JUVENILE DIVERSION: KEEPING CHILDREN OUT OF PRISON

THESIS

Submitted in fulfilment of the

requirements for the Degree of

MASTER OF LAWS

of Rhodes University

by

SHARON LEWIS

January 1997

ABSTRACT

This thesis covers the topic of juvenile diversion with respect to keeping juveniles from progressing further into the justice system as well as keeping them out of prison. It deals with a number of areas. The first is diversion before an offence has been committed - prevention. Here a number of recommendations are made with respect to education of the child and the community in order to make prevention a priority when new diversion programmes are considered and introduced. The second area is that of diversion after the offence has taken place. This deals with diversion by the police at the moment of apprehension and recommends the introduction of cautions as a diversionary measure. The third aspect that is considered is diversion after the juvenile has been arrested and/or charged. The establishment of Reception and Assessment Centres and the setting up of Family Group Conferences are especially highlighted. The detention of the child until his/her trial is also investigated and it is concluded that this is an unnecessary measure except in extreme circumstances. The progression of the child's case to court is the fifth area considered. Here, recommendations are made as to the necessity for the proper training of court personnel and the need for the introduction of court imposed diversionary programmes before sentencing. With respect to diversion after the child has been found guilty, a number of suggestions are made as to the introduction of new sentencing options and new or improved institutions. Finally, recent reforms are discussed. The conclusion reached is that juveniles should not be imprisoned except in the most extreme cases, and that diversion programmes should be instituted as soon as possible as the basis of South Africa's juvenile justice system. It is deemed essential that diversion begins with prevention and continues until sentencing is completed, and that all children are diverted unless this is not possible.

TABLE OF CONTENTS

GLOSSARY

Arrest: A procedure by which the forward motion or actions of a person who is endangering other people, property or him/herself is stopped, with the use of the minimum amount of force possible.*

Awaiting-Trial Youth: A person under the age of 18 about whom a determination of guilt or innocence has not yet been made.@

Caution: Divided into:

(1) *Informal Caution*: warning issued by a police officer at the scene of the alleged offence. No record is kept of this caution.

(2) *Formal Caution:* issued at the police station by a police officer above the rank of constable. The police keep a record of this type of caution.

(3) *Caution as a sentence:* handed down by the presiding officer of the juvenile court either unconditionally or with conditions attached.*

Charge: Includes an indictment and a summons.# Laid only once a decision is made to carry the case further than merely the police station.

Child/Juvenile:

- The Child Care Act No. 74 of 1983 defines a child as a person under the age of 18 years.
- The Criminal Procedure Act No. 51 of 1979 defines a child as a person under the age of 18 years.
- The Correctional Services Act No. 8 of 1959 defines a juvenile as a person under the age of 21 years.
- The Constitution of the Republic of South Africa Act No. 200 of 1993 defines a juvenile as a person under the age of 18 years.

For the purposes of this thesis, a child/juvenile will be deemed to be a person under the age of 18 years.

Children's Home: Any residence or home maintained for the reception, protection, care and bringing up of more than six children apart from their parents, but does not include any school of industries or reform school.$

Consensus: Agreement by the mutual consent of the participants of a Family Group Conference.*

Correctional Supervision: A community-based punishment to which a person is subject in accordance with Chapter VIIIA (of the Child Care Act No.74 of 1983) and the regulations if-

(a) he has been placed under that under section 6(1)(c) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

(b) it has been imposed on him under section 276(1)(h) or (i) of the Criminal Procedure Act, 1977, and he, in the latter case has been placed under that;

(c) his sentence has been converted into that under section 276A(3)(e)(ii), 286B(4)(b)(ii) or 287(4)(b) of the Criminal Procedure Act, 1977 or he has been placed under that under section 286B(50(iii) or 287(4)(a) of the Criminal Procedure Act;

(d) it is a condition on which the passing of his sentence has been postponed and he has been released under section 296(1)(a)(i)(ccA) of the Criminal Procedure Act, 1977; or

(e) it is a condition on which the operation of-
the whole or any part; or
any part of his sentence has been suspended under section 297(1)(b) or (4) ofthe Criminal Procedure Act, 1977, respectively.(&)

Delinquent: A young person who is over the legally defined age of criminal responsibility, but who is not an adult, who does not suffer from a

mental disorder, who commits an act which can be followed by criminal proceedings.(!)

Family/Family Group: These are terms used to describe the people that the young person defines as his/her support network. This may include relatives of the young person or anyone close to the young person, who takes care of him/her.*

Family Group Conference: A meeting of all or some of the people who constitute the support network of the young person, and all or some of the people affected by the alleged offence of the young person.*

Guardian: Any responsible adult who expresses a *bona fide* willingness to assist the young person at any stage of the justice process.*

Juvenile Court: A criminal court which deals solely with juvenile accused.

Offence: An act or omission punishable by law.#

Open-Care Facility: An institution which is provided to care for young people who are awaiting trial who have not been charged with a serious offence, and young people who have not been convicted of a serious offence.*

Place of Care: Any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the state including a provincial administration.$

Place of Safety: Any place established under section 28 (of the Child Care Act No. 74 of 1983) and includes any place suitable for the reception of a child into which the owner, occupier or person in charge thereof is willing to receive a child.$

Priority Status: Where a case involving a juvenile is given priority on the court role.*

Prison: Any place established or deemed to have been established under this Act (the Correctional Services Act No. 8 of 1959) as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to detention in or placing under protective custody, and includes the seashore ... and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, protection, labour, treatment or otherwise, and all quarters of members of members of the Department used in connection with such prison; and for the purposes of any offence under this Act or any contravention of or failure to comply with any provision of this Act, further includes every place used as a police cell or lock-up.(&)

Programme: An approved programme participated in by a young person as a part of his/her acknowledgement of his/her accountability for his/her actions. This may be run by the government or by non-governmental organisations.*

Reception Process: The process by which an incident involving a young person is reported at a police station.*

Referral Meeting: A meeting which takes place as soon after the Reception Process as possible. Here an initial decision as to how to handle the reported incident is made.*

Reform School: A school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or transferred thereto under this Act (The Child Care Act No. 74 of 1983).$

School of Industry: A school maintained for the reception, care, education and training of children sent thereto under this Act (The Child Care Act No. 74 of 1983).$

Secure-Care Facility: A locked institution which is provided for the secure care of young people awaiting trial who have been accused of the commission of a serious offence, or those young people convicted of a serious offence.*

Serious Offence: Murder; rape; robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved; assault with intent to do grievous bodily harm or when a dangerous wound is inflicted; assault of a sexual nature; kidnapping; any offence under any law relating to the illicit conveyance or supply of dependance producing drugs; and any conspiracy, incitement of attempt to commit any of these offences.(&)

* Adapted from *Juvenile Justice for South Africa: Proposals for Police and Legislative Change*. Published by the members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town (1994).

@ Adapted from *Justice for the Children: No Child Should be Caged.* An independent report by the Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape (22 October 1992).

(!) Adapted from Hollin, CR. *(et al) Managing Behavioural Treatment: Policy and Practice with Delinquent Adolescents* Routledge Publishers, London (1995) 8.

Definitions from Section 1 of the Criminal Procedure Act No. 51 of 1977.

(&) Definitions from Section 1 of the Correctional Services Act No. 8 of 1959.

$ Definitions from Section 1 of the Child Care Act No. 74 of 1983.

Table of Convictions

	JUNE 1987 - JUNE 1988		JULY 1988 - JUNE 1989		JULY 1989 - JUNE 1990		JULY 1990 - JUNE 1991		JULY 1991 - DEC. 1992		*1994-1995	
Offences	Total convicted	No. of Juveniles	Total convicted	No. of Juveniles	Total convicted	No. of Juveniles	Total convicted	No. of Juveniles	Total convicted	No. of Juveniles	Total convicted	No. of Juveniles
Murder	2 641	168	2 696	180	2 721	171	2 681	198	3 787	327	3 558	219
Assault GBH	48 690	3 751	50 188	4 404	45 897	3 618	43 926	3 648	43 275	3 229	38 263	2 610
Common Assault	41 422	1 813	41 325	1 995	37 438	1 584	36 381	1 699	34 707	1 556	29 185	1 194
Rape/Att. Rape	5 243	963	5 160	983	4 991	936	4 661	972	4 841	866	4 311	774
Indecent Assault	523	91	654	83	820	126	868	94	873	81	753	64
Robbery			10 988	1 841	8 464	1 432	9 265	1 610	9 519	1 528	7 829	1 227
Theft	119 728	18 222	97 448	15 065	98 622	15 770	104 880	17 750	107 094	15 956	97 904	14 870
Burglary/ House-breaking	39 725	10 881	33 633	9 612	34 109	9 778	35 930	10 014	37 334	9 274	34 453	7 679
Drug-related			45 715	2 503	39 867	2 106	41 537	2 221	46 468	2 385	34 932	1 576
Total no. of con-victions	**258 976**	**35 928**	**287 807**	**28 015**	**272 929**	**35 421**	**280 129**	**38 206**	**287 898**	**35 529**	**252 507**	**30 313**

Number of juveniles serving sentences as at January 1995: 667

* Statistics for 1993-1994 not available

The references for this table were taken from the following sources:

* Hansson, D and Theron, R 'The South African Legal System: Statistics 1988-1989 (1989) 2(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 351-353.

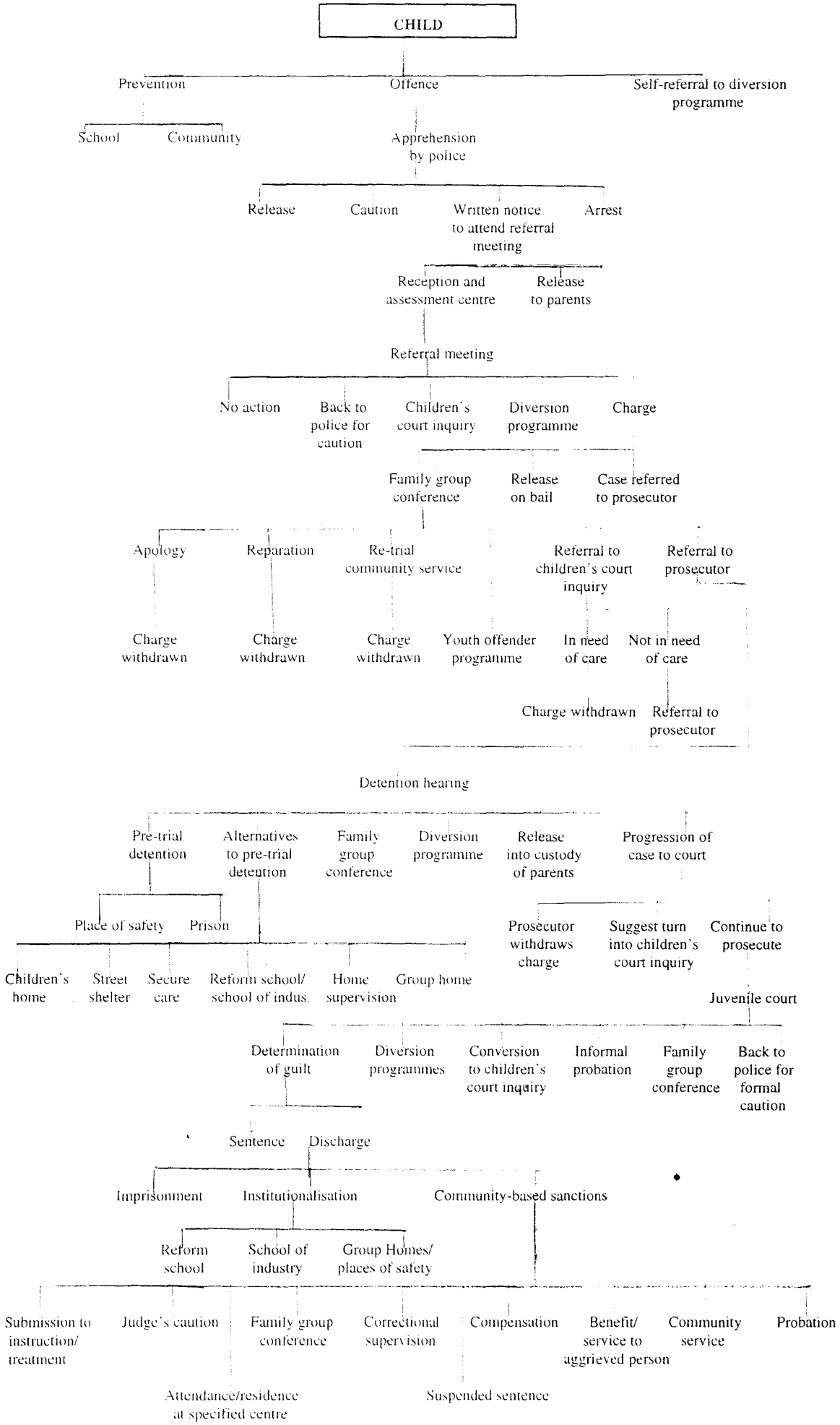
* Hansson, D 'Selected Statistics' (1990) 3(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 312-326.

* Hansson, D 'Selected Statistics' (1991) 4(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 364-371.

* Hansson, D 'Selected Statistics on the South African Criminal Justice System' (1992) 5(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 323-324.

* Hansson, D 'Statistics' 1994 7(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 364-381.

* Cochrane, R 'Statistics' (1995) 8(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 349-366.


CHILD
Prevention
Offence
Self-referral to diversion programme
School
Community
Apprehension by police
Release
Caution
Written notice to attend referral meeting
Arrest
Reception and assessment centre
Release to parents
Referral meeting
No action
Back to police for caution
Children's court inquiry
Diversion programme
Charge
Family group conference
Release on bail
Case referred to prosecutor
Apology
Reparation
Re-trial community service
Referral to children's court inquiry
Referral to prosecutor
Charge withdrawn
Charge withdrawn
Charge withdrawn
Youth offender programme
In need of care
Not in need of care
Charge withdrawn
Referral to prosecutor
Detention hearing
Pre-trial detention
Alternatives to pre-trial detention
Family group conference
Diversion programme
Release into custody of parents
Progression of case to court
Place of safety
Prison
Prosecutor withdraws charge
Suggest turn into children's court inquiry
Continue to prosecute
Children's home
Street shelter
Secure care
Reform school/ school of indus.
Home supervision
Group home
Juvenile court
Determination of guilt
Diversion programmes
Conversion to children's court inquiry
Informal probation
Family group conference
Back to police for formal caution
Sentence
Discharge
Imprisonment
Institutionalisation
Community-based sanctions
Reform school
School of industry
Group Homes/ places of safety
Submission to instruction/ treatment
Judge's caution
Family group conference
Correctional supervision
Compensation
Benefit/ service to aggrieved person
Community service
Probation
Attendance/residence at specified centre
Suspended sentence

ACKNOWLEDGEMENTS

The author would like to thank the following people for their invaluable assistance in the completion of this thesis:

* Ms Cheryl Frank - Criminology Department, University of Cape Town.
* The Department of Correctional Services - Pretoria, Cape Town and Durban.
* Ms Johanna Prosesky - Department of Welfare, Pretoria.
* Ms Fiona McLachlan - Practising Attorney, Johannesburg.
* Mr Michael Oelschig - Department of Law, Rhodes University, Grahamstown.
* Ms Brigitte Clark - Department of Law, Rhodes University, Grahamstown.
* Ms Nicola Jenkin and Mr Glen Cason for making time to proof-read.

Chapter 1

Introduction

Juvenile justice is a topic around which much discussion has been centred in the past few years, particularly in relation to its reform.[1] It is important with respect to juvenile justice that one remembers that juveniles[2] are probably the most confused members of society. They are undergoing various physical and psychological changes in their transformation from child to adult. These changes are usually accompanied by emotional and mental stress which tends to distort and magnify the normal problems of life. The child's intellectual powers are also awakened and this often leads to the questioning of authority and values as well as a great deal of uncertainty. These changes make them vulnerable to outside influences, many of which are negative.

One must always be aware that juvenile delinquents are the hardened criminals of the future, thus it is essential that they should be carefully dealt with. Their characters are still pliable, thus every effort should be made to reform juveniles and remould them to desist from criminality.

---

[1] This started with the death, in custody of 13 year old Neville Snyman in late 1992. It alerted the Community Law Centre of the University of the Western Cape who began to intensify their research into the administration of juvenile justice in South Africa, begun in January 1992. Since then, many academics, NICRO and the Lawyers for Human Rights (to name but a few) have begun to undertake the monumental task of instigating reform in the juvenile justice system. This has resulted in the publication of booklets like *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change*, amongst others, and has made the public aware of the changes that need to be made. This is further discussed in *Justice for the Children: No Child Should be Caged*. An independent report by the Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape (22 October 1992) 3-5.

[2] Specifically teenagers (*ie* juveniles between the ages of 13 and 18).

Skelton[3] describes a diversionary tactic as "a way of dealing with offenders in an alternative method, rather than allowing them to go through the normal criminal process. These methods concentrate on the restorative notions of justice, such as reconciliation, problem-solving and taking responsibility to make things right."

Lukas Muntingh defines diversion as:

> "the channneling of *prima facie* cases from the formal criminal justice system on certain conditions to extra-judicial projects, at the discretion of the prosecutor."[4]

The Inter-Ministerial Committee (IMC)[5] defines diversion as:

> "The channeling of *prima facie* cases away from the criminal justice system on certain conditions. These conditions are usually the participation in particular programme and/or reparation where possible."

Can it not be said that children at risk could be deemed to be *prima facie* cases as the fact that they are not helped before they commit a crime increases the likelihood that they will come into contact with the juvenile justice system? It is thus suggested that prevention should be included in the definition of diversion, for the main reason that if children are seen to be at risk of coming into contact with the criminal justice system and becoming *prima facie* cases, it would be better to prevent this happening rather than allowing it to happen and try to assist the offender at this time.

---

[3] Skelton, A Children in Trouble with the Law: A Practical Guide Lawyers for Human Rights (Publishers) Pretoria (1993) 24.

[4] Muntingh, L NICRO Research Series No 2 Perspectives on Diversion NICRO National Office, Cape Town (1995)

[5] The Inter-Ministerial Committee's Interim Policy Recommendations (1996) November.

Diversion is defined by the Collins English Dictionary[6] as:

"The act of diverting from a specified course."

Diversion is also defined as a "turning aside from a course, activity or use" by the Longman Dictionary of Comtemporary English[7]. It is realised that these are not legal definitions, but if they are taken into account, it seems that prevention could definitely be considered to be an act of diversion as its aim is to turn children aside from their course of becoming criminals.

The definition of diversion as contemplated in this work takes account of all the above definitions. It is suggested that diversion should be defined as "any act by which children are kept from entering the criminal justice system and thus ultimately, kept out of prison."

The Supreme Court of South Africa is the upper guardian of all minors. However, in the past this self-same court has done nothing about the detention of children in adult prisons, the abuses that they undergo there and the effect that this will have on the rest of their lives. It thus seems that it has abandoned this role. The present juvenile justice system tries to deal with the child itself, but does not take into account the socio-economic factors involved in that child's life. In most cases the problem does not stem from children themselves, but rather from their families or the communities in which they are raised. These problems are seldom solved by the removal of the child - removal of one child from a family may make one less mouth to feed, but this will not change the underlying problems, nor will it change the circumstances of the other children from the same family.

