managed in the US (and in all of its states and territories) but rather to look at the way in which major policy and legislative decisions over the past twenty years reflect the current situation in South Africa and to explore the similarities and differences in approach.

Age and childhood

The discussion earlier in the paper on age and related thresholds indicated that clear guidelines were originally developed by the SALRC. This clarity has become blurred, with the suggestions of several other ages to determine sentencing or a specific course of action. The experience in the US indicates clearly how a lack of clarity with regard to age thresholds can exacerbate inconsistency in the treatment of children in the criminal justice system. The American system is complicated by federalism. As stated by the National Centre for Juvenile Justice 'America does not have a juvenile justice system. Rather, it has 51 separate systems'.⁵³ As regards a definition of childhood, this varies from one state to another. This creates a great deal of confusion and inconsistency with regard to the notion of childhood. The situation in a federal system where there is no consistency across states leads to a situation where the decision with regard to the age at which a child can be prosecuted, the decision with regard to whether a child be waived into the adult criminal justice system, any imposition of a sentence to life imprisonment without parole, and so forth, can vary greatly based purely on the geographical location of the child.

The US is one of only two countries that has not signed the UN Convention on the Rights of the Child and confusion with regard to the definition of a child could well be one of the major stumbling blocks to ratification, in that the Convention provided clearly that a child is a person under the age of 18 years.⁵⁴ With the enormous variations across the US in this regard, it would be very difficult to agree on a central position, thus making signature almost impossible.

South Africa, too, should avoid the undesirable proliferation of different

age cut off points, as this undermines the overall protection international law intends for persons aged below 18 years. Further, the experience in the US points to the prevalence of ‘age creep’ – this year’s 16 becomes next year’s 15. Finally, given age determination problems that prevail in South Africa, the message is surely ‘keep it simple’!

The role of welfarism

The majority of children who find themselves in trouble with the law in the US are dealt with by the juvenile court. Males and Macallair describe the system as follows:

Founded on the belief that children were entitled to a range of special protections due to their vulnerability and immaturity, the juvenile court was intended to separate youth from the deleterious effect of the adult justice system. Inherent in these special protections was the belief that children, because they have not established fixed criminal careers, were more amenable to adult guidance and intervention. In addition, social commentators frequently noted that adult prisons and jails were little more than factories of ‘vice and viciousness’.⁵⁵

Until the late nineteenth century, juveniles who committed crimes in the United States were dealt with through the same criminal justice system as adults. Gardner explains that while minors were afforded a defence of ‘infancy’ they received no other legally recognised special attention. The juvenile court movement, which emerged at the turn of the twentieth century, was founded on the ideal of rehabilitation and offered children individualised and non-punitive dispositions according to their individual needs without the encumbrance of the adversarial model familiar to the criminal law. The need was recognised for a non-punitive *parens patriae* (referring to the fatherly or motherly benevolence of the presiding officer) alternative criminal justice system for juvenile criminal offenders.⁵⁶

The bulk of cases are still dealt with in the juvenile court – although mechanisms have always existed to waive certain cases into the adult criminal court. Juvenile court jurisdiction is not limited to criminal behaviour but also covers status offences, i.e. non-criminal behaviour deemed harmful to

the young person's healthy growth and development (truancy, for example). The theory is that the juvenile courts would impose dispositions beneficial to the individual appearing before them.⁵⁷

The risk inherent in a system of this nature is that while the intention is to provide dispositions perceived to be in the best interest of the child, the system inherently lacks the rigorous procedural protections mandated for criminal cases. Cases such as *in re Gault*⁵⁸ and others led to the United States Supreme Court re-instating many of these protections in juvenile court cases. While this afforded juveniles increased protection from overly onerous periods of deprivation of liberty in the care of the state, Supreme Court scrutiny also began to blur the lines between the functions of the juvenile and adult systems.

An important difference between the juvenile justice system in the US and the South African system is the way that decisions are made with regard to the management of the child once they have been found 'guilty' of an offence. Children in the American juvenile justice system are not convicted of an offence but rather are adjudicated as 'delinquent' by the juvenile court. This means that despite any potential incarceration, they will not have a criminal record on release from care (much like the South African children's court procedure which may result in a referral to a school of industry). In South Africa, once a child has been convicted, the court will make a decision regarding the sentence as well as the length of time that would need to be served in the case of a custodial sentence.⁵⁹ The time served could also be influenced by legislation relating to parole.

The US system differs considerably from state to state in the way they structure decision-making in connection with the placement, length of stay, and eventual release of a child.⁶⁰

The US National Centre for Juvenile Justice explains that

[I]n some states, the juvenile court's involvement with an 'adjudicated' child basically ends with the decision to commit him or her to state custody – the agency that runs the correctional facilities takes over from there, determining the placement location, the level of security, the length of stay, what programmes the child will participate in and the timing and conditions of release. In others, the court is actively

involved in some or all these decisions. There are states in which juvenile courts impose definite periods of confinement on committed delinquents, in the manner of an adult criminal court handing down a determinate sentence of imprisonment, and states in which the terms of commitment are almost entirely open-ended. Finally, there are states in which the decision to release a juvenile back to the community belongs solely to the agency that runs the commitment facility, states in which the court makes or at least reviews the release decision, and states in which a “juvenile parole board” operates independently of either.⁶¹

The spirit and intention of the system described above reflects quite closely the original intention of the Child Justice Bill to treat each child individually and to construct a sentence or management plan that would address the unique circumstances of a particular child. The positive aspect of this system is that it allows professionals trained in the care and management of children to determine how best a child can be rehabilitated and reintegrated into society. This works well in some states where there is strong intersectoral co-operation and systems are in place to properly assess each child and to monitor and review their progress and make the necessary decisions with regard to their release. The danger inherent in this system (and the lesson for South Africa) lies where suitable monitoring mechanisms are not in place. The facilities and care agencies have wide latitude in terms of how long the child should remain in their care (many of them having committed minor or status offences) – some states allowing for the child to stay until the age of 18 at the discretion of the facility or managing agency. There is therefore a need to be vigilant to ensure that children do not remain in the system for longer than necessary.

Individualisation and regulation of discretion

The juvenile justice system described above has a solid footing in the US and the majority of children in trouble with the law will be adjudicated through the juvenile courts. However, indications are that in the last few decades there has been a growing tendency to waive children out of this system and into the adult court. Skelton notes that ‘the US, having originally led the way

on the welfarist approach also has the less admirable record of having led the way on increasingly retributive, tough on crime attitudes towards the child offender in the last two decades.⁶²

Between 1992 and 1995, 41 states changed their juvenile justice systems to make it easier to try juveniles as adults. In 1999, nearly 18 000 children under 18 spent time in adult prisons, 3 500 in the general population with adults.⁶³

In the section above describing the evolution of the Child Justice Bill in South Africa, it was noted that the original intention of the Bill was to decide each case individually by looking at the circumstances surrounding the offence and taking into consideration the social, emotional and psychological issues impacting on the individual accused. The idea was to move away from judgments made purely on the basis of the crime category. However, in parliamentary debates and in later versions of the Bill, it is clear that decisions are being linked more and more closely with the particular crime category and that harsher penalties are being proposed for certain crime categories.

Similarly, it is clear that there has been a shift with respect to the exercise of discretion in the management of juvenile justice cases in the US. Bishop and Decker note that since the early 1990s there have been significant changes in discretion within the juvenile justice system, all of which having served to increase punitiveness. They cite the introduction of punishment grids and the expansion of methods for waiver to the adult court. They argue that rather than individualised discretionary decisions, judicial officers find their hands increasingly tied by mandatory minimum sentencing legislation and other forms of increased punishment. They further argue that diversion, one of the key initiatives in juvenile justice in America 20 years ago, has been largely sidelined due to punitive responses over the last decade.⁶⁴

According to Building Blocks for Youth, over the past ten years almost every state in the US has changed its laws to make it easier to prosecute juveniles as adults. In the past, appearance before the juvenile court was routine. In rare cases, where the young person was felt to be extremely violent or a chronic offender, the jurisdiction of the juvenile court was waived and the juvenile was transferred to the adult court. In addition to this mechanism, most states have always had legislation that excluded youth charged with certain offences (e.g. murder) from juvenile court jurisdiction. However, they

note that recently, states throughout the US have passed ‘transfer measures’ in order to send more juveniles to the adult system.⁶⁵

Building Blocks for Youth outline the three principle ways in which youth are tried in the adult criminal court, namely:

- Judicial waiver: state law allows the juvenile court judge the discretion to have the youth’s case tried in the adult criminal court.
- Direct file or ‘prosecutorial discretion’: state law that allows the prosecutor the discretion to have the youth’s case tried in the adult criminal court.
- Statutory exclusion: State law that automatically requires a youth’s case – usually based on the age of the youth or the alleged crime or both – to be tried in the adult court.⁶⁶

Probably the most rigid of the transfer methods is the latter, given that the juvenile court is completely circumvented. According to the Coalition for Juvenile Justice, 29 states have laws that exclude youth who commit serious offences and/or repeat offenders from the jurisdiction of the juvenile court. This differs from a mandatory waiver in that the adult court has jurisdiction from the outset and there is no juvenile court waiver hearing.⁶⁷

Young⁶⁸ argues that provisions for the transfer of youth to the adult court are not new. However, historically, transfers were largely subject to judicial discretion and were limited to the most serious offenders who, in the judgement of the juvenile court, could not be rehabilitated. He believes that in recent years the emphasis has shifted from rehabilitation to punishment and incapacitation and that this has led to the proliferation of transfer provisions which do not require the adjudication of the juvenile court, e.g. prosecutorial waiver and statutory exclusion.

Fagan juxtaposes this proliferation of waiver options with the thinking in the original juvenile court reform movement that there was a presumption of childhood (as noted by historian David Tanenhaus), and that only the most incorrigible juveniles were transferred to the adult criminal court. Thus, during the first three quarters of the twentieth century, children were far less likely to have been transferred into the adult system. This must be seen against the growth internationally in the late nineteenth century of the

legal construction of childhood as seen in the adoption of the United Nations Convention on the Rights of the Child.⁶⁹

Separation of children from adults

Much has been written on the demerits of trying children as adults. Many researchers would agree that the extent to which this more punitive approach is impacting on levels of serious and violent crime is negligible. To the contrary, indications are that a punitive, retributive system which involves lengthy periods of incarceration is unlikely to reduce recidivism and will in all probability have a negative impact on the successful reintegration of a young offender, ultimately increasing the cycle of crime.

Building Blocks for Youth outline a number of ways in which ‘transfer’ to the adult system weakens the protections afforded by a dedicated juvenile justice system. For example, they note that children tried in the adult court face the same penalties as adults including life without parole and until recently, the death penalty.⁷⁰ Further, they will receive little or no education, mental health treatment, or rehabilitative programming, will obtain an adult criminal record which could limit future educational and employment prospects, and are at greater risk of rape, assault and death in adult prisons.⁷¹

A number of scholars have noted the negligible positive impact of harsh sentencing practice. Bishop et al. found that transfer to criminal courts increased the likelihood of recidivism. They also found that the seriousness of the re-offending was greater.⁷² Similarly, Chen and Shapiro in a recent study noted that there is a direct positive link between harsh prison conditions and rates of recidivism.⁷³ Fagan found that criminalisation of adolescent crime failed to provide more effective punishment and lower recidivism rates. The expected outcomes of greater accountability and lengthier sentences were not gained from criminal court punishment, nor was community protection increased. Rather, he contends that the policy implications from his study suggest continued social jurisprudence for adolescent crimes and a separate jurisdiction for juvenile offenders.⁷⁴