It is for these reasons that a new system must be created which learns from the mistakes made in the past. But, it must be remembered that it is not only the interests of the child that must be considered; the interests of the victim and society as a whole must be taken into account too. Children should, where possible be diverted from the criminal justice system and be encouraged to accept that they are responsible for their own actions. The family and community must be involved in order to render support and assistance to the child. It is

---

[6] Published by Collins Publishers, London (1986) 448.

[7] Published by Longman Publishers, Great Britain (1981) 319.

important that children are recognised as a product of their environment and that they are taught to straighten themselves out within that environment.

It is also important to remember that every juvenile cannot be treated the in the same way. Society would probably accept that a child convicted of shoplifting (theft) would not receive a criminal record, but would expect a child of the same age charged with murder to be brought before a court, and if found guilty, to be severely punished. All of these factors have to be considered when suggesting a new diversion programme - one which will keep children out of prison as far as is possible, as well as minimizing any unnecessary intervention into the child's life by the juvenile justice system.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") state[8]:

> "1. Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, ...
>
> 2. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, ...
>
> 3. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or his/her parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
>
> 4. In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims."

This attempts to lessen the negative effects of the juvenile proceeding any further into the juvenile justice system. The people who deal with juvenile delinquents must be taught how to exercise their discretion to achieve optimum results, especially where the case is of a non-serious nature and when a very young juvenile is involved.

---

[8] In Article 11.

Many children are currently imprisoned across the country. They are being raped, sodomised, and physically and mentally abused on a regular basis.[9] These horrors cannot be allowed to continue. We must remember that by imprisoning a large number of children that come into contact with the criminal court system, we are creating a generation of ex-convicts - people who cannot find employment; who are uneducated and insufficiently socialised. We must also remember that for every minor offender sent to a prison where there are insufficient beds available, the likelihood is increased that a serious offender will be released in order to provide that bed. This is definitely not a desirable situation.

As Frosh[10] says:

> "It would seem to me that the most important thing that we must do, is to educate the public to the facts, to the statistics and to the needs of which we are aware. We must take every opportunity available by speaking, by writing or by grass-roots political involvement to let our neighbours and friends know that there are viable alternatives to imprisoning everybody who has come in conflict with the law. We must point out that sending everybody to jail, increasing the severity of criminal punishment, resorting to mandatory or minimum sentences and heaping criticism on the 'judges', are not solutions. We must point out that new jails have to be paid for by the public. We must point out the costs of these new institutions, both in [rands] and in human terms. We must point out that the men and women who go to jail come out someday; ... We must educate the public to the fact that jails - if they are to have any rehabilitative purpose - must be located within the very community from which the violations come; ... we must focus the attention of the bench and bar on viable alternatives to imprisonment in appropriate cases by preparation and attention to the sentencing function."

---

[9] Justice for the Children: No Child Should be Caged' An independent report by The Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape, Cape Town (22 October 1992) 45.

[10] Frosh, SB 'Constructive Alternatives to Prison Sentencing' (1982) 6 South African Journal of Criminal Law and Criminology 24-26.

The punishment process in South Africa inflicts a great deal of damage on those who come into contact with it. This is illustrated in a poem written by a Cape Town shelter worker:

"I have been sent to
Sea Point Police Station,
Where I was beaten by civil servants,
I have been to Polsmoor Prison,
Where I was sodomised
And left bleeding
On the cold damp floor.
I have been to
Places of Safety and Reformatories
Where I was hardened by
Warders and fellow inmates,
Where I learned to hold on
To what was mine and take
From those who could not fight.
I am now the perpetrator of violence
And not the victim.
On the streets
I am a law unto myself."[11]

In the last two years,many changes have been made in order to commence the overhaul of the juvenile justice system. The first change was the introduction of the Correctional Services Amendment Act of 1994[12] which prohibited the detention of juveniles under 14 in police cells, prisons or lock-ups for more than 24 hours after their arrest. It also prohibited the detention of juveniles[13] over 14 (but under 18) who were charged with a serious

---

[11] Glen Leedenberg (Poet) as cited by Pinnock, D, Skelton, A and Shapiro, R 'New Juvenile Justice Legislation for South Africa: Giving Children a Chance' (1994) 7 (3) South African Journal of Criminal Justice 338-339.

[12] Act No 17 of 1994.

[13] In police cells, lock-ups or prisons.

offence[14], for more than 48 hours. This led to the transfer of juveniles to places of safety which were ill-equipped to cope with the influx. As a result many of these young offenders escaped, causing great public outrage and concern over rising crime rates. This in turn led to the promulgation of the Correctional Services Amendment Act of 1996[15] which revamped the law relating to the detention of minors until their trials.[16]

The Inter-Ministerial Committee on Young People At Risk[17] was formed in May 1995 in an attempt to provide recommendations for the revamping of the juvenile justice system. The Committee consists of several NGO's, the Ministries of Welfare, Justice, Education, Health, Correctional Services, Safety and Security, and RDP and is chaired by the Deputy Minister for Welfare and Population Development, Ms GJ Fraser-Moleketi. Its task is to "design and enable the implementation of an integrated child and youth care system based on a developmental and ecological perspective."[18]

It appears that in dealing with juvenile delinquents, we should heed the words of Chief Justice Burger of the United States Supreme Court and divert as many children from the criminal court system as possible. The learned judge had this to say:

> "... In our own interest - and the interest of billions of [rands] lost to crime and blighted if not destroyed lives ... we must try to deter and try to cure. This will be costly in the short run and the short run will not be brief. This illness our society suffers has been generations in developing, but we should begin at once to divert the next generations from the dismal paths of the past and try to make homes and schools and streets safe for all."[19]

---

[14] Serious offences were listed in Schedule 2 to the Act. This has also been amended by the Correctional Service Act 14 of 1996.

[15] Act No 14 of 1996.

[16] See the discussion on the Correctional Services Act in Chapter 3.

[17] Hereafter referred to as the IMC.

[18] Inter-Ministerial Committee's Draft Discussion Document for the Transformation of the South African Youth Care System at 2.

[19] Op cit see note 9 at 26.

Chapter 2

Diversion

It is submitted that many children, during their childhood, commit a crime for which they could be arrested; be it shoplifting, drinking under the legal age, or driving a car without a licence, to name but a few common examples. A great number of these 'delinquents' are never apprehended, and most do not continue to become criminals, but lead a normal, law-abiding life. However, for those that are caught, being drawn into the criminal court system could change their lives forever. This is where diversion programmes are essential - to keep as many juveniles as possible from the stigma attached to the juvenile justice system, as well as keeping minor offenders away from having any contact with juveniles more hardened than they, who could get them started on the criminal path.

A Draft White Paper for Social Welfare was published in the Government Gazette in February 1996[1], calling for a change in youth justice and putting forward a number of suggestions and recommendations. This paper suggests the following principles and guidelines which pertain to youth justice:

"(a) The best interests of children and juveniles must be paramount in all actions

(b) Children and juveniles are always in some way connected to their family or support network, community or culture. These ties will be strengthened, and the capacity of such families and communities to provide support and care will be promoted.

(c) Every opportunity should be taken to ensure that children and juveniles coming into contact with the law have access to all available services to avoid recidivism. This is vital and in the long run will lower the overall crime rate.

(d) Diversion from the legal system should be the preferred way of dealing with child offenders and effective programmes should be developed."[2]

---

[1] Government Gazette, 2 February 1996 No 16943 Vol 368.

[2] Draft White Paper for Social Welfare at 142.

These principles are in keeping with the ideal that children should be diverted in as many cases as possible in order to keep them out of prison, as imprisonment is not in their best interests.

The White Paper puts forward several recommendations regarding juvenile delinquents. Some of these are:

1. A new juvenile justice system must be developed and services provided to vulnerable children and children at risk of becoming involved in crime must be made more comprehensive.[3]
2. Families must be involved in prevention so that the bonds between the children, the family and the community are strengthened.[4]
3. Teachers and other professionals must be educated in order to be able to identify children at risk at the earliest stage possible. School based developmental social welfare programmes must be developed to address the needs of all children, but especially those at risk of impaired social functioning.
4. A programme of upliftment of society in vulnerable[5] communities must be introduced.
5. A policy which attempts to keep young offenders out of the criminal court system for as long as possible must be developed.
6. The development of a uniform strategy and procedures for the assessment of the needs of young offenders is essential.

---

[3] This may require a large outlay of funds, but this will be worthwhile in the long-term if less children become involved in crime, thus lowering the overall crime rate.

[4] There is a problem with this suggestion as it presupposes a strong family unit. There is a prevalence of single parent families, broken homes and abandoned/street children in South Africa. It is important that where possible, families are involved in prevention, but where this is not possible, community and school involvement in prevention programmes should be encouraged. Street children are difficult to assist, but many communities have already provided shelters for them, and it is here that the social workers attached to these shelters could aid in the implementation of prevention programmes.

[5] "Vulnerable communities" are those susceptible to outside influences, which are usually negative, due to the social and economic situation in the community itself. A vulnerable community would usually be relatively poor and the social services therein would be lacking.

7. Young offenders and their families will receive counselling and have access to legal aid if necessary. This will be at the discretion of the court and should be means tested.[6]

These recommendations should be put into practice as soon as possible[7] in order that the family and the community are strengthened and more able to assist a juvenile in need of guidance. By introducing prevention strategies (especially those suggested in 1-5) it is hoped that an ever increasing number of juveniles will be helped before they commit a crime and thus will never become delinquents.

One of the most important aspects of this Paper is the fact that it provides for, and encourages the adoption of diversion as an option for juvenile offenders, and does not advocate their progression through the court system unless this is essential. It also emphasises that children should not be held in custody, unless this is necessary, but should rather be released into the care of their parents. The Paper[8] emphasises the need for more trained staff for the existing places of safety as well as the need for the development of other community based placements. The need for secure places of safety is also stressed. The Paper also suggests the exploration of the possibility for the development of smaller places of safety which emphasise a family-type environment and individual attention.[9]

The Inter-Ministerial Committee on Young People at Risk also puts forward a number of recommendations and suggestions with respect to guiding the operation of diversion:

---

[6] Op cit see note 1 at 142-144.

[7] Except for recommendation seven, which, it is suggested, should be reviewed. As has been previously discussed, it is submitted that in *all* situations where a cases may go to trial, legal representation *must* be provided for the young offender, in order that s/he has a fair trial. Thus, legal aid should not be granted only at the discretion of the court, but in all cases. The provision for counselling of children and their families should, however, remain.

[8] In Article 161.

[9] These would be similar to the group homes discussed in Chapter 7.

* An equal opportunity for diversion should be provided by the presentation of all cases to a representative and multi-disciplinary group which makes decisions based upon a previously agreed policy.[10]
* Any discussions with the young person about diversion must happen in the presence of the parent or guardian.
* In order to minimise the risk of coercion, the option of diversion should be explained before the young person has been asked whether he or she is prepared to acknowledge responsibility for the actions leading up to the arrest. The option of a trial should not be made to sound frightening, and it should be explained that if the case should go to trial, the young person will be offered protection in the form of legal representation. Specialised training will be necessary for all personnel dealing with referral to diversion.[11]
* When dealing with diversion the terms "guilty" or "innocent" should be avoided. The relevant terms should be "taking responsibility for" or "being accountable for".[12]
* If the diversion fails, a second referral meeting will need to take place in order to determine the causes of failure and to determine what should happen.
* There should be a mechanism to take a decision regarding diversion on review to a higher forum if and where this is necessary.[13]

It is submitted that these are laudable principles and procedures and should be expanded upon and made into a comprehensive set of rules to be followed by all people who may have cause to consider diversion.

---

[10] This will be undertaken by the Family Group Conference in the future.

[11] As discussed in Chapter 6.

[12] This is due to the fact that juveniles should be encouraged to accept responsibility for their offence rather than having someone in authority (the presiding officer in their case) deciding on their guilt. It is more effective for the juvenile to acknowledge that s/he has done wrong and to take responsibility for that fact that to be told that s/he was wrong. If s/he accepts responsibility s/he will not feel that s/he has been harshly dealt with and thus will not desire revenge against the justice system.

[13] The Inter-Ministerial Committee's Draft Discussion Document for the Transformation of the South African Youth Care System at 34.

The IMC has recently set up a number of pilot diversion projects like the Reception and Assessment Centre at the Durban Magistrate's Court[14]. It has also set up diversion projects like the Youth Empowerment School, Pre-trial Community Service, a Family Group Conference and the Journey programme.[15]

The IMC proposes the following recommendations for diversion:

1. Diversion programmes should be run in association with the young offender's community and family.
2. The diversion programme which the juvenile undergoes should assist him/her and his/her family to understand what went wrong, what can be done to repair the damage, and how recidivism can be avoided.
3. Resources must be diverted into community based family support options of both diversion and appropriate community based sentencing.
4. All services need to be paired with family support services, or services that encourage the mending of social networks and with developmental and educational needs.[16]
5. All programmes need to empower the young person towards living a constructive and worthwhile adult life.[17]

These recommendations should be followed when legislation is drawn up as well as when new diversion programmes are implemented. This is due to the fact that by including the

---

[14] See discussion in Chapter 5.

[15] This programme is being piloted in Outeniqua, Pretoria and Port Elizabeth. It involves creating a "journey" for a limited number of young people who have been identified by the local community as people who seem to be constantly becoming entangled with the law. The journey relies on a rites of passage process where young people pass through a process of becoming young adults - the natural rites of passage processes are replaced or re-discovered within the programme. The use of Outward Bound or other wilderness programmes is an integral part of pitting the young person against the elements and against his or her fear and concerns to overcome them and move on.

[16] It is important that the juvenile's family and community are involved as much as possible. This is necessary in order to provide the young person with support and encouragement so that the likelihood of the child recidivating is lessened.

[17] Op cit see note 13 at 36-37.

community in diversion as well as improving the well-being of the juvenile, will make all more receptive to the diversion projects and thus more likely to support them. Therefore, these projects will be more likely to be successful.

The above recommendations and suggestions reiterate the fact that it is essential that wherever it is possible, children are diverted from the criminal court system. They should be placed in programmes which encourage accountability, but which cause as little disruption to the child's life as possible. New Zealand's diversion scheme identified seven purposes of diversion. These are:

1. The prevention of re-offending.
2. Avoiding conviction/giving offenders a second chance.
3. Improved resource usage.
4. Avoiding the delays, costs and traumas of trial.
5. The better provision of services to victims.
6. Improving perceptions of police.
7. The provision of 'help' to offenders.[18]

Shapiro[19] describes the benefits of diversion as follows:

- it allows the offender to repair the damage;
- it serves a rehabilitative and educational function;
- it enables offenders to take responsibility and be accountable for their actions;
- it identifies problems which may have led to the offence being committed;
- it prevents offenders from acquiring a criminal record; and
- it lessens the case load on the formal justice system.

---

[18] Morris, M 'The Search for Justice in a Juvenile Justice System'. Papers and Reports of a conference convened by the Community Law Centre, University of the Western Cape, Cape Town (June 1992) 170.

[19] Shapiro, R 'Diversion from the Criminal Justice System and Appropriate Sentencing for the Youth'. Glanz, L(ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 90.

It is important to remember that diversion is not a soft option. Including the victim in the decision-making process usually ensures that s/he is satisfied with the outcome and does not feel the need for revenge. Diversion also lessens the chance that the child will be stigmatised as a delinquent. Diversion programmes use juveniles spare time - they has to give something up to make amends for their offence.

It is submitted that the sociological, economic and cultural environment in which the child is raised is one of the catalysts in causing a child to become delinquent. Edwin Schur[20] argues that socio-cultural change will cause the reduction of delinquency. He suggests that the values and structures of society should be changed, not the youth, and that collective action programmes are necessary rather than those for specific individuals. It can be said that this is true in the sense that an improvement in the standard of living in society could help to reduce delinquency.

As long as the standard of living is low and the children have no legal means available to them to ensure their survival, rehabilitation will be very difficult. After treatment, the children return to the same situation they were in before the crime was committed. This is why it is important that diversion programmes educate children, giving them another option for survival once their treatment is completed. With this education, especially job orientated education, the juvenile is more likely to find employment and thus a law-abiding way in which to survive.

It appears that society will put up with the commission of most minor offences, but the question arises as to how to balance the possible increased harm to society because there is no intervention, and the known harm to society because of intervention.[21] If no intervention takes place, will the children not merely continue committing crimes against society? Thus the harm to society will be increased. This must be balanced against the known harm,

---

[20] Cited in Morris, A and McIsaac, M Juvenile Justice? The Practice of Social Welfare Heinemann Publishers, London (1978) 149.

[21] Op cit see note 20 at 150.

caused by incarceration, upon juveniles[22]. This is where diversion programmes play a part. There is intervention, but it is not the kind of intervention leading to imprisonment. Very little harm is done to juveniles by diverting them and there is no increased harm to society. Thus the balance is achieved between lack of intervention and the over-zealous protection of society.

In the United States of America there is a threat of an adolescent crime wave. This is making states rethink their educational and crime-fighting policies. America has 40 million children under the age of 10 years. This leads to frightening predictions by criminologists who see the number of boys (without even considering the number of girls) aged between 14 and 17 years increasing by at least 500 000 by the year 2000. If the current trends of crime for that age group continue, this will mean that at least 30 000 more murderers, rapists and muggers will be out on the streets.[23]

The attitude that juveniles should be reformed instead of punished has suffered in the battle against these juvenile criminals. In California, which has suffered from gang violence for a long time, 14 year olds can be sentenced to life imprisonment without the possibility of parole. In Chicago, the murder of 5 year old Eric Morse in 1994 began an intense debate over what to do with murderous pre-teens.[24] In Dallas, new schools have been built with state-of-the-art security measures.[25]

The same situation has not yet arisen in South Africa, but it does serve to emphasise the need to prevent offending. One of the means by which this can be done is through the education of children in their school environment. It is also important that parents are educated to raise

---

[22] Incarceration stigmatises the juvenile. It can also cause the break-up of the family unit. The juvenile does not receive sufficient education and thus emerges from prison uneducated and unable to obtain employment. Thus, s/he often has to resort back to crime in order to live.

[23] Allen-Mills, T 'The Playtime Murders' Sunday Tribune (The Other Mag) (February 11 1996) 5.

[24] Two boys, aged 10 and 11, had thrown Eric from the fourteenth floor of a building.

[25] Op cit see note 23.

their children with an awareness of the difference between right and wrong. Children in South Africa are often exposed to violence. It is thus essential that they are made to realise that violence is not the answer to their problems and that it should not be resorted to in order for them to obtain what they want. By this, it is hoped that we can avoid the occurrence of what is currently happening in the United States of America.