In addition to the growing body of evidence that treating children as adults in the criminal justice system neither reduces crime nor protects the citizenry, Fagan argues that the drive to try children as adults is contradicted

by emerging research regarding their maturity and criminal culpability. Studies on brain development and the behaviours that it controls suggests that children are immature far longer than was previously thought, thus providing powerful support for the argument that children need to be treated differently. He reasons that limitations on maturity are recognised insofar as they affect children's ability to vote, marry or join the armed forces, yet the same standards are not applied when discerning criminal culpability. He ably illustrates the different outcomes where a child is tried in the adult criminal justice system. He contends that sending juveniles to the adult system exposes them to harsh punishment, and negative peer influences that may have a perverse effect on future criminal behaviour.⁷⁵

There are many problems related to the trial of children as adults, particularly as this relates to the length of sentence they receive and the facilities where they are detained. There is a growing body of knowledge proving that treatment and short periods of incarceration are more likely to have a deterrent effect than long periods of incarceration that are often with limited programmes. This becomes more true when one considers that children tried as adults are likely to serve their sentence in adult prisons that are not equipped to meet the need of juvenile offenders. An interesting observation in a newly released documentary film by Leslie Neale entitled 'Juvies'⁷⁶ showcases two case studies where two young girls have been incarcerated in the adult system for the same crime category (in different cases). One was sentenced to 8 years in prison while the other was sentenced to 27 years. Interviews with the girls give an interesting insight into human coping mechanisms. The girl with the shorter sentence has a clearly outward looking focus, i.e. what can she do while in prison in order to ensure that she survives once she gets out. She is therefore motivated to take as many courses as possible in order to secure employment upon release. The other has focused her attention inward, on how best to survive while in prison. It is clear that she does not see release as part of her future, and has therefore focused on 'learning the ropes'.

The story clearly illustrates how ineffectual a long term sentence is. The second child will be 43 years old when she is released and will still have many productive years during which she will be expected to support herself and contribute to society – yet how will she have learned to do so? And

how then does incarcerating her for this length of time contribute to a safer society?

There are those that argue that imposing harsh penalties on juveniles will deter other young offenders. In my personal experience of interviewing children in the criminal justice system, they admit that they seldom thought beyond whether they would be able to commit the offence without getting caught. They gave little or no consideration to the court process, let alone the length of the sentence that they would receive. This view is borne out by the research documented in a recently published Human Rights Watch/Amnesty International publication,⁷⁷ where the point is made that adolescent thinking is present-oriented and tends to ignore future outcomes and implications.

Trying juveniles as adults also exposes children to the range of 'tough on crime' measures that have been introduced in the US in the last decade, a response at the political level to the public demand for increased punitiveness. One such measure has been the introduction of 'enhancement laws' in certain states, allowing an increase in sentence if certain factors were at play when the crime was committed. These include gang affiliation or the use of a firearm in the commission of the crime. An example cited in the 'Juvies' documentary mentioned above profiles a 16-year-old boy who was driving a car from which two known gang members discharged a weapon. No one was injured and the court had no compelling evidence that the boy driving the car was in fact a gang member. However, as a result of enhancement laws in California, the sentence imposed was 35 years to life imprisonment. Members of the public who had stated that they were in favour of children being tried as adults, and who were canvassed as to how long they thought he should be sentenced, suggested periods of between one and eight years. All were shocked at the length of sentence imposed by the court.

The consequences of politicised policy reactions in the juvenile justice sphere has been graphically played out in both the United States and in the United Kingdom. Referring to the US, Krisberg asserts that the most destructive myth about juvenile crime was the creation of the myth of the juvenile 'super-predator', the popularisation of which was preceded by a sharp increase in violent crime during the 1980s in the United States including violent crime by adolescents.⁷⁸ The myth was fuelled by predictions of dramatic future increases in youth violence made by James Wilson and

John Dilulio. Wilson predicted that by 2010 there would be 30 000 more juvenile ‘muggers, killers and thieves’ in the US. Dilulio predicted that a new wave of youth criminals would be upon us by 2000. He said that ‘fatherless, godless and jobless juvenile super-predators would be flooding the nation’s streets’⁷⁹ and that ‘by the year 2010 there will be 270 000 more juvenile super-predators on the streets than there were in 1990’.⁸⁰

The dire predictions by Wilson and Dilulio never materialised. In fact, according to Human Rights Watch/Amnesty International, youth homicide began to drop and by 2002 was lower than it had been in 1976.⁸¹ Nonetheless, according to Krisberg, the media loved the ‘barbarian at the gates’ theory and that the politicians soon jumped on the bandwagon.

The Children’s Court Centennial Communications Project notes:

Too often when the public hears about the juvenile court, it is following a hyper-violent act committed by a youth. Although less than one half of one percent of all American kids were arrested for violent crimes last year, the majority of times kids are portrayed on the evening news it is in connection with violence. The result: although juvenile homicides have dropped by 45% since 1993, two-thirds of Americans believe that crimes by juveniles are on the increase. The ‘man bites dog’ credo of news coverage coupled with the pandering of some self-aggrandising politicians has given the public the impression that the isolated is the common. It has also created an environment in which this 100-year-old experiment called the juvenile court is badly misunderstood by the very nation that founded it. The result is ambivalence and at times outright hostility towards a separate system of justice for juveniles.⁸²

According to Krisberg, the ‘super-predator’ myth played a role in 47 states amending their laws on juvenile crime to get tougher on youthful offenders. This included modifying laws to permit younger children to be tried in adult courts; more authority for prosecutors to file juvenile cases in adult courts; allowing judges to use ‘blended sentences’; subjecting minors to a mixture of juvenile court and criminal court sanctions; weakening the protection of the confidentiality of minors tried in juvenile courts; allowing juvenile court

convictions to be counted later in adult proceedings to enhance penalties; amending state laws to add punishment as an explicit objective of the juvenile court system; and giving victims a more defined role in juvenile court hearings. Juvenile incarceration increased and more minors were sentenced to adult prisons.⁸³