Lately, it has become increasingly clear that the problems with the juvenile court system in South Africa lie with the system itself. This could be due to the fact that the state had taken over an increased number of roles as substitute parent which it was unfit to perform. Many children were tried by courts which were culturally alien to them, and were then placed in state institutions[26]. This served to sever ties with their communities and families. It has been suggested that:

> "[T]he incomprehensibility of the criminal justice system ensured that the moment a young offender collided with it, he or she became it's victim. And victims are generally more interested in revenge than restitution and reparation. The processing system was creating its own monster - and demanding more of the same to get rid of it. In the eyes of young people in trouble with the law, the justice system was the enemy. The obvious casualty was their respect for that law."[27]

In the past many juvenile offenders were removed from society and placed in institutions which were usually not at all appropriate for rehabilitation. The removal of children from their homes, schools and communities impedes their ability to successfully reintegrate themselves back into their community after release. Not only this, but children exposed to these institutions usually become alienated from society. Unable to obtain employment due to a lack of education and a criminal record, they feel alienated from society, and thus often continue on the delinquent path. It has been said that once juveniles are classified as criminals or delinquents, they then see themselves as such and make no effort to reform, no matter how petty their crime was. This is seen to be due to the fact that a conviction by a

---

[26] Op cit see note 18 at 340

[27] Op cit see note 18 at 340.

criminal court, and even more so, incarceration, is very likely to cause juveniles to alter their self-images.

Fishman[28] suggests that "[since] the labelling process attaches the label to both the activity and the actor, it enhances the likelihood that the labelled actor will adopt a deviant 'identity' in accordance with the looking-glass theory of identity formation." Juveniles then see no point in altering their behaviour as they have already been classified as 'no good'. Thus they continue in their deviant life style.

Diversion programmes are expected to:

1. Reduce stigma,
2. Reduce coercion and social control,
3. Reduce recidivism,
4. Provide services, and
5. Reduce the costs and improve the efficiency of the juvenile justice system.[29]

The first three goals stated above reflect the concern of the proponents of the labelling theory that the negative effects of coming into contact with the justice system will outweigh the benefits of any assistance offered.

It has been suggested that formal dispositions entail coercion, by threatening sanctions for non-cooperation with officials, and social control, by placing the juvenile under strict rules for behaviour. This tends to reinforce the message that the individual is not a normal person. This can cause children to see themselves as delinquent and lead to further delinquency.[30]

---

[28] Fishman, G 'The Paradoxical Effect of Labelling' (1976) 4 International Journal of Criminology and Penology 1.

[29] Palmer and Lewis cited in Osgood, D & Weichselbaum, H 'Juvenile Diversion: When practice matches theory.' (1984) 21 Journal of Research in Crime and Delinquency 35.

[29] Op cit see note 29.

Most of the goals of diversion rely on the fact that the juveniles are being removed from the criminal justice system. It has been suggested that if the aim of diversion is to keep children out of the courtroom, then it is succeeding. If, however:

> " ... diversion means keeping youths safely out of the official realm of the juvenile justice system [and] immune from incurring the delinquency label or any of its variations then the juvenile court may actually have accomplished the reverse. By developing an informal system of handling juveniles through court sponsored services, the courts have in reality extended their control over juveniles whose cases would otherwise have been dismissed."[31]

It is suggested that any definition of diversion should be expanded to take account of this view, and should include as diversion, a variation of attempts which will be made in order to keep children out of the criminal justice system. It is submitted that when children enter the criminal justice system, they often see themselves as delinquents, and the further into the system they progress, the stronger this label becomes. It is for this reason that diversion programmes should include prevention and any other means by which children can be kept from entering the criminal justice system at all.

It is submitted that diversion, when used as an alternative instead of an addition to the criminal justice system, can reduce the stigma attached to entering the justice system. It is suggested that sentencing to a diversion programme, although it is court sanctioned, should not leave the child with a criminal record. Thus they will not have to carry the burden of this record for the rest of their lives. This also helps to lessen the delinquent stigma received when they entered the criminal justice system. Prison tends to be seen by most people as a symbol of delinquency. It is hoped that by not sending children there, their perceptions of themselves as delinquents will be lessened.

It has been suggested that in some cases, however, encounters with the stigma attached to entering the criminal justice system are not necessarily negative. Juveniles may change their

---

[31] Kadish, S (ed) Encyclopedia of Crime and Justice The Free Press, New York (1983) 902A.

actions to avoid any further contact with the police and thus further deviance may be avoided.[32]

It is submitted that this is possible, but that it must not be relied upon. It is thus better, at every possible opportunity, to divert offenders rather than send them further into the criminal court system, and risk the chance that they will not feel labelled as delinquent and will cease their criminal behaviour immediately. It is submitted that it would be better to divert offenders and attempt to reform them. This lessens any stigma and hopefully provides for the reintegration of a law-abiding citizen into the mainstream of society.

2.1. **Welfare/Justice Model**

When it comes to intervention by the state in order to deal with juvenile offenders, two different models have been used. The 'justice' model is based on due process and calls for sentencing which is appropriate to the crime that has been committed. The 'welfare' model is more informal and requires punishments which take into account the needs of the juvenile.[33] In most judicial systems there has been an overlap between the two, causing most people to feel that they are not in opposition to one another, but merely contain a different emphasis.

The welfare approach is based on the following assumptions:

1. Delinquent behaviour has antecedent causes. These are usually found within individuals and their families. They are often disadvantaged in some way. Therefore, it is suggested that intervention by the state should be directed at removing these disadvantages or relieving their harmful consequences rather than punishing the offender.
2. These causes can be, and often have been, discovered.
3. Offenders differ from non-offenders

---

[32] See Fishman,G op cit at note 28.

[33] Asquith, S & Hill, M (eds) Justice for Children Martinus Nijhoff Publishers, Dordrecht (1994) 148.

4. The discovery of what causes delinquency has made it possible for this behaviour to be treated and thus controlled.[34]

The justice model holds the view that crime is an individual's response to an opportunity, and that due to this, individuals must be held responsible for their actions, unless they are too young or mentally incapable of having made a rational decision. Those favouring this model argue that the state may only intervene once a criminal offence has been committed and that proof of guilt in a court of law is the only basis for punishment. Adherence to this model requires that any individualised welfare disposition is done away with, and that punishment should be proportionate to the crime committed and that the sentence should be determinate.[35]

During the 1980's, many countries moved away from the welfare model towards the justice model. These included Canada, New Zealand, England and Wales. This was due to the fact that they felt the welfare model reduced a juvenile's ability to assert his/her innocence and that it encouraged indeterminate sentences[36]. In South Africa, there has been little or no use of the welfare system as instituted in the Child Care Act.[37] The children's court is hardly ever used as a means of rehabilitation. It is submitted that South Africa should try to adopt a model that encompasses the best of both systems. Diversion from the justice system should be the first option. This can be seen to be part of the welfare system where the child is treated and not punished. It is submitted that referrals to diversion programmes, even though they cannot be deemed to be sentences unless handed down by the presiding officer, should still consider the seriousness of the offence. It is important that the length of the programme is proportionate to the offence, and that it is determinate. If a case proceeds to court, these elements should also be considered when the child is sentenced.

---

[34] Freeman, MDA The Rights and Wrongs of Children Frances Pinter Publishers, London (1983) 81-82.

[35] Op cit see note 34 at 84.

[36] Op cit see note 33.

[37] Act No. 74 of 1983.

Too much concentration on the justice model can cause a great many youths to be sentenced to incarceration, as the welfare of the child is not considered. Thus a change is needed. It is evident that penal institutions do not rehabilitate offenders and that in some cases, they may actually cause great psychological harm to the juvenile. But, on the other hand, some juveniles need to be imprisoned as they are a danger to society. This is why a balance between the two systems must be achieved and applied.

2.2. **Failure of detention/deinstitutionalisation**

Currently, in most developed countries, imprisonment is only used as the last resort for serious offenders for whom other types of punishment would be ineffective and disproportionate to the crime which they have committed[38]. Naude[39] suggests that

> "[I]mprisonment often creates more problems than it actually solves and it is even averred that imprisonment costs more than university education yet yields appalling results such as high recidivism and inability to adjust to the demands of society. Prison sentence[s are] detrimental in that it labels and stigmatises the offender, overloads the criminal justice system with mostly petty offenders who are restrained for short periods only without the benefit of being subjected to suitable treatment programmes and it adversely affects released prisoners' reintegration and adequate functioning in the community."

Apart from these doubts in relation to the usefulness of punishment, there have also been doubts about the success of rehabilitation in the correctional system. The fact that, when released from prison, many ex-convicts continue in their lives of crime, indicates that prisons are not succeeding in reforming offenders. A former deputy commissioner of prisons admits that prison is not the ideal place for the rehabilitation and resocialisation of offenders.[40]

---

[38] Naude, C 'Correctional Supervision: Alternative community-based sentencing options for South Africa' (1991) 4(2) Acta Criminologica 14B

[39] Op cit see note 38.

[40] Cited in McQuoid-Mason, D. 'Solving the Crime Problem: Prevention or rehabilitation? - Possible new directions.' (1981) 5 South African Journal of Criminal Law and Criminology 11.

The central question is whether prison can reform and rehabilitate offenders, and until now, the answer has been "an emphatic 'no'."[41] It has been suggested[42]2 that there are four conditions which help to explain the fact that correctional treatment programmes have failed. The first is that it is extremely difficult to manage beneficial services in a coercive setting as the requirements of custody and treatment often come into conflict with each other. The second condition is the fact that personnel are often insufficient in their numbers and training and that they are forced to work in conditions where they lack the appropriate equipment and facilities. The third condition is the fact that the person who needs the assistance has been damaged by the stigma attached to being a convicted criminal. The final condition is the fact that nearly all offenders are handicapped by their limited education, and, it is submitted, the socio-economic circumstances from whence they come.[43]

The failure of correctional facilities has lead many people to intensify their belief in deinstitutionalisation. It is important that any treatment which is undergone by offenders does not depend on the amount of control exercised upon them. It is submitted that they could be treated just as easily in a non-institutional, as in an institutional, setting. If offenders do have to be institutionalised, they should preferably be placed in open-care facilities with little or no control - giving them a sense of responsibility and making it easier for qualified people to treat them.

Whitehead and Lab[44]2 define correctional treatment as "any intervention aimed at reducing subsequent recidivism by the juvenile, whether that activity be the initial deviant act, or further offending by an adjudicated delinquent. Interventions whose primary focus was punishment, such as imprisonment or corporal punishment, [are] not considered treatment."

---

[41] Frimpong, K 'Searching for Alternatives to Imprisonment: An African Experiment' (1992) 3 South African Journal of Criminal Justice 235.

[42] Op cit see note 31 at 266B-276A.

[43] Op cit, see note 31 at 266B-276A.

[44] Whitehead, J and Lab, S 'Meta-Analysis of Juvenile Correctional Treatment' (1989) 26 Journal of Research in Crime and Delinquency 282.

They included cautions, restitution and residential treatment, amongst others, in the category of correctional treatment.

The failure of imprisonment can be illustrated by considering the fact that in Britain in 1980, over 60% of those sent to junior detention centres and over 85% of those sentenced to Borstal Training[45] were reconvicted within two years. Most of this recidivism occurred within the first six months while the memories of the punishment were still fresh in the offenders' mind.[46] Freeman[47] states that the fact

> "[t]hat institutional care is no real answer to juvenile delinquency may be gauged from the fact that many juveniles commit offences whilst in institutions. The evidence is that, if anything, they exacerbate the problem ... institutional care has the effect of generating more delinquent behaviour in juveniles, and this in turn stimulates the need for more institutions and tougher ones."

It is thus submitted that sentencing to imprisonment should be used as a last resort and never in the case of first offenders, unless they are convicted of a serious crime - one which is contained in Schedule 2 of the Correctional Services Act[48]. Correctional facilities have been found not to reduce recidivism; have very little impact on the treatment and reformation of offenders; cause psychological problems for offenders; and cause their family relations to break down due to separation. This is not to mention the fact that children learn more about crime in prison than they ever would on the streets. It is for these reasons that diversion should always be the first option, at every stage of the criminal justice process. Trying to keep children out of court is the main prerogative, but where this cannot be achieved, attempts to divert the child should be made at every available point. Furthermore, the

---

[45] This is what could be described as a juvenile prison in South Africa.

[46] Freeman, MDA 'Getting Tough with Young Things: Britain's new proposals for dealing with juvenile delinquency' (1980) 4 South African Journal of Criminal Law and Criminology 147.

[47] Op cit note 46 at 148.

[48] Act No. 8 of 1959 as amended. Also see Annexure for offences.

juvenile court system is overloaded and the costs of juvenile proceedings are high. The justice process has very severe effects on those juveniles exposed to it and detention programmes have been proved to be ineffective at combatting recidivism. Diversion may help to combat these problems[49]. This is due to the fact that it can be seen to be cheaper and less stigmatising.[50]

O'Donnell[51], suggests that

> "the need for rehabilitation as opposed to the need for assistance in meeting one's basic needs should be employed as the criterion to distinguish between those minors who shall continue to be handled through the juvenile justice system - and institutionalised only if the judge deems this is necessary to accomplish rehabilitation - and those who should be diverted to appropriate welfare programmes."

It is submitted that more children should be categorised as in need of care, rather than delinquent in an attempt to reduce the number of children who go through the criminal system.

---

[49] Morris, M (ed.), in Letting in the Light: Seeking Justice for the Children of South Africa, A workbook for children in trouble with the law, and their families, friends and advocates. Published by the Children's Rights, Research and Advocacy Project, Youth Advocacy Unit - University of Western Cape Community Law Centre (June 1993) 25, suggests that "[t]he strategy of incarcerating more and more offenders, and especially very young children, is fundamentally a bankrupt policy. It is incredibly expensive and does not reduce crime rates. The fact remains that there are numerous other approaches to treating children in trouble that are less expensive and ultimately more rewarding than overwhelming our prisons with inmates."

[50] As Morris says (Op cit, see note 49):
"[S]uch efforts as 'family preservation' and 'home-building', as they have been labelled, often look and sound expensive, especially in South Africa's economis state. However, strategies like family conferences and victim-offender mediation programmes ultimately save hundreds of thousands of rands that would be spent on future incarceration and court costs."

[51] O'Donnell, D 'Alternatives to Imprisonment of Children' Tomasevski, K (ed.) Children in Adult Prisons: An international perspective Frances Printer Publishers, London (1986) 142.

It is important that juveniles who do come into contact with the criminal justice system are properly represented in court. This is where juvenile justice advocacy plays a major role. Juvenile justice advocacy maintains that the defence of a juvenile should be the same as that of an adult. As they would in the case of an adult accused, attorneys attempt to obtain a judgement that is favourable to the child. Juvenile justice advocacy has arisen from a disillusionment with the courts ability to help the juvenile and the belief of many attorneys that intervention in a child's life should be minimal, as this is the most beneficial to the child and to society.[52]

In the United States of America, the past two years have seen almost all 52 states amend their juvenile justice laws to allow more children to be tried as adults. In 1980 every state kept its youth criminals in juvenile court and today only Hawaii tries all children under 16 as juveniles.[53] The Massachusetts House of Representatives has voted that accused murderers as young as 14 be tried as adults. Tennessee has eliminated any minimum age for trying some youths as adults, Oregon has lowered its minimum age from 14 to 12 and Wisconsin has fixed the minimum age at 10.[54] This is a very unfortunate situation as children are being tried as adults, without the protections afforded to juvenile accused. It thus appears that the question of criminal responsibility is not even considered. It is hoped that South Africa will never have cause to treat children younger than 10 as adults, and it is for this reason that diversion should be instituted as soon as possible.

Virginia has initiated a review of juvenile justice. It suggests four basis purposes in the juvenile code to promote the welfare of the child. These are:

> "1. To divert from the juvenile justice system, to the extent possible, consistent with the protection of public safety, those children who can be cared for or treated through alternative programmes;

---

[52] Murrel, M and Lester, D Introduction to Juvenile Delinquency Macmillan Publishing Company, New York (1981) 225

[53] 14/5/96 - ACLU Fact Sheet on Juvenile Crime at: http://www.aclu.org/congress/juvenile.htmp

[54] US News Online Cover Story 25/3/96 'Crime Time Bomb' at http://www/usnews.com/usnews/issue/crime.htmp

2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing...;
3. To separate a child from parents, legal guardians ... only when the child's welfare is endangered or it is in the interests of public safety;
4. To protect the community against those acts of its citizens which are harmful to others and reduce the incidence of delinquent behaviour."[55]

It is submitted that South Africa would do well to adopt this as its code for dealing with juvenile delinquents. Here, the child is diverted if this can be done, but the interests of society are always considered. The best interests of the child should always be considered, but it is submitted[56] that the interests of society should always be balanced against the interests of the child. This code appears to do this successfully. There is, however, nothing in the Virginia system that does not allow for tough sanctions to be applied. In fact, in many cases, the 'welfare of the child' may require that the child receives a message that s/he should not commit a crime again and that his/her criminal behaviour will not be tolerated.[57]

The increase of youth crime[58] has led many American legislatures to ensure that juveniles receive the maximum punishment. It is important that this is not allowed to happen in South Africa and that diversion programmes are instituted as soon as possible to forestall this possibility. One must never forget that:

---

[55] 'Juvenile Delinquents and Status Offenders: Court Processing and Outcomes' December 1995 at http://www.state.va.us/d...mmary/rpt181/juvjust.htmp

[56] As is discussed in Chapter 3.

[57] Op cit see note 53.

[58] The US News Online Cover Story of the 25/3/96, 'Crime Time Bomb' (op cit see note 37) found that "[M]ore aggressive law enforcement has helped cut violent crime in many big cities, but homicide by youths under 17 tripled between 1984 and 1994 and a coming surge in the teen population could boost the juvenile murder total 25% by 2005. Youth violence with guns has been increasing at roughly the same pace, and teen drug use is rising after years of decline."

> "[P]utting young offenders in adult prisons increases, not lessens their propensity for committing crime. While in prison, the juvenile offender will learn from older, more hardened criminals. When [s/]he is released back into the community in his [/her] twenties - undereducated unsocialised, unemployed and at the peak of physical power - [s/]he will be the very model of the very person we wished to avoid."[59]

It is important that more emphasis is placed on attempting to reform first and minor offenders rather than spending a great deal of time and money on hardened criminals. These are the offenders who are most likely to be reformed, but currently we are not trying to prevent them from offending or nipping their criminal careers in the bud when they first enter the criminal court system. It is here that time and money must be spent on assisting these young people, not when they have progressed further in their criminal careers and are at a stage where they are unlikely to reform.

It is essential that we do not let South Africa get to the stage where crime is so bad that the public are crying for the dismantling of the juvenile courts and for the trial of children as adult offenders. We must learn from the American experience and concentrate the majority of the funds received for juvenile detention on prevention programmes and diversion programmes for minor offenders entering the system. By doing this, we can hopefully avoid them graduating to more serious crimes, and avoid what is currently taking place in the United States of America.

The IMC agrees with this and has put forward proposals which suggest that funds should be re-distributed to provide for prevention. The Committee feels that preventions should be a priority, in order to stop as many children as possible from coming into contact with the juvenile justice system.[60]

---

[59] Op cit see note 53.

[60] This will be further elaborated on in Chapter 4.

2.3. Criminal Capacity

> "The theory of criminal justice holds that children of a defined age of criminal responsibility, in South Africa at age seven, are subject, as are adults, to the jurisdiction of criminal law. This means that they may, on suspicion of criminal behaviour, be questioned and arrested by the police and brought before a court with criminal jurisdiction."[61]

It has been proposed[62] that the age of criminal capacity should be raised to 14 with children of between 7 and 14 being held accountable for their actions by means of a Family Group Conference. The reasons for this being that:

> "the sooner the family and others connected with the life of the young person become aware of the problems and begin to find solutions, the better the outcome is likely to be."[63]

It is suggested that the age of criminal capacity[64] should be raised to 10, not 14 and all children under 10 years of age be held accountable by a Family Group Conference no matter what the crime. This is due to the fact that children between the ages of 10 and 14 have been known to commit serious crimes and one cannot justify treating them leniently, as by this age, they should be as aware of the difference between right and wrong as a child of over 14 would be expected to be. Then, all children, no matter what their ages, who are

---

[61] Morris, M 'The Search for Justice in a Juvenile Justice System' Putting Children First Papers and Reports of a conference convened by the Community Law Centre, University of the Western Cape, Cape Town (June 1992) 153.