Similarly, in the UK, Muncie uses the example of the murder of 2-year-old James Bulger in 1992 by two 10-year-old boys to illustrate the influence of the media on public perception and subsequent policy and legislative development. The murder of the toddler obviously caused widespread moral outrage in the UK and around the world and was given sensational press coverage. Muncie uses Chibnall's five informal rules that govern what is considered *newsworthy* by the media to illustrate why the Bulger case received so much media attention, namely that the case involves a visible and spectacular act, physical or sexual violence, graphic presentations, notions of individual pathology, and demands for a firm and deterrent retributive response.⁸⁴ This case had an impact on child justice policy around the world in that law-makers now feel compelled to construct legislation that will cover the possibility that an event of this nature may reoccur.⁸⁵

Krisberg asserts that the movement to treat younger offenders as adults has been aided by other myths. These included the perception that juvenile courts are too lenient and that juvenile courts are unable to appropriately sanction serious and violent youthful offenders. Also, the public perceive juvenile court sanctions to be ineffective and that treatment does not work, although neither belief, he asserts, is backed by any empirical evidence. He contends that there is a growing body of evidence that refutes the myth that nothing works with juveniles.

Sarre agrees.⁸⁶ He refers specifically to the famous 'nothing works' article written by Robert Martinson and published in 1974 where Martinson asserted that '... with a few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism' and that 'our present strategies ... cannot overcome or even appreciably reduce the powerful tendencies of offenders to continue in criminal behaviour.' In light of the powerful impact that this article had on public perceptions, Sarre warns of the danger of research findings and conclusions assuming an inappropriate life of their own. Martinson's contention that 'nothing works'

became a catch phrase that provided a foundation for rightwing policy-makers and assisted them to sell the notion that long terms of imprisonment and capital punishment were the only viable solution for the protection of the public. Despite that fact that Martinson himself came full circle and distanced himself from these findings, and that subsequent research found that there were a range of rehabilitation programmes that did have a measurable and positive impact, the influence of this initial theory on policy development was profound. Sarre points out that 15 years after the publication of the article, the abandonment of rehabilitation was confirmed by the US Supreme Court. In *Mistretta v United States* the court upheld federal sentencing guidelines that removed the goal of rehabilitation from serious consideration when sentencing offenders.⁸⁷

Reliance on incarceration as a crime control mechanism

According to Mauer and Chesney-Lind 'by relying on incarceration as the predominant mode of crime control for the past 30 years, the United States has developed a social policy that can be described only as mass imprisonment. With two million Americans behind bars in the nation's prisons and jails, the impact of these policies on American society is more profound than at other points in history.'⁸⁸ Similarly, Travis notes that in 2002 more than 630 000 individuals left prison compared with 150 000 thirty years ago.⁸⁹ The US currently has over 2 million people in prison. Of the 600 000 persons released every month, it is estimated that two-thirds will return to prison within six months.⁹⁰

The Youth Transition Funders Group estimates that more than 100 000 teenagers are held in custody in the US every day, very few of whom are violent offenders. In fact, they say that one-third of these children are confined for what they term 'status offences', i.e. acts that if committed by an adult would not be considered violations of the law. These include acts such as running away, violating curfews, being 'beyond the control of parents', truancy, public order violations and technical violations of parole.⁹¹

During the past decade, crime in the US has decreased and according to the Bureau for Justice Statistics between 1991 and 2003 violence and property crime more than halved. However, despite the decreasing crime rate, the rates of incarceration of both juveniles and adults have continued to increase.

According to the Youth Transition Funders Group the numbers of youth in custody of the juvenile justice system rose by 50% during this period.⁹²

Apart from the more commonly acknowledged immediate problems related to incarceration (e.g. exposure to danger), it is important to look at the longer term impact of mass incarceration on both the individuals and the society to which they return. The US provides a useful case study of this collateral damage. This is a country that has disenfranchised large number of its minority citizens through its restrictive reintegration policy, barring access to social security for convicted felons.

A report by the Legal Action Centre (LAC) found that ‘people with a criminal record seeking re-entry face a daunting array of counterproductive, debilitating and unreasonable roadblocks in almost every aspect of life.’⁹³ They provide an overview of the following legal barriers that occur in some or the majority of states:⁹⁴

- Allowing employers to deny jobs to people who were arrested but never convicted;
- Allowing employers to deny jobs to anyone with a criminal record regardless of their subsequent track record;
- Banning some or all people with drug felony convictions from being eligible for federally-funded public assistance and food stamps;
- Most states make criminal history information accessible to the general public making it easier for employers to discriminate based on old or minor convictions;
- Housing authorities denying eligibility for federally-assisted housing based on arrest that did not lead to conviction; and
- Restrictions on the right to vote.

The LAC argues that these and other restrictions make re-entry into society much more difficult for people who have been arrested or convicted. Certainly, there is now a body of information that support the difficulties that South African prisoners face upon release, as regards access to jobs, housing, and so forth, in order for them to stay away from a criminal life.⁹⁵

4. So what does the US experience teach us in South Africa?

It is clear from Section 2 of this paper that while there is recognition both from the legislature and the executive that it would be beneficial for South Africa to have a separate statute dealing with children in the criminal justice system, the letter and spirit of the original Child Justice Bill developed by the SALRC has been eroded. While no official version has been released after the 2002 tabled document, utterances by politicians and legal drafters, when viewed against the backdrop of an increasingly punitive public mood and the tightening of legislation in nearly all other aspects of criminal justice, the conclusion that can logically be drawn is that the elements of the Bill which promote a less retributive methods of adjudication and sentencing may be sacrificed as part of a 'get tough on crime' agenda. Specifically, in terms of age and criminal capacity the Justice Portfolio Committee has shown a reluctance to ban outright the incarceration in prison of children awaiting trial, or even more narrowly children below a fixed cut-off age. It was noted that 16 and 17 year olds have been singled out for different and more severe treatment – while the committee is not overtly saying that this age group should be tried as adults, it is to all intents and purposes excluding them from some of the main protections offered to other children in the Bill, such as the preliminary inquiry procedure where they are charged with offences such as rape.