[62] By the authors of Juvenile Justice for South Africa: Proposals for Policy and Legislative Change. Published by the members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town (1994) 29.

[63] Op cit see note 62.

[64] That is, that children, from the age of 10 should be seen to be *doli capax* unless the state can prove that they were unaware of the consequences of their actions and thus cannot be held responsible.

accused of the commission of a minor offence, would only come before the Family Group Conference and would then probably be diverted.

It is submitted that 10 year old murderers should not be dealt with by a Family Group Conference and diverted. This is not in the best interests of society - will they not do it again when they have completed the diversion programme? People would not tolerate this, and that could lead to a form of vigilante justice arising, where victims take justice into their own hands. This is an extremely undesirable situation. It is for this reason that it is submitted that the age of criminal capacity should be raised to 10 years of age, not 14, as suggested by some learned authors[65]. Children over 10 accused of the commission of serious offences, surely must be aware of the difference between right and wrong and should be held responsible for their actions by the juvenile court. Here they should be sentenced according to the circumstances of the offence, with age merely counting as a mitigating factor.

It can be seen[66] that incarceration is not succeeding in the rehabilitation of offenders. It is necessary for South Africa to develop a system based on the best points of both the welfare and justice models for dealing with juvenile criminals: a system that causes as little stigma for the offender as possible. It is submitted that a system of diversion which begins from prior to arrest is the system that should be opted for. The recommendation made in The White Paper and by the IMC should studied in great detail and used as a basis for this system. All attempts should be made to keep children out of prison unless this is completely essential. It is hoped that through these means, juvenile crime in South Africa will be reduced and that those who do come into contact with the criminal court system will emerge having learnt a lesson from their experience and will thus not offend again.

---

[65] For example, the authors of Juvenile Justice for South Africa: Proposals for Policy and Legislative Change op cit see note 62.

[66] From the discussion above.

Chapter 3

The Relevant Acts

In the past, only three Acts regulated the adjudication of trials involving delinquent children and the sentencing and punishment of those offenders who were found guilty. Recently, South Africa has ratified the United Nations Convention on the Rights of the Child[1] which contain elements of other United Nations Rules which until this time were not considered as sources of law. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") and The United Nations Rules for the Protection of Juveniles Deprived of their Liberty were the first Rules drawn up. Provisions of these which are consistant with those in the United Nations Convention on the Rights of the Child now have to be seriously considered as sources of law in South Africa. However, they must still be taken into account on their own as they contain many important provisions which can assist South Africa in drawing up a viable diversion system. The Interim Constitution for the Republic also came into being in 1993, which has affected the interpretation and content of some of the Acts which were already in place.

In order to properly contemplate diversion programmes, it is essential that these Acts, Conventions and Rules are examined in order to be aware of measures that are currently in place with regard to juvenile delinquents. One also needs to consider changes that would need to be made before South Africa could begin to practice a policy of diversion.

3.1. The Child Care Act No. 74 of 1983

> "The current Child Care Act of 1983 has as its primary function the "best interests of the child" and seeks to intervene at an early stage to discover the antecedent causes of unlawful or deviant behaviour. Once these causes are identified, treatment such as counselling, rehabilitation and reform are

[1] Ratified on 16 June 1995.

implemented, usually by social workers. Issues of due process do not come into play."[2]

Unfortunately, the "best interests of the child" has never been defined with any clarity, leaving the way open for subjective interpretation. This phrase needs clarification as at the moment it is seen to be indeterminate. It depends greatly upon the specific value system of the presiding officer[3]. It is submitted that this cannot continue and that the "best interests of the child" should be defined with sufficient clarity in order that similar decisions are reached in similar cases.

It is submitted that it is seldom in the "best interests of the child" for children to be removed from their families and communities. The author agrees that some children are psychopathic and need to be removed from society for the best interests of society itself. It is admitted that some children are chronic or compulsive criminals who have to be dealt with harshly, and who will probably never be reformed. These children, however, constitute a small portion of the juveniles currently incarcerated. It is here that the best interests of society have to be balanced against the "best interests of the child". Thus, it is submitted that a new term should be introduced with relation to juvenile delinquents; one which realises that society also needs its interests to be taken into account. This could be termed the "interests of all."

The system, as it stands, opts more for institutional care than it does for the replacement of the child in the family/community situation. A great deal of money is spent each year on building and maintaining prisons, places of safety, reform schools and schools of industry, but very little is spent on re-building and helping the families of those delinquents who have come into contact with the judicial system. It is suggested that if more money was spent on community development and the return of children to their families, the likelihood of those

---

[2] Morris, M 'The Search for Justice in a Juvenile Justice System' Papers presented at the Conference on the Rights of the Child, Cape Town 1992, at 161.

[3] Parker, S 'The Best Interests of the Child - Principles and Problems'. Alston, P (ed.) The Best Interests of the Child (Reconciling Culture and Human Rights) Clarendon Press, Oxford (1994) 26.

children being reformed would be greatly increased, and there would be less need for institutions[4].

Currently, South African law makes provision for two courts dealing only with children, the children's court and the juvenile court. The children's court deals with children "in need of care" while the juvenile court deals with those children who have allegedly committed a criminal offence.

3.1.1. The Children's Court

The children's court is far less formal that the juvenile court and the proceedings are a lot more flexible. Section 8 of the Child Care Act provides for the procedure in children's courts as follows:

> "(1) A children's court shall sit in a room other than that in which any other court ordinarily sits, unless no such other room is available and suitable.
>
> (2) At any sitting of a children's court no person shall be present unless his [/her] presence is necessary in connection with the proceeding of that court, or [s/]he is the legal representative of any person whose presence is necessary as aforesaid, or unless the commissioner presiding at that sitting has granted him[/her] permission to be present.
>
> (3) No person shall publish in any manner whatever any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is/was concerned in those proceedings. ... "

The most important aspect with respect to the children's court is that it is an inquiry, not a trial. Here, the circumstances of children are investigated in order to determine whether they are "in need of care", or whether they have been abandoned by their parents, and for these reasons need to be removed from the custody of their parents and placed in a foster home, place of safety or any other children's home established under the law. Inquiries undertaken in the children's court rely very heavily on the reports of social workers to determine whether the child is indeed "in need of care".

---

[4] This will be discussed further in later chapters.

It is suggested, by the IMC, that the Children's Court be made more central to the issue of youth justice than it is at the moment. If at the Referral Meeting it becomes apparent that the child is in need of care, the child should immediately be referred to the Children's Court. It has been previously suggested that many of the children who come into contact with the criminal court system have been arrested for an economic offence. These children are often stealing in order to feed themselves and can thus be considered to be in need of care. It is therefore agreed that increased use should be made of the referral of alleged offenders to a children's court inquiry.

3.1.2. The Juvenile Court

In the juvenile court, which is actually a magistrate's court, juveniles are on trial for a crime that they allegedly have committed. They are entitled to all the formal protections that an adult accused would be entitled to; that is, they are entitled to be represented by counsel if they can afford this; they are entitled to apply for legal aid; and they are entitled to be presumed innocent until proven guilty.[5] These exist alongside the protections afforded by section 25 of the Constitution of the Republic of South Africa Act 200 of 1993.

Trials in the juvenile court are also held in camera, and before an unrobed magistrate. The magistrate is unrobed in an attempt to make the proceedings seem less formal and less frightening to the juvenile accused. Juvenile accused are not allowed to be identified outside the court (much the same as the children's court procedure), thus anyone who has no business at the trial is refused entry unless the presiding officer rules otherwise.[6]

The parents of the accused juvenile, if they live in the same magisterial district and can be reached without undue delay, must be present at the trial.[7] It is very important to be aware

---

[5] 'Justice for the Children: No Child Should be Caged'. An independent report written by the Community Law Centre, University of the Western Cape, Cape Town (22 October 1992) 18.

[6] Section 154(3) of the Criminal Procedure Act No. 51 of 1977.

[7] Section 74(2) of the Criminal Procedure Act.

of the fact that the assistance provided by a parent in terms of subsection 73(3) of the Criminal Procedure Act does not compensate for the lack of legal representation.

The juvenile court, in sentencing, has the opportunity to use alternative punishments to those provided for adult criminals.[8] In sentencing the convicted juvenile, it is the duty of the juvenile court to consider the nature of the crime that was committed by the juvenile, the interests of society at large and the circumstances, age and personality of the child.[9] It is unfortunate that magistrates often do not have this information at hand. Probation officers' or social workers' reports are only submitted to the juvenile court if they are requested. In South Africa, a magistrate is not compelled to request a probation officer's report. This has, however, become standard practice in the large centres recently. It is thus submitted that legislation should be introduced in order to make this compulsory at all centres in all juvenile trials.

Morris argues that:

> "the magistrates and prosecutors in juvenile courts should be trained to deal with children in trouble with the law and educated on alternative sentences and services and that an independent social worker or probation officer should be appointed to every juvenile court to act as an ombudsperson."[10]

The learned author suggests that only serious offenders should be tried in juvenile court. In 1992, it was estimated that only about 5 in every 1000 cases heard in juvenile court were serious offences[11]. The majority of children were charged with petty crimes, most of which were socio-economic in nature.[12]

---

[8] See Section 290 of the Criminal Procedure Act and discussion later in this Chapter.

[9] Gross, FA Who Hangs the Hangman? Juta and Co Ltd, Cape Town (1966) 83.

[10] Op cit see note 5 at 17.

[11] Offences like murder, rape, violent assault and robbery.

[12] Op cit see note 5 at 17. Also see Table of Statistics.

It is submitted that if magistrates and prosecutors were better trained to deal with delinquent youths, they would be more likely to send those youths into diversion programmes, whether before the case reaches the court (the prosecutor's discretion) or after the case has been adjudicated upon (the magistrate's discretion). This would keep a great deal more petty offenders from coming into contact with the juvenile court, as well as keeping those convicted of a crime out of prison and away from places where they will learn a great deal more about crime and emerge as the hardened criminals of the future.

3.2. **The Criminal Procedure Act No. 51 of 1977**

In terms of our common law, a child under the age of 7 years is considered to be *doli incapax* and is never held responsible for criminal offences. A juvenile between the ages of 7 and 14 years of age is presumed to be *doli incapax*[13] but this presumption is rebuttable. The onus lies on the prosecution to rebut this presumption.

However, it is submitted that this presumption is too easily rebutted. Often the child is merely asked "Did you know what you were doing was wrong?"[14] The prosecution may also rebut this presumption by answering the following questions in the affirmative:

> "Did the child in question in the circumstances have the capacity (or ability) to appreciate the wrongfulness of his/her conduct, and if the child did, then did the child have the capacity to act in accordance with such appreciation?"[15]

---

[13] S v S 1977 (3) SA 305 (O); S v M 1979 (4) SA 564 (B); S v Khubheka 1980 (4) SA 221 (O); S v Pietersen 1983 (4) SA 904 (E).

[14] Van Zyl, D 'The Juvenile in the Arms of the Law'. Youth, Alienation and Deviance (Lectures presented at the 1985 Summer School) Printed and Published by the Centre for Extra-Mural Studies, University of Cape Town (1985) 40.

[15] Van Dokkum, N 'Unwelcome Assistance: Parents Testifying Against their Children' (1994) 7 South African Journal of Criminal Justice 213.

In S v Dyk[16] the learned judge stressed that the most important test is the state of mind of the accused and his/her appreciation of the wrongfulness of the offence at the time it was committed. (My underlining)

It is suggested that the presumption be changed for children over 10.[17] They should all be presumed to be *doli capax* and the onus should be on the defence to prove that the child could not appreciate the wrongfulness of the offence. This will then preclude the problems discussed above from arriving. This is then another reason why it is essential for a juvenile accused to be represented in court.

Another criticism with respect to the rebuttal of the presumption, is that under section 74 of the Act, the parent or guardian of an accused under 18 is warned under threat of criminal sanctions to appear at the criminal proceedings. It is here where the parent or guardian is often called to testify for the prosecution as to the age of the accused; to verify that the accused has been taught to distinguish right from wrong; and to confirm that the accused could make that distinction when s/he committed the alleged offence.

It is submitted that this should be abolished. Husbands and wives may refuse to testify against each other in terms of their marital privilege. It should be the same for parents and children. Children whose parents testify 'against' them, could feel that their parents have abandoned them and no longer care for them. This can cause the breakdown of the family unit which is the main thing that one should be working to build, protect and strengthen.

All other juveniles (those over 14 but under 18 years of age) are deemed to be *doli capax* and are treated in much the same way as adult accused, apart from the exceptions discussed above with respect to the juvenile court.

There are many problems that arise when one considers the provisions of the Criminal Procedure Act. In theory, the Act provides sufficiently for the protection of children, but

---

[16] 1969 (1) SA 601 (C) 603.

[17] As discussed later.

unfortunately it does not always work in practice. It is essential for the provisions to be reconsidered to be made more practically workable.

The Act[18] provides that if juveniles are arrested they must be taken immediately to a police station. If they are to be detained until their trial[19], they may be taken to a place of safety by the police or may be released into the custody of their parent or guardian who will then undertake to have them in court on the day of the trial.

However, these alternatives to pre-trial detention seldom work as planned. This is due to the fact that the police, prosecutor or magistrate often believe that the juvenile will not in fact appear in court if s/he is not detained. Children's homes and places of safety are often so full that they are not an option for the placement of a child who is awaiting-trial. Often the police see detention in prison as their next option, and as the definition of a "place of safety" is so broad that it could be interpreted to include a police cell, the police often choose this option thinking that it is better for the juvenile than imprisonment. This is however, not a suitable place to hold a child for any length of time.

The police are not compelled to follow any of these alternatives and in fact do not even have to contact the juvenile's parents if they live outside the magisterial district and if contacting them would cause undue delay. This then removes another alternative to pre-trial detention. The aim of the police is to have accused juveniles present at their trials and thus they often do not care how they achieve this as long as it is achieved. The recent amendments to the Correctional Services Act No 8 of 1959[20] changes the situation as to pre-trial detention but does not do much to remedy this problem in the law.[21]

---

[18] In Section 50.

[19] Whether pre-trial detention is in fact necessary at all will be discussed later.

[20] The Correctional Services Amendment Act No. 17 of 1994 and The Correctional Services Amendment Act No. 14 of 1996.

[21] As will be discussed later.

Juvenile accused have the right to be informed of their right to legal representation, yet many are unaware of this[22]. Those that are, often do not even think of engaging a lawyer as they fear that they will be unable to afford the fees. Most juvenile accused are also unaware that they can apply for free legal aid. This can be seen to prejudice the juvenile accused who thus appears in court unrepresented. Juveniles who conducts their own defence without any knowledge of the criminal law or the laws of criminal procedure cannot be said to have had a fair trial. It thus appears essential that legal aid should be provided for all juvenile accused who cannot afford the costs of an attorney, in order for them not to be prejudiced in their defence and so that they can be seen to have had a fair trial.[23] It can thus be said that lawyers are of great asssistance to juvenile accused in that they know the law and can obtain a favourable disposition for the child; one which children either would have not known about or would have not had the knowledge and skill to obtain for themselves.

Subsection 73(3) of the Act provides that accused juveniles may be assisted in their defence by their parent or guardian. The court may also allow any other person to assist if it feels that the accused needs such help. However, this cannot compensate for the experienced defence accused juveniles would receive if they were to be defended by a lawyer; someone familiar with the procedure and the rules of court. It was held in S v Assel[24] that the assistance which a parent or guardian may render to a juvenile, is not synonymous with legal representation.

Section 74 provides that the court must warn the parents of an accused who is under 18 to attend the trial. This can take place even after the trial has begun. However, the court is only required to do so if the parents are resident within the same magisterial district as the court and if they can be traced without undue delay. By providing for this, the Act is woefully inadequate as it leaves an easy and completely legal way to secure the attendance

---

[22] Op cit see note 14.

[23] See discussion on legal representation in Chapter 6.

[24] 1984 (1) SA 402 (C).

of juveniles without the assistance of their parents.[25] This situation is not desirable and this part of the Act should be amended to provide that the parents must be traced, no matter where they reside. This must be done within a reasonable time in order that children are not kept in custody or at places of safety for an extended period of time. Non-government organisations should be used for this, relieving the pressure on the police and hopefully minimising any delays that may arise from this change.[26]

Under subsection 112(1)(b) the court must question accused who have pleaded guilty with reference to the alleged facts of the case in order to ascertain whether they in fact do admit the allegations in the charge to which they have pleaded guilty. If the presiding officer is not satisfied as to the guilt of the accused, s/he may change the accused's plea to not guilty and deal with him/her under subsection 115. Subsection 112(1)(b) attempts to protect those who plead guilty by mistake. As Didcott J said in S v M[27]:

> "The safety device is an important one. Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of their doing so is obvious in a society like ours which sees so many who are illiterate and unsophisticated coming before the courts with no legal assistance. The danger is greater still, it goes without saying, when one is a young child with a limited grasp of the proceedings."

Theoretically, this is a laudable procedure, but it is submitted that many juvenile accused who plead guilty would still not understand the full importance of it and may admit things during the presiding officer's questioning that they actually do not intend to admit. The author suggests that in the case of juvenile accused who plead guilty, the presiding officer

---

[25] This is due to the fact that the police may determine that the child's parents are resident outside the magisterial district of the court and thus no attempt is made to find them, as this would cause an undue delay. Thus the child appears in court alone; without the help and support of his/her parents.

[26] See discussion on the use of non-governmental organisations (NGO's) to find the parents of an arrested child in Chapter 5.

[27] 1982 (1) SA 240 (N) 242.

should question the accused in order to determine whether they do in fact plead guilty, but that the prosecutor should still be required to prove the guilt of the accused. If the diversion programmes proposed by the author later in this thesis are accepted and put into action, only serious cases involving juvenile accused would appear before the court, thus allowing the prosecutors more time to be able to do this without holding up the court roll.

A juvenile court may[28] convert the trial into a children's court inquiry if it appears to the presiding officer that the child is "in need of care." This order can be made at any stage of the proceedings, even after the verdict has been delivered. If the order is made after the child has been convicted, the conviction is automatically annulled. The child is then removed from the criminal court system. This procedure is intended to protect all neglected children who are desperately in need of financial and often emotional support. As the learned judge said in S v Shange:[29]

> "It is clear that it is a competent and proper order in certain circumstances for a "child in need of care", as defined in the Children's Act, to be sent to a children's home. It is equally clear that a child "in need of care" may well be a child who has acted in a criminal or irresponsible fashion or has been subjected to 'contaminating influences'."

It is a great pity that this procedure is not used more often, as it appears to the author that many of the children who appear in the juvenile court, do so for petty crimes. These children are far more "in need of care" than 'criminals', and would most likely be far better off in a foster or children's home than they would be in a prison.