The Bill as submitted to Parliament did not allow for minimum mandatory sentencing to be applied to children. While facing the weight of disapproval of the judiciary in the Brandt judgement⁹⁶ (where the Supreme Court held that minimum sentences as currently drafted do not apply to 16 and 17 year olds), the possibility remains that the Portfolio Committee could redraft the applicable provisions and graft them onto the existing sentencing provisions of the Child Justice Bill. Further, there is still a notable hesitancy towards the abolition of the life imprisonment sentence for children (as required by article 37 of the UN Convention on the Right of the Child) with one proposal rather disingenuously permitting the sentence of life for children but limiting it to a period of 25 years imprisonment.⁹⁷

Similarly, it was noted that the deliberations and debates in South Africa

have moved away from the individualisation of cases as was the original intention of the drafters. The intention was to look at each child individually rather than to link all decisions with regard to how the case is managed to a particular crime category or schedule of offences. Similarly in the US, the original intention of the juvenile justice system was to assess all children holistically, taking into consideration the unique circumstances of each case. With the increase in the number of waiver provisions, the US has also moved away from this model to one that looks specifically at age and offence categories for certain key directive decisions.

Interestingly, there is a growing recognition in some states in the US that a punitive juvenile justice system which focuses on punishment and incarceration rather than rehabilitation and reintegration is not having the desired effect (as discussed in Section 3 of this paper). Gest and Pope argue that juvenile crime will only begin to decrease when the 'get tough' and preventive approaches are effectively combined.⁹⁸ Marc Mauer⁹⁹ is of the view that the public in many countries has come to rely far too heavily on viewing the criminal justice system, and prisons, as the primary solution to the crime problem. This is a 'back end' approach that is very limited. Ultimately, he believes, we need to find ways to expand the discussion on crime in a broader way. Within the justice system, this might include more emphasis on community policing, community service sentencing, or restorative justice.

Within the policy environment, it is useful to record that despite the introduction of harsher crime control policies and laws (as discussed earlier), there remain vestiges of the previous more preventive and restorative approaches, particularly in the policy positions of some of the criminal justice cluster departments. The Department of Social Development, responsible for the administration of the management of juvenile facilities as well as the administration of the probation service,¹⁰⁰ continues to adopt a restorative policy framework with prevention and treatment as the main driving forces, and with the notion of incarceration as a measure of last resort as a guiding principle. They have also aligned their latest strategy for service delivery to children in the criminal justice system explicitly with a range of international instruments relating to minimum standards (namely The Beijing Rules for the Administration of Juvenile Justice; United Nations Standard Minimum

Rules for the Protection of Juveniles Deprived of their Liberty and the Riyadh Guidelines for the Prevention of Juvenile Delinquency) none of which promote retribution as the key objective of punishment.

Similarly, the release of the White Paper on Correctional Services indicates a strong move to view rehabilitation and reintegration as the primary foci of the Department of Correctional Services, with a recognition that children do not belong in prison and that every effort should be made to ensure that they do not end up in the custody of the state.¹⁰¹ The Department (and obviously the White Paper enjoyed Cabinet approval too) has also iterated the position that children should not be in correctional centres (prisons), and should as far as is possible be diverted from the criminal justice system. Where this is not an option, they should be accommodated in secure care facilities that are designed for children.¹⁰² The White Paper further asserts categorically that children under the age of 14 have no place in correctional centres. Diversion, alternative sentences and alternative detention centres run by the Department of Social Development and the Department of Education should be utilised for the correction of such children.

However, historically there has been a tendency by South African law- and policy-makers to look to US models for guidance when seeking solutions to the crime problem. This is illustrated by, for example, the modelling of the Scorpions on US equivalents, the introduction of privatised prisons, the use of the Minnesota Guidelines in the development of a mandatory sentencing policy, and the development of the Preventions of Organised Crime Act (the clauses regarding penalties for gang affiliation being taken largely from US law).

While the Parliamentary deliberations concerning the Child Justice Bill have not overtly adduced or cited US models of juvenile justice in support of particular positions, there is some evidence that the changes may result in a system in which protection is selectively provided to deserving cases, whilst a punitive response is obligatory where serious crimes are involved, or where the children are regarded as undeserving of the protection of childhood. A more punitive criminal justice policy is the central driver behind this development, it is argued.

5. Conclusion

As stated initially, South Africa still has the opportunity of reversing some of the adverse changes to the Child Justice Bill before it is voted into law.¹⁰³ In its original form, the Child Justice Bill has already served as a model law elsewhere in Africa,¹⁰⁴ and it would be unfortunate indeed if regressive measures, such as bifurcation, mandatory sentencing and pre-trial detention of children aged below 14 years in prisons, were allowed to survive. Rather than following the lead of the US, we should be championing the restorative and reintegrative models embraced closer to home in Africa, and associating ourselves with the values of *ubuntu*, proportionality and individualisation that they have enshrined as central in their child justice laws.