The court often does not know that a child is "in need of care" due to the fact that it does not have to request a probation officer's report and often will not do so when the child is a first or second offender. Of course, after that it is usually too late for the juvenile who is well on his/her way to becoming a hardened criminal. The author suggests that probation or social worker' reports should be compulsory at all trials. This is especially necessary

---

[28] Under Section 254 of the Criminal Procedure Act.

[29] 1967 (2) SA 81 (C) 82.

when juveniles are first offenders as this is when one can determine they are "in need of care" and can then keep them away from the contaminating influences that they may be exposed to upon entering the penal system, as well as the label that will be attached to them if they are convicted of a criminal offence.

3.2.1. Sentencing

Section 276 of the Act provides for the imposition of the following sentences once an accused (adult or juvenile) has been convicted:

- Imprisonment (minimum 4 days; maximum life)
- Periodical Imprisonment (minimum 100 hours; maximum 2000 hours)
- Committal to an institution established by law
- Fine (in the case of non-payment converted to imprisonment)

All of the above may be suspended or postponed. In addition, the following sentences[30] are available solely for juveniles:

- Probation under the supervision of a probation officer
- Placement in the custody of a suitable person
- Reform school.

There is however, no compulsory minimum sentence available for juvenile sentencing, and courts are given a discretion as to the length of imprisonment they can impose. However, in practice, children are usually only sentenced to imprisonment after they have several previous convictions and usually after they have spent some time in a reformatory.[31]

It is important to remember that the alternative sentences available for juveniles are not easy sentences by any means. A sentence to reform school, is especially not to be considered as a light sentence. The length of time for which juveniles may be detained[32] in a reform school is decided by the court on contemplation of their age at the time that the order is

---

[30] As provided for by Section 290.

[31] McLachlan, F Children in Prison in South Africa Published by the Institute of Criminology, University of Cape Town (1984) 29.

[32] Up to a maximum of two years.

made.[33] It is submitted that this should be amended and that the sentence be determined by the age of the juvenile at the time of the commission of the offence.

Often too, reformatories are not secure, thus the presiding officer in a case where the crime is serious, will sentence the juvenile to a prison term as s/he feels that reform schools are not secure enough.[34] As harsh as the regime in a reform school can be, reform schools are far more preferable than prisons, and thus concerted efforts should be made to make them more secure to avoid this happening.

It thus seems realistic to conclude that although the Criminal Procedure Act attempts to provide protection for accused juveniles, it rarely succeeds in practice. As McLachlan says:

> "[T]he discretion of the courts and police, practical difficulties in the implementation of alternative welfare sentences, the technical complexity and inadequate provisions of the law itself, cause the Criminal Procedure Act to provide little real protection to children in the criminal justice system."[35]

3.3. **The Correctional Services Act No. 8 of 1959**

There are very few provisions in the Correctional Services Act relating to juveniles with the attendant result that there is little difference in the way adult and juvenile prisoners are treated. The Act defines a juvenile as a person under the age of 21. This is out of line with the Child Care Act, the Criminal Procedure Act and the Interim Constitution, not to mention the United Nations Convention on the Rights of the Child - all of which define a juvenile as a person under the age of 18. It is essential that this definition be brought into line with the other acts in order to keep juveniles under 18 from being detained with "juveniles" over 18 who are usually more hardened criminals. It is from these "juveniles" that further criminal skills are learnt.

---

[33] Op cit see note 14.

[34] Op cit see note 14.

[35] Op cit see note 31.

The Act provides[36], that no person shall be detained in a police cell or lock-up without the authority of the Commissioner for a period longer than one month. If unconvicted juveniles must be held in prison, they may not be put in a cell with or allowed to associate with anyone over 21 who is in custody, unless that person is a co-accused or where the association would not be to the accused's detriment.[37] Here one can see that the difference in definitions allows for a juvenile to be detained with people over 18, as long as they are under 21. It is submitted that this is not a desirable state of affairs and that, as far as is possible, juveniles should only be detained with juveniles of their own age group; but failing that, that they only be detained with persons of eighteen years or below.

In the past, unconvicted juveniles could not be detained in a prison or police cell or lock-up unless the detention was necessary and no suitable place of safety mentioned in section 28 of the Child Care Act was available. However, this provision did not always work. Courts did not always limit pre-trial detention of juveniles to cases where it was necessary. Often juveniles were detained for petty offences which would not even eventually merit the detention. Other juveniles were detained because the police could not spare the time to contact their parents. Finally, places of safety were often reluctant to admit juveniles awaiting trial due to their lack of secure facilities, as well as the fact that many of the children there were children "in need of care" awaiting placement in foster homes. Thus a great number of juveniles arrested ended up awaiting trial in a prison, police cell or lock-up.

It was for this reason that the Correctional Services Amendment Act No. 17 of 1994 was introduced. This Act provided for the prohibition of the detention of all minors under 18 in prisons, police cells or lock-ups for more than 24 hours after their arrest. However, due to the release of the children into the custody of places of safety which were unable to cope with the influx, and which were not secure enough to contain the juveniles, many of them escaped.

> "A major miscalulation was the suitability and capacity of places of safety to hold the children who had previously been held in prisons or police cells.

---

[36] In Section 28.

[37] Section 29(6) of the Act.

> Places of safety were originally designed to care temporarily for children who are victims of abuse or neglect. These children rarely need to be confined, so most places of safety do not have barred windows or fences to keep children in. In addition, the staff at these facilities are not trained or experienced with regard to the appropriate handling of young people who have come into contact with the law."[38]

Courts were often also forced to release children on their own recognisance, or into the care of their parents or guardians and hope that they will return to court to stand trial. In many cases they did not return.

Another serious side-effect of the fact that the Act was put into force so suddenly was the negative public opinion about the problems related to section 29. The print media, in particular, emphasised the problems with headlines like: "Children on Crime Spree"; "Hundreds Escapre from Places of Safety"; "Lock Up These Wild Kids"; and "War on Teen Gangs". This had a very damaging effect as the labelling by the press further marginalised young people who were already difficult to assist. It also turned public opinion against the youth, which was perturbing when the youth justice system so desperately needed community based solutions, which are vital to the success of a new justice system.[39]

The result was that a Private Member's Bill was introduced into Parliament by ANC Member of Parliament Carl Niehaus, head of the Correctional Services Portfolio committee in an attempt to amend this Act. This resulted in the promulgation of the Correctional Services Amendment Act No.14 of 1996.

The Act[40] provides for:
- a distinction between children under 14 and children between 14 and 18

---

[38] Skelton, A 'Rethinking the issue of Children in Prison' Child Rights (1996) May 21-22.

[39] Op cit see note 38.

[40] Act No 14 of 1996.

- a distinction between detention before the first court appearance (which must be within 24 hours of arrest if under 14 and within 48 hours of arrest if between the ages of 14 and 18) and detention whilst awaiting trial
- limitations on the power of the court to order detention of juveniles between 14 and 18 after arrest - these juveniles now have to be charged with serious offences (which are listed in Schedule 2[41] of the Correctional Services Act).

Under the amendment to section 29, subsection 29(1) provides that children under the age of 14 may not be detained in a prison, police cell or lock-up after their first appearance in court. They may only be kept in a police cell or lock-up in the period after arrest but before their first court appearance. (This period MAY NOT exceed 24 hours). This may, however, only take place if the detention is necessary and in the interests of justice or if:

> "the person concerned cannot be placed in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, for the period in question."[42]

If none of the alternatives mentioned above are available the court cannot order the juvenile's detention in a lock-up, police cell or prison. The court would then be forced to release the child. Thus the onus is now on the police to a far greater degree to find the parents or guardian or any other suitable person before the child's first appearance in court. The new legislation regulates detention from the time of arrest until the first court appearance and also bans the detention of juveniles under 14 in prisons, police cells or lock-ups after they have appeared in court for the first time. If the police cannot find the parents, guardians or other suitable persons before the first appearance, the child may have to be unconditionally released.

It is submitted that this is a very good theoretical provision, but what does one do with a 12 year old who is accused of murder. Surely s/he cannot be released back into the community under the care of his/her parents. S/he is not likely to come to court voluntarily to face such

---

[41] See Annexure.

[42] Section 29(2)(a) and (b) of the Act.

charges. An even worse scenario occurs when his/her parents cannot be found. Must the court now release him/her unconditionally? Thus, it appears that the Act does not sufficiently provide for such extreme cases and should be amended in order to do so.

Section 29 also provides for the detention of children, between 14 and 18 years of age, in police cells or lock-ups in the period between their arrest and their first appearance in court. The detention of children in police cells or lock-ups, no matter what their age however, may only be justified if the detention is "necessary and in the interests of justice" or if the child cannot be released into the care of his/her parent or guardian or any other suitable person or any institution or place of safety for this period.

Subsection 29(5) deals with what happens to children between the ages of 14 and 18 after their first appearance in court. Subsection 29(5)(a) states that a juvenile may not, before his/her conviction and sentence:

> "be detained in a prison or police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983), is available for his/her detention."

If juveniles are accused of committing any Schedule 2 offences, or any other offences in circumstances of such a serious nature that such detention would be warranted, they may be detained in a prison, but not a police cell or lock-up. The section also provides that such juvenile will be brought before the court that made the detention order every 14 days so that the court may reconsider the order.

It is submitted that this would be extremely time-consuming and very expensive and should be done away with. If the presiding officer has, on review of the data submitted to him/her after the child has been assessed at the Reception and Referral Centre[43], decided that the

---

[43] As discussed in Chapter 5.

child should be detained until his/her trial, then this should hold until the child is brought to trial. It is also submitted that the trial should take place within 30 days of the child's first appearance in court. Bringing the child to court every 14 days wastes the court's time and may even delay the actual trial.

If the child is to be detained in a place of safety, subsection 29(5) requires that the place of safety be secure. This will require that security measures at the current places of safety be greatly improved. Currently, children are escaping from places of safety regularly, leading to the conclusion that they are not secure enough. This leads one to consider the provisions of subsection 29(5A)(a).

This provides that:

> "[I]n considering whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of a person referred to in subsection (1)(b)[44] in a prison (but not a police cell or lock-up) the presiding officer shall, in addition to any factor which he or she deems necessary, take into account the following factors, namely:
> (1) the substantial risk of absconding from a place of safety mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983);
> (2) the substantial risk of causing harm to other persons awaiting trial in a place of safety;
> (3) the disposition of the accused to commit offences."

This allows for juveniles to be detained in prison if they are likely to abscond from places of safety.

Section 29 is a very laudable provision and allows for children arrested for minor offences and who are not a threat to society to be released into the care of their parents. In fact, it appears to prohibit the detention of these juveniles after their first appearance in court. It can be seen to faciliate diversion, as young people are no longer exposed to the criminal justice system for long periods of time without knowing what the outcome will be. Detention

---

[44] Juveniles between the ages of 14 and 18 years.

before trial and the subsequent labelling attached to it (even if the juvenile is not convicted) is done away with in most cases. Here children can be released into the care of their parents and can continue with their schooling. This also allows for them to be placed in diversion programmes without being which may result in their cases being withdrawn and them never having to go to trial. This is what should be aimed for. Only children accused of serious offences should be detained while awaiting trial.

The fact that these children[45] are not allowed to be detained in police cells or lock-ups is an important step forward for juvenile justice. This is due to the fact that they cannot be detained for long periods of time without any educational or recreational facilities. They will have to be moved to prisons where these are provided. At central places like prisons and places of safety, proper observation and care of the juvenile may also be allowed to take place.

Finally, it is submitted that the prisons in which the children are detained should be those set aside for children and that children should always be kept separate from adults. Children should also have proper educational and recreational facilities provided for them while they are being detained.

Schedule 2 is a step forward in eliminating what can be called minor offences. However, it does not cover many offences which could be called serious, for example, possession of an unlicensed firearm. But as Sloth-Nielsen points out, these lacunae could be rectified once it was clear that juveniles accused of these offences were not following the conditions of their remands while in the custody of their parents or guardians.[46]

---

[45] Those accused of the commission of serious offences.

[46] Sloth-Nielsen, J 'No child should be caged - closing doors on the detention of children' (1995) 8(1) South African Journal for Criminal Justice 55

3.4. The Constitution of the Republic of South Africa Act No. 200 of 1993

> "The rights enshrined in section 25 are part and parcel of the so-called procedural human rights which ensure that a persons rights, including his/her substantive human rights, are justiciable and also that a person's rights may only be infringed in a specified and just manner. The most important procedural right is accordingly the right to equal protection of the law (subsection 8(1)), encompassing the right of access to a court of law (entrenched in terms of section 22) and the right to a fair trial(subsection 25(3))."[47]

Subsection 25(1)(c) provides for the right of the accused to consult with an attorney of his/her choice; the right to be informed of this right, and that where substantial injustice would otherwise result, the right to be provided with the services of a legal practitioner by the state. As has been discussed above, the appearance of undefended children in court can be seen as causing substantial injustice. Children cannot possibly defend themselves properly, not to mention the fact that they probably do not understand what is happening. They may be found guilty and harshly sentenced when this is not deserved or when they are in fact innocent. It is thus submitted that substantial injustice always results when a child appears in court undefended and therefore juvenile accused should always be provided with the services of a legal practitioner by the state as provided for in this section.

Subsection 25(2) deals with the rights which arrested people possess from the time of their arrest until the start of their trial or until they are released before the trial. It is important that the person is treated as "innocent until proven guilty," and with relation to this, accused must be aware of their right to remain silent. It is also important that accused persons are informed of the consequences that could follow if they make a statement. The right to remain silent was previously included in the Judges Rules, but did not have the force of law. With the introduction of this provision into the constitution it appears that accused persons

---

[47] Basson, D South Africa's Interim Constitution (Text and Notes) Juta and Co Ltd, Cape Town (1994) 37.

will always have to be informed of their right to remain silent, as well as the fact that if they give up this right, anything they say can be used in court. This is a very laudable provision and must be strictly enforced in order that people are aware that they should not say things at the time of arrest as these could be used against them later.

The maximum time that accused persons may be detained before their first appearance in court is prescribed by subsection 25(2)(b). A person under arrest should be released as soon as is reasonably possible, but no longer than 48 hours after the arrest or unless a court feels that in the interests of justice, the person should not be released. It is important to note that the police are, however, not compelled to detain arrested persons for the full 48 hours. If they are in a position to release them prior to the end of the 48 hour period, but do not do so, the further detention of that person will be seen to be unlawful, even if the person is brought to court within the 48 hour period.

Subsection 25(3) states that every accused person shall have the right to a fair trial, which especially includes the right to be tried within a reasonable time after having been charged[48]. This right is universally recognised.

> "The Sixth Amendment of the United States Constitution guarantees a defendant a speedy trial, while subsection 11(b) of the Canadian Charter affords the charged person the right to be tried within a reasonable time. This requirement is also contained in articles 5(3) & 6(1) of the European Convention for the Protection of Human Rights & Fundamental Freedoms."[49]

Subsection 30(3) of the Constitution makes it clear that the "best interests of the child" must be seen as paramount. However, again this phrase is not sufficiently defined, leaving what can be seen to be the "best interests of the child" up to the interpretation of the individual. It also states that "for the purpose of this section a child shall mean a person under the age

---

[48] Subsection 25(3)(a) of the Act.

[49] Cachalia, A (*et al*) Fundamental Rights in the New Constitution Juta and Co Ltd, Cape Town (1994) 84.

of 18 years ... " As the constitution is the cornerstone of our law, it is imperative that the Correctional Services Act changes its definition of juveniles to fall in line with this definition.

Under subsection 30(2) the right of detainees stated in section 25, are extended to juveniles. It is also stressed that the child has the right to be detained under conditions and treated in a manner which takes account of his/her age. In addition to these rights, the child also has the right not to be incarcerated with adults, the right to educational material and the right of access to parents and relatives. If children in detention are to perform labour, that labour should be light in accordance with subsection 30(1)(e).

Sections 25 and 30, along with section 8, the equality provision[50], are those sections in the constitution which have the most relevance to juvenile accused. They do not change many of the Acts discussed in this chapter, but do add to them. The Criminal Procedure Act is the one most affected by the constitution, as section 25 now concretises many of the rules that were not actually part of the Act, but were still recognised by the courts. Before, the fact that these were not followed would not have been deemed to lead to an irregularity in the proceedings, but now that they are part of the law, this will be so.

3.5 **The United Nations Convention on the Rights of the Child**

This convention attempts to minimise the necessity for intervention by the criminal justice system in a juvenile's life and thus to reduce the harm that could be created by this intervention. South Africa has recently become a signatory to the Convention and therefore it is necessary to consider whether our laws conform to the principles stated in the Convention or whether changes need to be made in order for us to conform.

---

[50] See Annexure.

Article 1 of the Convention (CRC) states that:

> "[f]or the purpose of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."

Due to the fact that South Africa has ratified this convention, it is submitted that the age of a juvenile must be deemed to be 18 and the definition of a juvenile as a person under 21 as given in the Correctional Services Act must be amended to fall into line with this.

Article 3 states that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This falls in line with section 30(3) of the Interim Constitution and the provsions of the Child Care Act and should always be heeded. However, again the phrase is not defined. This must be done as soon as posssible in order that decisions are not made and merely justified by saying that they are in the child's best interests. It is important that a standard be set against which the "best interests of the child" can be measured.

Article 37 says that no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. Both capital punishment and life imprisonment without the possibility of release are prohibited for offences committde by persons below 18 years. Any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. A child who is detained shall have legal and other assistance as well as contact with the family. This is very important with respect to the rights of children and corresponds with the Interim Constitution in that this also provides that no person shall be subject to cruel or inhuman treatment.

Article 40(2)(b) states:

> "Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him.her, and, if appropriate, through his/her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his/her defence;[51]

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

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his/her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his/her privacy fully respected at all stages of the proceedings.

The rights set out here are due process rights and are guaranteed to every child that is accused of a criminal offence. These provisions correspond to a large extent with sections 25 and 30 of the Interim Constitution and show that South Africa is committed to reforming the juvenile justice system. It is important that all of these rights are given effect to as soon as possible in order that children who come before the criminal court can be seen to have had a fair trial.

Article 40(4) states:

---

[51] This provides backing for the argument that all children should be legally represented in court. To fall in line with this provision, legal representation will have to made accessible to all juvenile accused.

> "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

This provision emphasises the need for alternative sentences as well as the importance of the development of programmes which will serve as alternatives to the sentences currently used. Some of these are already in use, but those that are not should be researched, their viability assessed and provision made for their institution (if they are viable) as soon as possible.

With the ratification of the CRC, diversion from the formal criminal justice system for children under the age of 18 is a goal which signatories must attempt to put into action. Article 40(3) emphasises this when it says:

> "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically available to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:
>
> (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
>
> (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

Article 40(3)(a) relates back to the discussion on criminal capacity.[52] It is important that a minimum age be established. This age must be one below which children have been proved not to understand the difference between right and wrong, as, it is submitted that if they can appreciate this difference, they should be held accountable for their actions.

---

[52] See Chapter 2.

3.6. The United Nations Rules

It is important to look at these Rules as well as at the Convention on the Rights of the Child as they are also important with respect to being the basis for the CRC. Aspects in both sets of Rules overlap with some of the provisions of the CRC. Even though these Rules are not binding rules of law, they must be considered as they can be a useful guide in any attempt to make diversion an option for proceeding in the South African justice system. These Rules must be looked at in order to see whether the South African legal system conforms, and if not, what changes need to be made in order to ensure conformity.

3.6.1 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")[53]

Article 5 states that

> "[T]he juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."

This is not presently done in South Africa. Sentences are disproportionate for similar offences. Often the circumstances of the offender are not taken into account either, due to the fact that social services reports are not compulsory and are usually not compiled unless the judicial officer requests them. It is submitted that this should be the cornerstone of our juvenile justice system and should thus be adopted into our law.

Article 7 which deals with the rights of juveniles corresponds very closely to the present section 25 of our interim constitution and Article 40(2)(b) of the CRC. It states that

> "the basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross- examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings."

---

[53] Adopted by General Assembly Resolution 40/33 of 29 November 1985.

Article 10.1 deals with what should be done when a juvenile first comes into contact with the criminal justice system. Our Acts have attempted to follow this lead, but unfortunately this is not working very well in practice. It is submitted[54] that this provision should be followed and that it should be mandatory for the police to contact a juvenile's parents or guardian, no matter where they reside as long as this can be done within a reasonable time. The provision states that:

> "upon the apprehension of a juvenile, her or his parents or guardian shall be notified of such apprehension, and where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter."

Article 10.3 states that

> "[C]ontacts between the law enforcement agencies and a juvenile shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case."

This is a very laudable provision. It is submitted that this allows for the application of diversion programmes to "avoid harm to" the juvenile.

Section 25 of the Constitution and Article 40(2)(b) correspond with article 15, as do sections 73 and 74 of the Criminal Procedure Act. This article states that

> "[T]hroughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country," and "[T]he parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interests of the juvenile."

Article 16.1 deals with social inquiry reports. It states that

> "[I]n all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background

---

[54] As has been discussed above.

and the circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority."

It is submitted that these reports should be mandatory at every trial even in respect of minor offences[55]. It is important that the presiding officer be aware of the relevant facts about the juvenile before s/he makes his/her final determination.

Article 17 suggests that the disposition of the presiding officer should be guided by the principles stated below.

"(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of a persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case."

These provisions do not seem to be followed at the moment, but the Correctional Services Act[56] does provide for this in theory. However, this does need to be put into practice by the courts.

Article 18 corresponds with Article 40(4) of the CRC and provides suggestions for sentencing, some of which are currently used in South African law. These sentences attempt

---

[55] As has been discussed above.

[56] In Section 29 and Schedule 2.

to avoid institutionalisation to the greatest extent possible. These measures, some of which could be used together, include:

(a) Care, guidance and supervision orders;

(b) Probation;

(c) Community service orders;

(d) Financial penalties, compensation and restitution[57];

(e) Intermediate treatment and other treatment orders;

(f) Orders to participate in group counselling and similar activities;

(g) Orders concerning foster care, living communities or other educational settings;

(h) Other relevant orders.

Article 19 should be included in our law. The new Schedule 2 of the Correctional Services Act does provide for serious offences, and this should be used to determine what the last resort would be. The article reads as follows:

> "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."

It is also important that priority be given to 'open' over 'closed' facilities and that these facilities should always be of an educational or treatment orientated type, rather than of a prison type.

3.6.2. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty[58]

Article 1 relates back to articles 5 and 19 of "The Beijing Rules". It states that

> "[T]he juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort."

The recent amendment to section 29 of the Correctional Services Act has attempted to provide for this.

---

[57] See discussion on sentences in Chapter 7.

[58] Adopted by General Assembly Resolution 45/114 of 14 December 1990.

Section 25 of the constitution already makes provision for article 18(a), which states that

> "[J]uveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications."

Article 29 provides that

> "[I]n all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned."

This corresponds with the provisions of section 28 of the Correctional Services Act.

Article 30 is one provision that is currently not operating in our law, but it is submitted that provision should be made for these types of detention facilities as they are far better than 'closed' detention facilities (prisons). It recommends that

> "[O]pen detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. ... "

The provisions of articles 38 and 39 should be made mandatory in the Correctional Services Act. At the moment, juveniles that are being detained often do not have access to educational programmes, which is detrimental to their rehabilitation and makes it more difficult for them to be properly reintegrated into society. Even 'open' facilities like places of safety are lacking in this instance. These articles state:

> "38. Every juvenile of compulsory school age has the right to education suited to his/her needs and abilities and designed to prepare him/her for return to society. ... "
>
> "39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes."

Provision should also be made for those juveniles who wish to have access to vocational training as provided for by article 42. Every correctional facility should provide for vocational training and should be given the necessary funds to ensure that this is possible. Article 42 states that

> "[E]very juvenile should have the right to receive vocational training in occupations likely to prepare him/her for future employment."

Thus, it can be seen that in order to contemplate diversion programmes, it is necessary to have recourse to the above-mentioned Acts. The United Nations Rules give guidelines that should be followed and in many cases are, in an attempt to keep juveniles out of the penal system. There are many changes that need to be made, but these cannot be made overnight. The reform of the juvenile justice system will be a process that will take time, but we must persevere in order to divert as many juvenile offenders as possible.

Chapter 4

Pre-Offence and Post-Offence Diversion

4.1. Pre-Offence Diversion

> "The regimes associated with 'treatment' and 'punishment' are both designed to shape the personality: They differ in that they aim to produce different types of person. The personal qualities, the virtues, which they prize and seek to inculcate fall into two distinct groups, each associated with a particular image of society ... They differ, too, in the psychological theories that underlie them, theories about how people learn different modes of behaviour or acquire different virtues ... And although both try to produce controlled and controllable behaviour, each identifies a different mechanism, a different concept of control. If the key idea of punishment is 'obedience to authority', the key idea of treatment is 'conformity to social norms'."[1]

Treatment and punishment both attempt to change the individual by anticipating his/her future actions. One expects that the child will commit further offences unless something is done, and this is where intervention comes in. Treatment and punishment can be seen to be the cure; that is, the child has committed an offence and needs to be cured of his/her tendencies towards delinquent behaviour. It is here where one remembers the old saying, "prevention is better than cure." It is submitted that it is better to

> "combat delinquency at its source than to try to eradicate it only when it has taken root. Admittedly, it does not follow from this observation that we must not try to 'cure' it at all, but there is a strong implication that we ought to

---

[1] Thorpe, DH (*et al*) 'Out of Care: The Community Support of Juvenile Offenders' George Allen and Unwin Publishers London (1980) 98.

> concentrate what few resources are available where they are likely to do most good."[2]

This is why it is necessary for South Africa to begin a comprehensive war on juvenile crime, starting with an attempt to prevent juveniles from becoming criminals at all - pre-offence diversion.

The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) set out a number of guidelines which should be followed by States in order to prevent juvenile offending. These Guidelines suggest that serious efforts must be made to provide a continuum of services which tackles the problem of juvenile offending before it occurs, and then provides follow up services based in the family and the community. The Riyadh Guidelines put forward a social policy which focuses on

> "the centrality of the child, the family and the involvement of the community, which are pivotally important to the development of a juvenile justice system."[3]

The involvement of the family is emphasised at guideline 12:

> "Since the family is the central unit responsible for the primary socialisation of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children."

In order to achieve this, the government should establish policies which are conducive parents being able to raise their children in a stable family environments. The Guidelines stress that special attention should be given to the children of families which are affected by problems brought about by rapid and uneven economic, social and cultural change.[4]

---

[2] Op cit see note 1 at 105.

[3] Taken from Skelton, A 'Developing a Juvenile Justice System for South Africa' Keightly, R(ed) Rights Juta and Co Ltd, Cape Town (1996) 183-186.

[4] Op cit see note 3.

Community involvement and community based solutions are seen to be vital. At Guideline 32, the following is stated:

> "Community based services and programmes which respond to the special needs, problems interests and concerns of young persons and which offer appropriate counselling and guidance to young persons and their families should be developed, or strengthened where they exist."

The Guidelines also encourage the participation of young people within their communities. They state that youth organisations should be created or strengthened at the local level and that these organisations should become involved in management and decision-making within the community.[5]

If the people developing policies in the relevant government departments take the suggestions made in the Riyadh Guidelines into account in their general policy and planning, the framework for effective prevention will be put in place.

It is admitted that there are certain fiscal constraints against the implementation of some of the measures that will be suggested. However, it is submitted that a great deal of money is spent by the Government on non-essentials. This money would be far better used and would be more beneficial to the country if it were redirected into juvenile diversion programmes. It must be remembered that any money spent on keeping a youth from committing a crime (or for that matter, committing further crimes) is an investment, not only in that child's future, but in the future of the country as a whole. It will also *help* to reduce the current horrific crime problem, something that South Africa drastically needs to facilitate more foreign investment and foreign tourism, in order to boost her flailing economy[6]. This will provide more funds for these projects; the projects will be able to combat more crime as they will reach more and more people; crime will be further reduced and so on. No-one will lose by an investment like this -it is an investment in South Africa's future.

---

[5] Op cit see note 3.

[6] Many countries will not invest in South Africa because of crime. This is one of many reasons, but it is submitted that a reduction of crime would make South Africa more user-friendly.

The Draft White Paper for Social Welfare[7] suggests that child and juvenile offenders should be targeted for education and action to prevent crime and recidivism. It suggests that prevention programmes should be directed at groups which can be deemed to be vulnerable when the factors related to the causing of criminality in children are identified. The Paper recommends that prevention programmes include the following:

* advocacy of a system of justice for young offenders which takes a comprehensive approach and also provides for tertiary prevention;
* the development of diversion and alternative sentencing programmes which emphasise the prevention of recidivism;[8]
* the involvement of parents and communities in an effort to prevent recidivism; and
* early assessment of young people in conflict with the law.[9]

The IMC recommends that prevention be given the highest priority in terms of recognition, support and funding. It is submitted that this is essential in order to stop young people from offending initially. As has been said previously, an investment in the prevention of crime is an investment in the future of the country. The suggested prevention strategies and programmes put forward by the IMC include:

* Formal education which is accessible to all young people, is holistic, inspiring, encouraging and is rooted in learning and development orientated environments.[10]
* School based child and youth development programmes which supplement academic and formal education programmes such as: social skills training, life-skills training, self-awareness programmes, relationship and emotional development programmes, sex

---

[7] In Article 157.

[8] This is essential in order to lower the high crime rate in South Africa. Imprisonment has not achieved this objective, thus the institution of other alternative programmes *must* be considered.

[9] Draft White Paper for Social Welfare at 142. And see discussion on assessment in Chapter 5.

[10] It is submitted that compulsory education for all children of school-going age, combined with a revamp of the school curriculum to include these aspects, will make prevention a more viable alternative.

education/AIDS education, leadership training, peer education and parenting awareness and responsibility programmes.[11]

* Child and/or youth development programmes such as those run by youth clubs, youth groups, youth forums, schools, welfare agencies, churches and a variety of NGO's.
* A range of early childhood development programmes.
* Parent education and support.
* Day care, after-school centres, recreation centres, weekend support programmes to families, and overnight support programmes to families or youth.
* Adoption[12]

These prevention strategies emphasise the need for intervention in the lives of children at risk. It is submitted that the family and community should be included in the implementation of these programmes. Parents should also be encouraged to learn about their children so that they are able to advise them on the right path to follow. By educating all children and providing them not only with academic training, but also life skills, children will emerge from the schools with a better ability to handle the world as a whole, as well as being better equipped to find employment and thus will be less likely to consider delinquency as an option. It is for these reasons that it is essential that prevention strategies be given priority funding and support in a new juvenile justice system.

Early intervention is seen as the second priority in the prevention of crimes perpetrated by juveniles. This includes school-based support systems for young people and their families which incorporate a multi-disciplinary team in the schools who are trained to detect risk factors in young people and their families. Child and youth development and diversion programmes run by organisations and projects which are able to deal with young people at risk can also be used to facilitate early intervention.

---

[11] This is essential in order for children to receive a comprehensive schooling; one which prepares them sufficiently for entry into the world outside school, not just one which prepares them for entering the job market.

[12] The Inter-Ministerial Committee's Draft Discussion Document for the Transformation of the Child and Youth Care System at 10-11.

It is suggested by the IMC that where poverty is the main issue, financial support should be given to families in crisis, combined with a programme of development and self-help. This, it is submitted, is, however, not a viable suggestion for the facilitation of early intervention. The number of families in crisis in South Africa is far too great for all of them to receive financial support from the government; for the main reason that the government could not afford this. It is suggested that this be abandoned as an option for early intervention, with the emphasis rather on intervention in the schools.

It is extremely important that intervention does not cease once a child has come into contact with the criminal court system or has been diverted from it, and has been released or has completed his/her diversion programme. Continuing support must be given to the child to enable him/her to make a smooth transition back into society.[13] Social workers should pay regular visits to the child's home to offer advice and counselling to the child and/or his/her family if this is needed. The family should also be advised on how to deal with the child and how to play an important role in helping to stop the child recidivating. It is suggested that:

> "[A]ftercare and re-integration programmes are essentially prevention and early intervention programmes in themselves. They are considered an essential part of the child and youth system and should be supported through funding and legislation. Such programmes should be community-based, should begin prior to disengagement with the system and should continue for a minimum of 6 months after disengagement. Healthy re-integration is a process which involves nuturance, support, creation of and networking with resources, and competency building. It cannot be left to chance and does not happen automatically. Aftercare programmes particularly apply to young people disengaging from foster care, residential care secure care and prison."[14]

---

[13] This is especially true for those juveniles who have been released from prison after a relatively extended term.

[14] Op cit see note 12 at 12

It is essential that prevention strategies are put into practice immediately. It cannot be stressed too often that the sooner a child's delinquent tendencies are identified, the sooner that child can be treated and helped to continue on a path which will keep him/her out of the criminal court system.

Criminal behaviour amongst juveniles has been increasing steadily over the years. In some countries, 60-70% of all recorded crimes can be attributed to juvenile delinquents.[15] A disturbing trend has begun to surface recently in that the number of juvenile delinquents under the age of ten is increasing rapidly. This is especially so in areas where drug trafficking, unemployment and the disintegration of the family structure is prevalent.[16]

It is in these areas that the prevention of juvenile delinquency will hopefully lead to the prevention of crime in the community as a whole. These areas should be targeted and the institution of programmes aimed at the prevention of delinquency at the pre-offence stage should be started here. If children are encouraged to engage in lawful and socially useful activities, they can be helped to develop attitudes which will not lead them into a life of crime. Emphasis should be placed on preventive policies which facilitate the socialisation and integration of all young people into society. This needs to be done through the community as well as through the mass media and the schools.[17]

One should heed the words of the Penal and Prison Reform Commission of 1947 which stated:

> "In the case of large numbers of juveniles, the anti-social career starts in early childhood, so that every attempt should be made to deal with any symptom

---

[15] Cilliers, C and Du Preez, G 'International co-operation in crime prevention and criminal justice for the twenty-first century' (1991) 4(1) Acta Criminologica 15B.

[16] Op cit see note 15.

[17] Op cit see note 15 at 18A.

> of maladjustment in their early stages before they have had a chance of developing further."[18]

Social measures are the most important way in which crime can be prevented. It is essential in order to curb crime in South Africa that the living standards of all members of society are improved. Most of the theories of criminology link crime to poverty. By providing for equal education, and job opportunities for all, especially the poorer members of society as well as providing housing and improved health services, the standard of living would be improved, leaving less reason for juveniles to turn to crime. A crime prevention programme which fails to account for the evils in society which act as catalysts for the breeding of delinquency, is unlikely to succeed.

Prevention is the ideal diversion programme due to the fact that it keeps juveniles from having to undergo any kind of exposure to the juvenile justice system. It also protects the rights of the potential victims of any criminal offence and does not label a juvenile as a delinquent. The main problem with relation to potential offenders is predicting which juveniles will become criminals. The fact that there seems to be a correlation between school failure and future delinquency[19] as well as the fact that all school children can be seen as a 'captive audience' suggests that general preventative measures should be started in the schools. Of course if juveniles need personal help, this should be accessible to him/her whether in school or outside it.

It is admitted that it is very difficult to legislate for preventive strategies. It is possible, however, to do this by providing for a new curriculum in the schools which is aimed at prevention. Now that education has been made free and compulsory for all, it should also be possible to deal with the problem of truancy which is one of the first signs of juvenile

---

[18] Cited in Gross, FA Who Hangs the Hangman? Juta and Co Ltd, Cape Town (1966) 85.

[19] Kadish, S Encyclopedia of Crime and Justice The Free Press, New York (1983) 366B.

delinquency.[20] This is due to the fact that all juveniles of school-going age are compelled to attend school and thus an eye can be kept on those who 'bunk' school on a regular basis.

School systems need to become more flexible. The school must be made to be the centre of the community. Here prevention programmes can be offered by psychiatrists, psychologists and social workers. Parents should be encouraged to become more active in school activities as well as being given guidance on how to deal with any behavioural problems exhibited by their children. It is submitted that schools should be opened to the community and be used as a support system for community members, especially with relation to the education of all members of the community. Parents should also have access to the professional mental health workers attached to the school so that they can be helped to deal with their problems as parents as well as with the problems of their children.[21]

It is submitted that the school curriculum should be altered so that the subjects taught to the pupils are more job and career orientated. Social skills and life skills programmes should be made part of the curriculum. Children should be taught parenting skills as well as being encouraged to expand their intelligence through learning how to solve problems instead of being compelled to rote learn. Counselling by professionals or teachers trained as counsellors should be readily available and classes should be held where group counselling is practised. This change in curriculum will produce school leavers who are capable of coping with society as a whole, not just educated matriculants who are capable of finding employment. This makes a great difference, especially for those children who do not enjoy formal education. Under this new curriculum, at least they will learn something relative to life in general from their schooling; something that will enable them to cope with life outside the school.

---

[20] Skelton, A 'Developing a Comprehensive Juvenile Justice System'. Glanz, L (ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 107.

[21] 'A National Strategy for Preventing Juvenile Offending in South Africa'. Glanz, L (ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 115.

There is a great necessity for school programmes which allow contact between the children, the community and the police in an attempt to enhance police-community relations and to attempt to encourage co-operation between the police and the public. The type of programme envisaged here is one which encompasses either talks by members of the police force to the children and their parents, or an 'adopt-a-cop' type programme where a police officer is assigned to a school and attends all their functions, as well as giving talks and being available at certain times every week for parents or children to consult with him/her.[22]

Street Law programmes should also be compulsory at every school. These will teach the children about the law; what punishments they will face if they break the law; and what their rights are if they do fall foul of the law. These programmes help to make legislation easy to understand. It is important that these programmes are also available to the community and especially the children's parents. This could possibly be done through a lecture once a week which is available to all who are interested. These lectures could include instructions on what to look for in a potential offender so that parents could become aware that their child could become an offender and begin to take steps to avoid this.

After-school and other such activities are also important in the prevention of crime. Community education projects like slide presentations and lectures on crime to adults make them more aware of crime and the fact that their child could become a delinquent. Programmes for children that keep them occupied in non-school hours with constructive behaviour, reducing the need for them to search for excitement, also help in the prevention of crime. These should be available to all and all should be encouraged to participate.

---

[22] This programme is currently in place at St Andrew's College, Grahamstown and is working very well there. It is, however, submitted that the programme needs to be introduced all over the country, but especially in township schools as this is where poverty is prevalent and it is here that children most need the aid and assistance of the police to help them from turning to a life of crime. It is also in these areas where the mistrust of the police is the strongest, and with the introduction of this programme, it is hoped that the children will begin to trust the police and have more faith in them.