Endnotes

- 1 Criminal Procedure Act 55 of 1977. Other relevant legislation of limited relevance is the Probation Services Act 1991, as amended, and the Child Care Act 74 of 1983.
- 2 Community Law Centre, 1999, *What the Children Said*. Bellville, Western Cape: University of the Western Cape, p.1.
- 3 Sloth-Nielsen J., 2000, 'Child justice'. In C.J. Davel (ed) *Introduction to Child Law in South Africa*. Cape Town: Juta and Co, Chapter 22.
- 4 Section 28 (3).
- 5 Ratified on 16 June 1995.
- 6 Ratified on 7 January 2000.
- 7 Skelton A., 1998, 'Juvenile Justice Reform: Children's Rights versus Crime Control' in C.J. Davel (ed) *Children's Rights in a Transitional Society*. Protea Book House.
- 8 J Sloth-Nielsen (Note 3 above).
- 9 See SALRC *Report on Juvenile Justice* (2000) at par. 1.18–1.20, where this is explicitly stated.
- 10 Originally clause 36(4)(c) of the draft Bill contained in the *Report on Juvenile Justice* (2000).
- 11 *Report on Juvenile Justice* (note 9 above) par. 1.20.
- 12 The Bill seeks 'To establish a criminal justice process for those children accused of committing offences so as to protect the rights of children entrenched in the Constitution and provided for in international instruments; to provide for the minimum age of criminal capacity of such children; to incorporate diversion of cases away from formal court procedures as a central feature of the process; to establish assessment of children and a preliminary inquiry as compulsory procedures; to provide that children must be tried in child justice courts and to extend the sentencing options available in respect of children; to entrench the notion of restorative justice in respect of children; and to provide for matters incidental thereto.'
- 13 This was evidenced by the extensive research done in the course of the investigation by the SALRC. Many provisions contained in the Bill have been influenced by examples from other countries, such as the 1989 New Zealand Young Persons and their Families Act, the 1989 UK Children Act and the Uganda Children Act of 1996.
- 14 Interestingly, the Child Justice Bill continued to focus on a restorative justice approach – a lone beacon of rights-based legislation in a sea of rather draconian law reform efforts – and an important aspect of this approach is an emphasis on the circumstances surrounding each individual opposed to a formulaic treatment of juveniles based on crime categories.
- 15 Sloth-Nielsen J. & Ehlers L., 2005, 'Mandatory and Minimum Sentences in South Africa: A pyrrhic victory?' *ISS Occasional Paper no 111*.

- 16 Skelton A., 2006, *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice*. Unpublished LLD thesis, University of Pretoria.
- 17 The (unofficial) minutes of these Portfolio Committee deliberations were compiled by the Parliamentary Monitoring Group (PMG) and can be found at the following website address: <http://www.pmg.org.za>. They will be referred to hereafter as PMG minutes.
- 18 However, the *Report on Juvenile Justice* notes that in practice the rebuttal procedure has been frequently glossed over, and even where lip service is paid to this aspect of the criminal procedure, inept and even incorrect methods of rebuttal are employed (par. 3.24).
- 19 Sloth-Nielsen J., 1996, 'No Child Should be Caged: Closing the Doors on Detention of Children' *SACJ 47*; Sloth-Nielsen J., 1995, '1994–1995 Juvenile Justice Review' *SACJ 331*; Sloth-Nielsen J., 1996, 'Pre-trial Detention Revisited: Amending Section 29 of the Correctional Services Act' *SACJ 60*; Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above).
- 20 See note 21 below.
- 21 Even a legal challenge to have two 13-year old detainees removed from Westville Prison in November 2005 was unopposed by the government respondents and the Cabinet (see volume 7(4) *Article 40* p.11 for details of this case) – the approved Department of Correctional Services White Paper of 2005 states explicitly that the Department does not view prisons as suitable places of detention for children aged below 14 years.
- 22 PMG minutes 27 February 2003.
- 23 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) p.475 (quoting clause 24(5) of the working draft of the Child Justice Bill (Sept 2003)). How this review would, in practice, be done is not clear. Just because there are no children under 14 years requiring secure care on the date of expiry, does not necessarily mean there will be no such children in the future.
- 24 Section 51 of Act 105 of 1997.
- 25 Citing clause 31 of the working draft of the Child Justice Bill made available at the Portfolio Committee hearing on 4 September 2003. The debates indicated a tougher line taken by women politicians on this point – they favour an exclusion from the possibility of diversion for all rapes committed by children below the age of 14 years (interview with Gallinetti on 26 August 2005 in Cape Town).
- 26 Skelton comments that 'this has already been achieved through the passing of the Criminal Procedure Amendment Act 42 of 2003 which inserted Section 309(1)(a)(i) and (ii) into the Criminal Procedure Act 51 of 1977. Also Krieglner (*Annual Survey 786*: 2003), who describes the new legal rules and criticises the differentiation between 14 and 15-year olds (who have an automatic right of appeal without applying for leave if

they were not legally represented and were sentenced to direct imprisonment) and 16 and 17 year olds (who have no automatic right for leave to appeal and who, like adults, must apply for leave to appeal).’

- 27 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at pp.480–1.
- 28 Skelton A., ‘Juvenile Justice Reform: Children’s rights versus crime control’ (note 7 above); Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at pp.458–9.
- 29 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at p. 459 refers to Kriegler (note 26 above) who points out that there is no clear rationale for treating 16 and 17-year olds differently from 14 and 15-year olds. She notes that although this comment relates to the rules relating to automatic appeal as introduced by the Criminal Procedure Amendment Act 42 of 2003, the point is equally applicable to the laws on minimum sentences.
- 30 Section 51(3)(b) of Act 105 of 1997 provides as follows: ‘If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.’ In relation to offenders aged 18 years or more at the time of commission of the offence, the court is bound to impose the prescribed sentence unless substantial and compelling reasons can be adduced to justify the imposition of a lesser sentence.
- 31 [2005] 2 All SA 1 (SCA). Also, Sloth-Nielsen J. & Ehlers L. ‘Mandatory and Minimum Sentences in South Africa: A pyrrhic victory?’ (note 15 above).
- 32 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at p.482.
- 33 Clause 73(2)(a) of the working draft of the Child Justice Bill, which was made available at the Portfolio Committee hearing on 4 September 2003 (hereafter referred to as the working draft of the Children’s Bill (Sept 2003)). The clause reads as follows: ‘A sentence of imprisonment may not be imposed unless, in the case of a child below the age of 14 years, such child is convicted of an offence referred to in Part 1 of Schedule 3 and substantial and compelling reasons exist for imposing a sentence of imprisonment.’
- 34 PMG minutes 26 September 2003: ‘The Chairperson [of the Portfolio Committee, Adv J de Lange] understood the strong feeling against the imprisonment of children under fourteen, but felt there should be an exception in the case of children who commit serious crimes.’
- 35 See, in general, Sloth-Nielsen J., 2001, *The Influence of International Law on Juvenile Justice Reform in South Africa*. Unpublished LLD thesis. University of the Western Cape. Chapter 6.