NICRO (National Institute of Crime Prevention and the Rehabilitation of Offenders) has established a gymnasium and recreation centre in Cape Town, and other community work projects that aim at raising the quality of life, in other areas.[23] Youth clubs that provide religious guidance as well as sport projects for children who wish to attend them after school and at weekends, also keep the children busy. There is great necessity for these kind of recreation and sports centres to be established, especially in township communities.

It is submitted that any place in the community which is manned by responsible adults, which has the services of a mental health worker, and which provides activities which teach the children something or provide them with physical challenges (like sports) helps to keep the children off the streets, curb their boredom and give them an avenue in which to work off their frustrations. These all work together to keep children from committing crimes.

It is admitted that there are problems with these suggested community schemes due to the fact that it is impossible for them to eradicate the deep socio-economic problems in the communities they are trying to help; they are unable to reach everyone in the community; they may displace crime to other areas; and they are often over-worked and underfinanced. The effectiveness of the programmes offered also depend on the personality of the juveniles, the peer group in which the juvenilese find themselves, as well as the circumstances of the juvenile's family.[24]

But one cannot stop trying to find a way in which to successfully prevent crime. For every child helped, one (if not more) less crime is committed in society. If *one* child can be helped, then there is hope for the rest. It is essential that children who can be seen to be at risk and their families are identified as soon as possible. High risk children should be subjected to intensive attention from the professional or teacher-counsellor at their school. They should be exposed to various different prevention strategies which " ... concentrate on:

---

[23] McQuoid-Mason, DJ 'Solving the Crime Problem: Prevention or Rehabilitation? - Possible New Directions' (1981) 5(1) South African Journal of Criminal Law and Criminology 7.

[24] Op cit see note 18.

(1) the development of individual-societal attachments and the replacement of negative support networks with positive ones by creating opportunities for positive involvement with families, schools, communities and peers;
(2) the acquisition of social, cognitive and behavioural skills to enable successful participation in these units; and
(3) the availability of reinforcements through consistent rewards for pro-social behaviour."[25]

Through trial and error and continued attempts, the best prevention programme for South Africa will soon be determined, but it is essential that a comprehensive programme which includes the attempt to improve the standard of living in society as a whole, and a change in the school curriculum is implemented immediately in order to save as many children as possible from committing an offence and being drawn into the juvenile justice system.

4.2. **Post-offence diversion**

The second aspect of diversion to be considered is post-offence diversion. This involves a great deal of police discretion in that the police must decide *not* to arrest juveniles and bring them into contact with the juvenile justice system, but rather to take alternative measures. There is very little doubt that South Africa's high recidivism rate amongst juvenile offenders is due partly to the damage done to the child by the system itself. The more that children are unfairly exposed to the juvenile justice system, the more they see themselves as victims; and victims generally feel self-pity, blame the system for their ills, and usually want revenge. This revenge often surfaces as the commission of further offences.

A child's first contact with a member of the police force is a very important one. It can have long-term effects on the child and therefore affect the community as a whole. It is important that the police utilise their discretion and instead of arresting every child that commits a crime, especially those that can be classified as 'petty crimes', use their powers to either

---

[25] Op cit see note 21 at 118.

release children (into the care of their parents, social workers, a street shelter or on their own recognizance), or to warn them. This role that is played by the police is very important, not only in the way that it affects the lives of the children, but also in the volume and the type of cases that pass into the juvenile justice system.

Goldman[26] suggests that there are 13 factors which come into play with the police in deciding how a particular child should be handled. These are as follows:

"1. The police officer's opinion of and attitude towards the juvenile court.
2. The police officer's previous experiences with ... parents of juveniles, or with the juvenile court.
3. Concern about possible criticism from the court.
4. Potential public reaction to informal handling of the case.
5. Concern for the police image in the community if disrespectful juveniles are treated too leniently.
6. Inconvenience for the officer, as in potential court appearances.
7. Interest group pressure.
8. The officer's personal evaluation of the particular offence.
9. The officer's evaluation of the juvenile's family situation.
10. The demeanour of the juvenile.
11. Perception of black children as more in need of formal handling.
12. Seriousness of the offence.
13. Each member of a group of juveniles will be handled similarly."

It can be seen from the above that one of the main problems with relation to discretion concerns its application. Currently, discretionary power in making arrest decisions is utilised differently by different officers within the same department. This does not even consider the differences between officers in different departments. It is important that the making of these decisions be standardised by educating and training police officers as to how to make this decision. If all similar situations are treated similarly, dissatisfaction at police measures will

---

[26] Cited in Murrell, ME and Lester, D Introduction to Juvenile Delinquency Macmillan Publishing Co, New York (1981) 235.

be reduced. Diversion by the police provides juveniles with a second chance and keeps them out of the juvenile justice system.

> "Police officers tend to view arrest as an essentially irrevocable act which inevitably leads to prosecution and imprisonment. To convince the police to accept the use of diversionary procedures is the first and highest hurdle in the battle for acceptance. Officers must see the programme as one which continues to enhance their law enforcement powers. To ensure that the programme is accepted, orders must come from the very top. Police officers must adhere to internal policy and guidelines quite stringently and therefore any change in their role must be re-inforced within the hierarchy of the force."[27]

It is important that these orders are given as soon as possible in order to allow the police to feel free to caution and divert more children from the criminal justice system. The police should also be properly educated in order that they are aware of these options and exactly how they work. They would then, hopefully, be more inclined to view this as an alternative to arrest.

Instead of arresting children who have allegedly committed an offence, the police could caution them. In Britain in 1979, 50% of juvenile offenders were being cautioned. This is common practice there, especially where minor offences are involved.[28] It is, however, not currently formally used in our juvenile justice system. The caution should be issued by a senior police officer[29] (above the rank of constable) and may be in writing or given orally.

---

[27] Morris, M 'The Search for Justice in a Juvenile Justice System' Putting Children First Papers and Reports of a conference convened by the Community Law Centre, University of the Western Cape, Cape Town (June 1992) 169.

[28] Geisthorpe, L and Morris, A 'Juvenile Justice 1945-1992'. Maguire, M (*et al*) (eds) The Oxford Handbook of Criminology Clarendon Press, Oxford (1994) 968.

[29] Skelton, A 'Raising Ideas for the Creation of a Juvenile Justice System in South Africa'. A paper prepared for the "Children in Trouble with the Law" Conference organised by the Community Law Centre, University of the Western Cape, held in Cape Town (October 1993) 5.

A caution could be administered to the young people at home in the presence of their parent/s or guardian; or the caution could be issued at a police station.[30]

Cautions issued orally should be seen as informal cautions, no matter where they are issued, and should not be recorded. Written cautions, however, should be recorded and stored on a central computer which should be set up to record previous convictions and which should include this as one of its purposes. This is due to the fact that there is no use in continually cautioning juveniles if they have clearly not learnt from their previous warnings. It may now be necessary to take the process one step further in order to curb this offending, no matter how minor it may be.

In Britain the proportion of 14-16 year old boys cautioned for indictable offences increased from 34% in 1980 to 69% in 1990. The comparative figures for 10-13 year old boys were 65% and 90% respectively. The number of juveniles that have been cautioned has declined since 1980 apart from boys in the 14-17 age group. In many areas in Britain the police are giving cautions for a number of offences if each different offence meets the required criteria in the guidelines. However, it is more usual for the delinquent to be prosecuted after two cautions unless exceptional circumstances are present[31]. Gelsthorpe and Morris say that the main reason for the reduction in the number of juveniles who have been subjected to official processing is due to the increase in the number of unrecorded cautions in some police areas.[32]

One of the problems with instituting cautions is that, at present, prosecutorial discretion does not lie with the police in South Africa as it does in The United Kingdom. This would necessitate a formal delegation of authority by the Attorney-General[33] to the police to enable

---

[30] 'Juvenile Justice for South Africa; Proposals for Policy and Legislative Change'. Published by the members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town, Cape Town (November 1994) 8.

[31] Op cit see note 28 at 977-979.

[32] Op cit see note 28 at 979.

[33] Sloth-Nielsen, J External Examiner's Report, March 1997.

them to utilise this discretion and thus to make it work. It is submitted that this delegation should be instituted in order for the police to begin using cautions as a means of diverting children from the criminal justice system, and sparing the children the ordeal of being arrested for what can be considered to be a minor crime.

Children may also be cautioned formally after a (suggested) Referral Meeting.[34] This is a process which, it is suggested, could replace the immediate arrest and charge of the young person. The Meeting should not take place in a police station, but at the Reception and Assessment Centre attached to the police station.[35] It is submitted that the child should not be arrested and forced to appear (in the case of the minor offences for which they will merely be cautioned), but should be requested to appear. The child's parents or guardian should attend the meeting, along with the police officer who brought the child in, a social worker, and the child. Here a decision will be made as to how the case should be handled. If, after having assessed the child, the social worker considers a caution to be the most appropriate punishment, this should be issued. It is submitted that here the caution could be accompanied by the offer of supervision of the offender, where a police officer especially trained for this task or a social worker visit the child from time to time, to see how they are doing and to offer their assistance with any problems.

The introduction of cautions in Britain has thus been able to reduce the number of juvenile delinquents who appear before the courts for minor offences. This is a great achievement as the stigma is lessened and the juveniles are less likely to come into contact with other juveniles more hardened than they. It has not yet been proved that a system of cautions reduces recidivism, but it is submitted that a caution would cause juveniles to think twice before committing another crime and could thus lead them away from the commission of another offence. It is also suggested that South Africa opt for a system of cautions, both

---

[34] At the moment this is a disputed idea due to the issue of prosecutorial discretion (discussed above with respect to cautions). There are no Referral Meetings currently in operation, but the author submits that this is a laudable suggestion as a diversion option and that it should be introduced as soon as possible.

[35] Reception and Assessment Centres will be discussed in Chapter 5.

formal and informal, as soon as possible. This will serve to keep juveniles out of the criminal justice system for longer and may even reduce recidivism in the long term.

Another alternative to arrest, which is exceptionally viable if the child's parents or guardian cannot be reached immediately, is the issue of a written notice to appear at a (suggested) Referral Meeting. This could be done if, in the opinion of the police officer, the child would be likely to turn up at the Meeting. It could also be possible to threaten that failure to arrive at the Referral Meeting will result in the arrest of the child. This would help to ensure attendance at the Meeting. At the Meeting, the child and his/her family should be assessed by the social worker, who will then recommend a further course of action.

Delinquency prevention and the use of post-offence discretion by the police are two of the most important aspects of diversion as they minimise any contact that the child has with the juvenile justice system - and usually manage to keep the child out of a police station completely. It is submitted that this is where diversion programmes should start and where the emphasis should be situated - on keeping minor offenders from having any contact with the system, thus avoiding any stigmatization that could occur.

Chapter 5

Diversion after Arrest/Charge

Arrest and charge of the offender are actually different stages of the justice process, but they are usually treated as one and the same. Once an alleged offender is arrested, s/he is charged in most cases. The suggestions in this chapter could be used at either stage of the process, but it is submitted that there should be a differentiation between the two. Children should not be charged before attending the (suggested) Referral Meeting or before being assessed. They should, however be charged, before they go into the (suggested) Family Group Conference and its sanctioned diversion procedures.

It is acknowledged that the problem of juvenile offending is increasing, along with the severity of crimes for which children are arrested. However, hundreds of children are still arrested daily for minor or petty offences. It is these children that will benefit from being diverted at this stage. Serious offenders will have to move further into the criminal justice system in order that they are seen to be rightly punished for their misdeeds.

The process of arrest is very disruptive for children and their families. Arrested children often become labelled as delinquent or enter the justice system and never get out. It is suggested[1] that children should only be arrested if the arrest is necessary:

- to ensure the attendance of young people at the Referral Meeting;
- because the parent or guardian cannot be found immediately;
- to prevent any further offences;
- to prevent tampering with state evidence;
- to protect young people from doing damage to themselves; or
- because the alleged offence is deemed to be serious in terms of the definition in Section 1.

The offences listed in the definitions section are:

---

[1] In 'Juvenile Justice for South Africa: Proposals for Policy and Legislative Change'. Published by the members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town (1994) 11.

- armed robbery
- robbery resulting in serious injury
- rape or sexual assault
- assault resulting in grievous bodily harm, and
- arson resulting in serious damage.[2]

It must be remembered that even if the offence is not one of these listed above, the young person may still be arrested if any of the other grounds listed are present.

It is contended that these provisions are laudable, but they still leave much room open for abuses by the police. To provide that children can be arrested if their parent/s or guardian/s cannot be found immediately is providing for the arrest of a large number of children who have allegedly committed an offence. It is submitted that if a child's parents cannot be found immediately, s/he should be taken to the (suggested) Reception and Assessment Centre and left there for assessment. There concerted attempts will be made to trace the child's parents; the child will not have to spend time in the police station; and s/he will avoid the trauma of being arrested. Only after children have been assessed and the social worker has determined that they show no remorse for their crime and that they should progress further into the judicial system, should they be arrested.

The provision for arrest to prevent further offences can also be widely interpreted. It must be stressed that this means that the child must be planning on committing more offences 'immediately', due to the fact that children who have broken the law could be deemed likely to commit further offences, therefore the police would be justified in arresting them to prevent this occurring. This is unfair on a child, especially one who has allegedly committed a minor offence.

It is also submitted that the offences listed in the definition are not enough. Offences like dealing in dependence-producing substances, car theft (hijacking), possession of an unlicensed weapon and burglary are also offences which can be seen to be serious enough to warrant

---

[2] Op cit see note 1.

immediate arrest. It is suggested that these be included in any schedule that defines serious offenses.

The IMC emphasises the fact the no young person or his/her family should enter the criminal court system without having been assessed.[3] This assessment should always result in a mutually agreed upon and written plan for the young person and his/her family. This plan should include long and short-term goals and objectives and should be reviewed every six months. The IMC also suggests that a process of self-referral to any programme in the diversion system should be made available to any young person and his/her family whether they can be seen to be at risk or not.[4]

It is important that a process of self-referral be introduced as this will reduce the number of children coming into contact with the police and the court system. It is submitted that parents, teachers[5] and concerned relatives should also be able to refer a child to a diversion programme for assistance and counselling if they feel that this is needed by the child.

The IMC suggests that the media have an important role to play in the prevention of juvenile crime. It is suggested that media personnel should be drawn into debates about youth justice as well as being encouraged to present a positive image of youth and their role in society.[6] It is submitted that the media has a great influence over the youth, and should definitely be used to attempt to reduce the number of juvenile offenders. This can be done by the introduction of programmes aimed specifically at juveniles; encouraging them to live a law-abiding life (for example, the "Don't Do Crime" advertisements currently shown on television). The consequences of delinquent actions should be fully explained and alternatives suggested to the adoption of a life of crime. Positive morals should also be emphasised.

---

[3] See discussion on Reception and Assessment Centres later in this chapter.

[4] IMC Draft Discussion Document on the Transformation of the Child and Youth Care System at 12-13.

[5] Teachers would need the consent of the parents/guardian before doing this.

[6] Op cit see note 4 at 26-27.

At the moment the decision as to whether to refer the juvenile to a diversion programme is made by the public prosecutor. This is a problem as prosecutors seldom initiate diversion of their own accord. In order for all arrested juveniles to obtain equal and speedy access to diversion, an effective diversion process needs to be introduced. It is also recommended that guidelines be drawn up for prosecutors to ensure that all appropriate young people are offered the possibility of diversion.

If at the Referral Meeting, it is decided that the case is unsuitable for diversion (that is, if the offence is serious or the juvenile is an habitual criminal), or if the juvenile does not admit responsibility, then the case should be referred to the prosecutor. It should, however, be possible for the prosecutor to refer the matter back if new information arises or if the circumstances change, but only if this is beneficial to the young person.

It is extremely important that the current referral system is amended in order that all minor offenders may have immediate access to diversion programmes. In the case of more serious offenders, the question of diversion would have to be considered after a complete assessment of the facts of the case and the circumstances of the child. It is suggested that the decision to refer the child to a diversion programme should not rest on the prosecutor alone (if the case eventually reaches him/her) but that s/he should be assisted by the recommendations of the Family Group Conference. It is submitted that, in the long term, most of the children that are arrested will appear before a Family Group Conference[7] and will be suitably diverted by this group of people. Only in the event of their unsuitability for diversion programmes would their cases be referred to the prosecutor.

At the moment, when juveniles are arrested, they must be brought as soon as possible to the police station. Here, the police may release them if they do not plan to charge them; they may keep juveniles in custody (after charging them) until their first court appearance; they may release juveniles on police bail or they may release juveniles into the care of his/her parents or guardian and warn them to appear in court. There are many problems with this current system.

---

[7] See discussion on Family Group Conferences later in this chapter.

The police are only required to contact the parents of the juvenile if this can be done without undue delay and if they live within the magisterial district of the court[8]. The police often do not make concerted efforts to contact the juvenile's parents, merely assuming that they live outside the magisterial district[9]. In many cases where they do make the effort, they meet with little co-operation from the communities due to an entrenched fear and mistrust of the police after years of Apartheid. Many parents do not have telephones and are very difficult to contact. Children may also be afraid and thus may not want to give their parents' names and addresses to the police.[10] It is suggested that the police should use the assistance of concerned non-governmental organisations (NGO's) in contacting the parents of arrested juveniles. Children would be more likely to talk to someone who is unconnected with the police and parents would be more likely to trust them. This also frees the police officers to concentrate on their other duties.

Arrested juveniles are also often not informed of their rights.[11] Once a juvenile is arrested, s/he should have his her rights explained to her in a language that s/he understands. This requires that not only the child's mother-tongue be used, but also that language which is appropriate to the age of the child is used. It is also submitted that the police should have limited contact with any children who are arrested. They should, in all appropriate cases, be released into the care of their parents or guardian as soon as they can be located. If the parents cannot be located, receiving places should be created in order for this to be facilitated.

Currently, the police do not receive any special training with respect to juveniles. They should be taught how to deal with juveniles and how to act in a manner that encourages the child to trust them. They should be encouraged to divert children arrested for petty offences

---

[8] Section 74 of the Criminal Procedure Act 51 of 1977.

[9] 'Justice for the Children: No Child Should be Caged'. An independent report written by the Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape, Cape Town (22 October 1992) 42.

[10] Op cit see note 9.

[11] Op cit see note 9.

rather than charging them and forcing them to go further into the juvenile justice system. It is important that children are assessed as soon as possible after arrest to determine their suitability for diversion.

The IMC furthers this idea by suggesting that the police should be encouraged to promote the well-being of the juvenile. It is also recommended that the police develop national guidelines on their power to arrest young persons under 18. Such guidelines should:

> "... emphasise the discretion of the individual police official and should proceed from the view that arrest is only one of a range of available options. Distinctions should be drawn between minor and more serious offences to guide police in the exercise of their powers, and alternative means of securing the attendance of young people at the reception centre or at court should be encouraged particularly in less serious cases or in cases where the evidence is not strong, such as increased use of the process of presenting dockets for decision of the prosecutor. In the case of pre-adolescent children, arrest should not generally be used."[12]

These guidelines would provide for diversion by the police from the moment of arrest and would especially reduce the number of juveniles subjected to pre-trial detention. It is submitted that these guidelines should be introduced as soon as possible, and at the same time, training programmes instructing police personnel on the correct way to deal with juvenile offenders should be introduced.