- 36 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at p.479.
- 37 In line with Rule 6 of the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice which states that in view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion should be allowed at all stages of the proceedings.
- 38 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) at p.487–8.
- 39 Sloth-Nielsen J., *The Influence of International Law on Juvenile Justice Reform in South Africa* (note 35 above), Chapter 6.
- 40 *Issue Paper* par. 8.13–8.18.
- 41 *Discussion Paper* par. 10.23–10.35.
- 42 *Discussion Paper* par. 10.36–10.38.
- 43 Sloth-Nielsen J., *The Influence of International Law on Juvenile Justice Reform in South Africa* (note 34 above).
- 44 Clause 53(2) of the draft Bill attached to the *Discussion Paper*; the *Report on Juvenile Justice* proposed essentially the same in clause 71(2).
- 45 Clause 81 of the Bill.
- 46 Sloth-Nielsen J., *The Influence of International Law on Juvenile Justice Reform in South Africa* (note 35 above) discussed the children’s court in relation to juvenile justice comprehensively in Chapter 8. See, too, a historical overview in Skelton (note 16 above).
- 47 *Issue Paper* par. 3.22.
- 48 Louw J. & Van Oosten F.F.W., 1998, 61 *THRHR* 123 124.
- 49 Section 8 of the Child Care Act 74 of 1983 provides that the hearing must take place in a room other than a courtroom, unless no such room is available. Therefore, another advantage is that the child is not exposed to the alienating environment and formality of a court.
- 50 Although the submission of such reports at a children’s court inquiry has only been compulsory since the implementation of Section 14(2) of the Child Care Amendment Act 96 of 1996 (Van Heerden et al., 1999, *Bobergs Law of Persons and the Family*. Juta and Co, p.654).
- 51 A referral of a convicted child to a reform school can only be imposed as a sentence under the Criminal Procedure Act 51 of 1977. Courts have held that there is a ‘vast difference between a school of industries and a reformatory’ (*S v Thlatswayo* 1972 (4) SA 29 (W) 30E), and that a child should be referred to a reform school only where he or she has committed a serious offence or has manifested marked criminal tendencies (*S v L* 1978 (2) SA 75 (C)). In *S v M* 1998 (1) SACR 384 (C) the court pointed out that, despite the fact that the working of the Criminal Procedure Act suggests that referral

to a reform school is an alternative to a sentence, it is in fact a punishment in itself, and that it can be experienced as a severe punishment by those who are referred there (see Sloth-Nielsen & Muntingh (1999) 'Annual Juvenile Justice Review' 12 SACJ 65 73).

- 52 Sloth-Nielsen J., *The Influence of International Law on Juvenile Justice Reform in South Africa* (note 35 above), Chapter 8. The transfer provision is retained, but a proposed innovation is the requirement that referral to the children's court must, in certain circumstances, be considered by a probation officer making a recommendation in an assessment report, by an inquiry magistrate or by a judicial officer presiding in a criminal court.
- 53 Available at <http://ncjj.servehttp.com/NCJJWebsite/main.htm>. Retrieved 15 June 2006.
- 54 See, also, the definition of a child in the African Charter on the Rights and Welfare of the Child, ratified by South Africa on 7 January 2000.
- 55 Males M. & Macallair D., *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*, Building Blocks for Youth. Available at www.buildingblockforyouth.org. Retrieved 26 January 2006.
- 56 Gardner M., 1997, *Understanding Juvenile Law*. Matthew Bender, p.179.
- 57 Gardner M., 1997, *Understanding Juvenile Law*. Matthew Bender, p.179.
- 58 387 US 1 (1967).
- 59 The exception to this is if a child is sentenced to a period of incarceration in a reform school. In this instance the child will be sentenced to a period of incarceration for two years. This can then be extended or shortened at the discretion of the Department of Education which currently administers such sentences. The problems here are twofold. Firstly, the provisions in legislation that allows for appointment to reform schools is underutilised by judicial officers; and secondly, when it is used, children often await such appointment in prison because of there being too few reform schools, which are also unevenly spread across the nine provinces.
- 60 Available at <http://www.ncjj.org/stateprofiles/>. Retrieved 21 July 2006.
- 61 Available at <http://www.ncjj.org/stateprofiles/>. Retrieved 21 July 2006.
- 62 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above).
- 63 The Children's Court Centennial Communications Project, 1999, *Second Chances, 100 years of the Children's Court: Giving Kids a Chance to make a Better Choice*, American Civil Liberties Union of Michigan.
- 64 Bishop D. & Decker S., *Juvenile Justice in the United States: A review of Policies, Programs and Trends*. Prepared for the European Working Group on Juvenile Justice. Available at http://www.esc-eurocrim.org/files/jjt_juvenile_justice_in_the_united_states.doc. Retrieved 21 July 2006.

- 65 *Youth crime/Adult time: Is justice served?* Fact Sheet, transfer of youth to the adult criminal justice system, Building Blocks for Youth. Available at <https://buildingblocksforyouth.org>. Retrieved 26 January 2006.
- 66 *Youth crime/Adult time: Is justice served?* Fact Sheet, transfer of youth to the adult criminal justice system, Building Blocks for Youth. Available at <https://buildingblocksforyouth.org>. Retrieved 26 January 2006.
- 67 Coalition for Juvenile Justice. Available at <http://www.juvjustice.org/resources/waiver.html>. Retrieved 21 July 2006.
- 68 Judge Davis A Young, Circuit Court Baltimore City, 5 June 1998. *No Minor Matter*. Available at <http://hrw/reports/1999/maryland/Maryland-02.htm>. Retrieved 25 June 2006.
- 69 Fagan F., 2005, 'Adolescents, maturity and the law: Why science and development matter in juvenile justice'. In *The American Prospect, Liberal Intelligence, Special Report*, September 2005.
- 70 The US Supreme Court finally abolished the death penalty for crimes committed by juveniles in 2005. See *Roper v Simmons* 125 S Ct 1183 (2005).
- 71 J. Fagan (note 69 above).
- 72 Bishop D., Frazier C., Lanza-Kaduce L. & White H., 1996, 'The transfer of juveniles to criminal court: does it make a difference?' (1996) *Crime and Delinquency* 42, pp.171-191 in *Youth crime/Adult time: Is justice served?* Fact Sheet, transfer of youth to the adult criminal justice system" Building Blocks for Youth <https://buildingblocksforyouth.org> retrieved 26 January 2006.
- 73 Chen M.K. & Shapiro J.M., 2005, *Does Prison Harden Inmates? A Discontinuity-based Approach*. Yale School of Management and the Cowles Foundation, University of Chicago.
- 74 Fagan J., 1995, 'Separating the men from the boys: the comparative advantage of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders'. In Howell J., Krisberg B., Hawkins J.D. & Wilson J (eds), *Serious, Violent and Chronic Juvenile offenders*. Thousand Oaks, CA: Sage.
- 75 Fagan J. (note 69 above).
- 76 More information on this film can be obtained on the official website <http://www.juvs.net/news/index.html>.
- 77 See Human Rights Watch/Amnesty International, 2005, *The Rest of their lives: Life without parole for child offenders in the United States*.
- 78 Human Rights Watch/ Amnesty International (note 76 above) p.15.
- 79 Dilulio J., 'How to stop the coming crime wave'. New York: Manhattan Institute 1996, p.25. In Krisberg 2004 p.2.
- 80 See J. Dilulio 'How to stop the coming crime wave' (New York: Manhattan Institute 1996) in Human Rights Watch/ Amnesty International (note 76 above) p.15.

- 81 Human Rights Watch/ Amnesty International (note 76 above) p.15.
- 82 The Children's Court Centennial Communications Project, *Second Chances, 100 years of the Children's Court: Giving Kids a Chance to make a Better Choice*, p.6, no date provided.
- 83 Krisberg B.A., 2004, *Juvenile Justice, Redeeming Our Children*. Sage Publications.
- 84 Muncie J., 1998, *Youth and Crime, A Critical Introduction*. Sage Publications, p.5.
- 85 Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (note 16 above) notes that the *Bulger* case has been expressly referred to the South African Parliamentary deliberations on the Child Justice Bill.
- 86 R. Sarre *Beyond 'what works': A 25 year Jubilee Retrospective of Robert Martinson*, paper presented at the History of Crime, Policing and Punishment conference convened by the Australian Institute of Criminology in conjunction with Charles Stuart University, Canberra 9–10 December 1999.
- 87 Sarre (note 86 above).
- 88 Mauer M. & Chesney-Lind M. (eds) 'Invisible punishment: The collateral consequences of mass imprisonment' (2002) *The New Press*, New York.
- 89 Travis J., 2005, *But they all come back: facing the challenges of prisoner reentry*, Urban Institute Press.
- 90 Chen & Shapiro (note 73 above).
- 91 Youth Transition Funders Group, 2005, 'A blueprint for juvenile justice reform', unpublished document.
- 92 Miller J., Ross T. & C. Sturgis, 'Beyond the tunnel problem: Addressing cross-cutting issues that impact vulnerable youth', *Briefing paper no. 2 Redirecting youth from the school to prison pipeline*. A briefing Paper Series of YTFG in partnership with The Annie E. Casey Foundation, November 2005.
- 93 'After prison: Roadblocks to reentry'. A report on the legal barriers facing people with criminal records by the Legal Action Centre, 2005.
- 94 For full details see: 'After prison: Roadblocks to reentry'. A report on the legal barriers facing people with criminal records by the Legal Action Centre, 2005, or the Legal Action Center website at www.lac.org/roadblocks.html
- 95 Muntingh L.M., 2005, 'Offender reintegration' *CSPRI research paper no.*
- 96 *Brandt v S* [2005] 2 All SA 1 (SCA).
- 97 'Disingenuous' because the present provisions provide that parole be considered for any lifer after 25 years in any event.
- 98 T. Gest & V. Pope, *US News*, 25 March 1996: Crime time bomb: seeking solutions to rising juvenile crime. <http://web.archive.org/web/200108606221929/http://www.usnews.com/usnews/issue/crime>

- 99 Marc Mauer is the director of The Sentencing Project, a New York-based NGO focusing on alternatives to incarceration.
- 100 The Department of Social Development administers the Probation Services Act, 1991 (Act 116 of 1991) as well as parts of the Criminal Procedures Act, 1977 (Act 51 of 1977) relating to children specifically.
- 101 See section 28(1)(g) of the Constitutions providing for deprivation of liberty of children as a last resort and for the shortest appropriate period of time.
- 102 It is notable that the numbers of children incarcerated in prison has declined steadily over the last three years, from a high of nearly 4000 children awaiting trial or sentenced to nearly half that. See A Dissel in *Article 40* (August 2006) (forthcoming). Overall, this is low compared to the US.
- 103 At the same time it is only fair to point out that there are also some areas where considerable improvements were brought about by Parliament – strengthening diversion, to give one example, as well as the reinstatement of measures non-penal for dealing with children below the age of criminal capacity who commit acts that would otherwise have been infringements of the criminal law.
- 104 The Gambia, Lesotho, Namibia and South Sudan, to cite but four examples.