5.1. Reception and Assessment Centres

It is submitted that the police should take any arrested juvenile to a Reception and Assessment Centre within 12 hours after arrest if they have decided not to release the child. The social worker attached to the Centre should determine whether the child should be diverted, treated as a child "in need of care" or processed through the court system. The social worker should also have access to the central computer containing records of previous offences, in order to determine whether the child is a first or repeat offender. If the child's

---

[12] Op cit see note 4 at 29.

parents have not been located, the social worker should be able to enlist the help of NGO's to assist in finding them. It is often essential that the child's parents are found in order for the social worker to be able interview them so that a complete assessment of the child can be carried out.

It is thus important that Reception and Assessment Centres be established so that every child can be taken there after arrest. This facilitates early assessment as well as minimizing the time that the child is forced to spend in the police station or in police custody. Here, if the charge is a relatively serious one that is likely to come before the court, a full social enquiry report could be started. Children could also be held here, while being assessed until they are taken before the court for the first time for their detention hearing. This hearing must take place within 24 hours of arrest. It is here that the assessment report must be submitted to the presiding officer in order that s/he is able to decide whether the child should be released, and if so on what conditions, or whether the child should be detained until his/her trial. An accurate assessment report is necessary for the court to be able to make the right decision in each case.

The IMC makes the point here that when a young person is arrested after hours it may be difficult to bring all the significant role players together. However, it suggests that the assessment process in this case be a pre-assessment process which aims at dealing with the determination as to whether the child could be immediately released into the custody of his/her parents, or whether an overnight placement in a residential facility should be arranged. The proper assessment would then take place on the following working day.[13]

If the charge is less serious, but the child's parent or guardian cannot be traced, the social worker can arrange for the child to be held in a place of safety until his/her first court appearance (detention hearing) and/or until s/he has successfully completed any diversion programme that s/he is placed in by the social worker. If the detention of the child until s/he

---

[13] This is a desirable option as it keeps minor offenders and those offenders who are not a threat to society from being detained unnecessarily. If it is at all possible, they will be released into the custody of their parents which reduces the trauma of coming into contact with the justice system.

has completed a diversion programme is contemplated, the alleged offence must be reconsidered in order to determine whether this detention is warranted or not. If not, the child could merely be released on his/her own recognisance. However, the court would have to make this decision during the detention hearing.

The task of finding the parents of the juvenile should fall on the shoulders of the arresting officer. S/he should hand all evidence of the attempt to find the parents of the young offender as well as proof that the juvenile is in fact under the age of 18 (if this has been obtained) to the staff at the Reception and Assessment Centre in order that efforts made by the arresting officer are not duplicated by the staff at the Centre.

Reception and Assessment Centres should be centred in the larger urban magisterial districts. There is a practical reason for this: In those districts where there are many police stations it is necessary that all juveniles who have been arrested are brought to one central point as soon as possible so that no arrested juveniles are forgotten or undiscovered and thus remain in custody for a long period of time. Another reason for this is because there are so few social workers on duty at any specific time that they would not be able to travel between police stations in order to assess arrested juveniles who are detained in cells.[14] This also serves to get the child out of police custody as soon as possible.

In October 1994, the provincial probation services arm of the Western Cape Province introduced assessment by a probation officer before the child's first appearance in court. Initially the goals of the assessment process were:

1. To verify the age of arrested juveniles
2. To locate the parents or guardians of juveniles, and
3. To plan for the placement of children while they are awaiting trial.

This assessment process introduced the use of volunteers to locate parents and to get them to the court or police station if this was needed. Additional overnight placement options were also utilised, reducing the numbers of children detained in police cells. An after hours

---

[14] Sloth-Nielsen, J 'Juvenile Justice Review 1994-1995' (1995) 8(3) South African Journal of Criminal Justice 334.

service was also established, in which probation officers were available at night and at certain times over the weekends to ensure that children did not spend unnecessary time in detention. Day-time staff, some of whom were permanently assigned to specific magistrate's courts, were also able to decide immediately after the children had been assessed, whether they were suitable for diversion or not.[15]

Another assessment procedure has been in operation for over a year through the efforts of the Department of Justice in co-operation with the Bloemfontein Provincial Administration office. Here the court officer is notified of each appearance of a juvenile who is charged with a minor offence, and who is under the age of 16. Assessment of the child is made in consultation with the control prosecutor of the district court. The case is usually remanded for one week, allowing the court officer sufficient time to evaluate the case and make the necessary recommendations as to whether the child should be prosecuted or diverted. If the case is to be diverted, it is postponed for six weeks, during which time the juvenile joins a group work project (known as Information Class). After the juvenile has gone through this prevention programme, depending on the progress made, the court officer will submit his/her recommendation as to whether the charge should be withdrawn or whether the prosecution should be continued.[16]

An Arrest, Reception and Referral Centre was set up in June 1996 at the Durban Magistrate's Court. This Centre will attempt to address the problems of juveniles who have come into conflict with the law in an individualised manner. The Centre hopes that every juvenile brought to it will be allocated to a social worker who will assess the child's background and trace and involve the family if possible. The social worker will then make a recommendation as to the punitive measures to be taken against the child. The Centre plans to consider alternatives like diversion programmes for first offenders, or for very young children who have committed a petty crime. The children will be required to sign an

---

[15] Op cit see note 14.

[16] Sempe, R 'Processing Juveniles Through the Court System'. Glanz, L (ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers Pretoria (1994) 77.

agreement under which they undertake to conform to the conditions of the diversion programme. They will not be prosecuted unless these conditions are broken.[17]

The first two programmes (it is too early for an accurate assessment to be made of the successes or failure of the Durban Centre) appear to have achieved a certain measure of success. Certainly, the assessment process can be seen to have important benefits for those juveniles who are arrested. One of these benefits is that arrested juveniles are brought into contact with someone who cares about their welfare, shortly after arrest. The social worker/probation officer is more likely to ensure that the best interests of the child are considered than a police officer. Another benefit is that the juvenile is moved quickly out of the justice system, albeit merely until they attend court. Pre-trial assessment of petty and first offenders is likely to show reasons for diversion, thus in many cases, keeping the child from being brought before the court at all.

There are, however, practical realities that need to be dealt with in order for these Centres to become realities in all major areas in South Africa. One of these is the lack of manpower. Since the Centre would have to be open 24 hours a day, sufficient staff are needed for this to be satisfactorily accomplished.[18] Another problem is that there may not be enough cases in rural areas to warrant such a Centre. Here a social worker from a nearby town with a Reception Centre could be on call and travel to the police station where the child has been arrested to assess him/her there. Lack of support from parents and guardians is also a problem. This often results in children being detained for longer than is necessary and also causes delays in the court process.[19] But, it must be remembered that nothing ever runs smoothly with no problems at all. Careful planning, and co-operation between the police, the justice department and the community are necessary to iron out these problems and to help these Centres get off the ground.

---

[17] Paul, LJ 'New Approach to Juvenile Crime Problem' The Northglen News (June 28, 1996) 1-2.

[18] Op cit see note 16 at 77.

[19] Op cit see note 16.

5.2 The (suggested) Referral Meeting

After the assessment has taken place, a Referral Meeting can be held. This Meeting can also take place before the child is arrested, but this would only be for really petty crimes, and would usually be used more as a deterrent than anything else. It is here that the Referral Meeting is most important. At the Meeting, young people, their parent/s or guardian/s, a social worker and the arresting officer decide which way the case should be handled. The children could either:

- be referred back to the police for a formal caution, or
- progress to a Family Group Conference, or
- be referred to a Children's Court Inquiry, or
- have no action taken against them,[20] or
- be referred to a diversion programme like pre-trial community service.

If the charge is serious, the case would usually be referred directly to the prosecutor.[21] It is suggested that this Referral Meeting should take place in the case of all minor offences where the parents or guardian can be found. Hopefully, in the future, most cases will progress to the suggested Family Group Conference.

The IMC suggests the following procedures with respect to the way in which cases should be handled:

* enquiring whether the young person acknowledges responsibility for the offence;
* gathering information regarding the age, the nature of the offence, family circumstances and possible behavioural problems;[22]
* explaining to all involved their rights, as well as the process that is being followed;
* decision making on the correct disposition of the case.[23]

---

[20] Op cit see note 1 at 17.

[21] Op cit see note 9.

[22] It is essential that all of these are considered in order for the correct disposition to be made in any specific case. If a diversion programme is the chosen disposition, these must also be considered in choosing the correct programme for the specific offender.

[23] Op cit see note 9 at 31.

It's suggested options for referral are:

1. Withdrawal of charges
2. Formal caution
3. Children's Court inquiry
4. Diversion programmes
5. Criminal court.[24]

It is submitted that these options should follow in the order in which they are stated above, with each option being considered before moving on to the next one. The referral of the child to a children's court inquiry should, however, be the only one taken out of turn; that is if the child is clearly "in need of care", then this option should be considered first. If an option is not viable, then the next option should be considered.

5.3 **Family Group Conference**

The suggested Family Group Conference[25] (FGC) will usually follow after charge. This Conference contains the principles of a victim-offender mediation conference. It would be a consensus decision-making procedure which would be convened by the social worker in charge of the child's case. It is submitted that this should be done within 14 days of the arrest or within 7 days if the juvenile is in custody. This is to minimise the time spent by the child agonizing over what punishment s/he will receive.

The FGC will be set up to deal with whatever brought the child into conflict with the law in the first place. It should be attended by the alleged offender, the offender's parents or guardian, the victim or his/her representative, the social worker, and the police officer investigating the case. If s/he is not available, then s/he should provide a detailed written arrest report to be submitted at the meeting.

When the victim or his/her representative attends, which will hopefully be in most cases, s/he must be briefed on the procedure before the Conference begins. S/he should also attend

---

[24] Op cit see note 4 at 31.

[25] This is suggested by many authors as an option for the future.

voluntarily. The intended aim of the FGC is to attempt to repair the harm done to the victim and society. This is based on the idea that the victims have the right to be involved in the process of justice, and that offenders have a responsibility to attempt to put right the harm caused by their offence. Offenders must face their victims as well as being involved in the decision as to how their act/s should be sanctioned and the way in which they can attempt to repair any damage that they have caused.[26]

This is far more challenging than the current system and encourages juveniles to take responsibility for their actions, as well as encouraging the parent or guardian to take a part of this responsibility and to help the child to avoid recidivating. This is especially useful with young offenders as meeting the victim of their offence forces the juvenile to confront the effects of their behaviour. As most young offenders are usually still willing to learn the right way to do things, this may shock them into the realisation that crime is not the career they wish to pursue for the rest of their lives.[27]

Decisions made at the Conference would have to be by consensus, therefore plans made by it could be vetoed by the offender or the victim. It is important that offenders agree to the outcome otherwise it will have no beneficial effect on them. Offenders must also acknowledge that they were responsible for the offence. If consensus is not reached; if offenders will not accept that they are responsible; or if the FGC decides that the matter cannot be dealt with there, then the case should be referred to the prosecutor for further consideration.

The Family Group Conference could have various options for outcomes. Some of these could be:

- an apology (only in *very* minor offences),

---

[26] Op cit see note 1 at 19.

[27] Skelton, A in Children in Trouble with the Law: A Practical Guide Lawyers for Human Rights (Publishers) Pretoria (1993) 26-7 maintains that:

> "Being given the opportunity to put things right creates a sense of responsibility, whilst at the same time giving a chance to the offender to put the incident in the past and effect a change of behaviour for the future."

- reparation to the victim/s,
- community service,
- participation in an elected programme,
- making plans to avoid committing recidivism, or
- referral to a Children's Court Inquiry if the child is found to be in need of care.[28]

If offenders and/or their families do not comply with the sanctions set at the Conference, it may be reconvened by the social worker, whereupon another sanction could be decided upon or, the case could, in the right circumstances, be referred on to the prosecutor. If the sanctions are performed properly, the case can either be withdrawn, or postponed until it comes up again and then the charges are withdrawn.

The major advantage of this Conference is that the family and the community will be involved, as well as the victim. People feel involved in the process, and the victim sees that justice is done plus s/he may receive some benefit in the form of an apology or reparation. The only problem with this is that it may be difficult to convene, but with the support of the community, facilitated through education, this should be made possible.

South Australia also uses a similar practice. They have a juvenile aid panel which consists of a social worker, another expert, a member of the community and also possibly a police officer. These members consider the position of the children that are referred to them. This panel requires that the children that go before it are under the age of 15; that they chose to go before the panel; that they admit their guilt and that the offence with which they are charged is a minor one. Their objective is to discover what made the child commit the crime and to decide on specific treatment for each child. This treatment is usually made up of counselling and other social service and often follow-up counselling services. Any report written by the panel is inadmissible in court if the child should come before the court later in his/her life or even later in that specific case. Here the child is kept out of the criminal

---

[28] Op cit see note 1 at 19 and 21.

justice system and does not receive a criminal record. This also allows the courts to concentrate on those children who need more severe punishment.[28]

In Wales and England, what are known as juvenile bureaux have been established in most police areas. These consist of a group of police officers who deal solely with children's cases. If a case is referred to one of these bureaux, the bureaux has to notify the social services department in order to obtain any information it might have on the arrested juvenile. The police also check the child's criminal record and pay a visit to his/her home. The bureaux then reports back to the senior police officer with a recommendation as to what action should be taken. Any cases that are problematic can be referred to a consultative panel which is made up of the bureau and probation and social work representatives. The senior police officer has the final say in the matter, but usually follows the recommendation.[29]

New Zealand also has a system of family group conferences which was instituted when the Children, Young Persons and Families Act was adopted in 1989. The purpose of this legislation was to involve communities in the decision-making process as well as aiming for a solution which is negotiated and thus acceptable to both parties. The family group conferences are convened by a statutory official called a Youth Justice Co-ordinator who calls all the people who are important in the young persons life together in order that they can assist the young person in dealing with the consequences of his/her offence. The victim or his/her representative and a member of the police force are also present. The aim of the meeting is to discuss what occurred and how the situation should be responded to. It is essential that the young person take responsibility for his/her actions. All charges except for murder and manslaughter are handled in this way. This totals about 90% of the Youth Court cases. This is a very new approach to conflict resolution - where the crime is seen not as

---

[28] McLaghlan, F 'Innovative Police Strategies to Deal with Young People in Trouble'. Glanz, L (ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers Pretoria (1994) 73.

[29] Steytler, N 'Shoplifting by Juveniles: A case for Diversion'(1984) 8(2) South African Journal of Criminal Law and Criminology 65-6.

an attack on the State, but as a damage done between individuals.[30] The meeting attempts to negotiate an agreement which must be reached by consensus.[31]

This conference has been successful in that in over 95% of conferences, agreement has been reached, with 84% of the young people and 85% of their families being satisfied with the result. However only 49% of the victims expressed satisfaction. The number of young offenders appearing before the courts has also decreased from 13000 cases per year to 1800.[32] The number of residential facilities for young people has also been cut from 26 to 3 since the introduction of the programme. It thus seems that the system has been very successful.[33]

The problem lies with the fact that the victims do not appear to be satisfied with the result. However, this could be due to the fact that they are still bitter about the fact that a crime was committed against them and thus feel that the punishment was not harsh enough. This can be seen to be a part of human nature. It is submitted that it is more important that the offender is happy with the decision as this affects his/her life to a far greater degree.

In Australia, experiments have been done with what are called community conferences in an area called Wagga. This experiment has been more successful in terms of victim satisfaction, due to the fact that it is more victim-centred than its New Zealand counterpart. This difference is also indicated by the fact that the New Zealand approach defines 'community' as the community of people surrounding the young offender, whereas the Australian model concentrates on the community of people around the incident. Thus, while

---

[30] McDonald, R 'Face to Face Justice' Good Weekend May 18, 1996 at 17.

[31] Skelton, A 'Developing a Juvenile Justice System for South Africa' (May 1996) Rights 193-194.

[32] Op cit see note 31.

[33] Morris, M 'The Search for Justice in a Juvenile Justice System' Putting Children First Papers and Reports of a conference convened by the Community Law Centre, University of the Western Cape, Cape Town (June 1992) 166.

both models include the victim, the Australian model results in a stronger emphasis on victim needs.[34]

The South Australian model could work in South Africa. It is submitted that a few changes would however have to be made to suit the current situation in this country. The age of the offender should be increased from 15 to 18, thus encompassing all juvenile offenders, not merely those 15 and under. This is due to the fact that a great number of juvenile offenders are over the age of 15, but could also benefit from a system such as this. It would be unfair to deprive them of the chance to appear before such a tribunal.

It is also suggested that victims should also be involved in any panel discussion on the punishment of the offender. This should be done in order that they do not feel isolated from the punishment process and should ensure that they are happy with the decision, leaving them with no desire for revenge. It is thus suggested that for this reason, the New Zealand model would be the most appropriate for institution in South Africa.

It is, however, doubtful whether the juvenile bureaux would find any place in South African society as the communities are far too sceptical about anything that requires such intense police involvement. This is due to the reputation of (and in some cases due to the atrocities committed by) the police during the Apartheid era. This attitude is slowly changing along with the changes that have been made in the country, but it is submitted that it is too soon to ask particularly black communities to trust a police force which in the past was instrumental in enforcing their oppression. It is suggested that in any model which is sought to be implemented in South Africa, decisions should be made by consensus, not merely by one person, and that panels should consist of people from different professions who have an insight into the mind and life of the juvenile, not just from one specific group (for example, the police).

It is thus submitted that of the models discussed above, the South Australian and the British models would not work in their entirety in South Africa, but could be applied if the changes

---

[34] Op cit see note 31.

suggested were implemented. It is submitted, though, that the New Zealand model would work here, and that attempts should be made to institute pilot projects based on this model as soon as possible. It is important that we consider and learn from models that have worked in other countries in order to benefit any future models that are introduced, like the Family Group Conference, for example.

Scotland uses a different system which is less formal than a court. It is called the Children's Hearings System and has been in operation since 1971. Asquith and Hill[35] give the four principles upon which this system is based. These are:

(1) the welfare of the child is the key factor in all decisions,
(2) delinquency is symptomatic of need,
(3) the only criterion for intervention is the need for compulsory measures of care, and
(4) children who commit offences should be dealt with by the same body as deals with children in need of care and protection.

It should be mentioned that offenders who have committed crimes deemed by the Lord Advocate to be very serious, are seen to be different to those children in need of care and protection and are tried before the adult court.

These principles are very laudable, but it is very difficult to justify the welfare of the child always coming first. It is a very important element and must be considered, but as has been discussed before[36], the interests of the victim and society must also be considered. One cannot always say that delinquency is symptomatic of need, as there may be many reasons why children turn to crime and not all of them relate to need.

The actual system is well-planned and is similar to the suggested Family Group Conference, but does not allow for the victim to take part in determining the disposition of the case.

The rules of the Children's Hearing are

---

[35] Asquith, S and Hill, M (eds) Justice for Children Martinus Nijhoff Publishers, Dordrecht (1994) 11.

[36] See discussion on "the best interests of the child" in Chapter 3.

> "designed to facilitate full, frank and informed discussion between parents, child or children, panel members[37], social worker, reporter[38] and any other interested person who the chairperson deems might be helpful. There may be present a child specialist ... a representative of the school, neighbour or family friend: Notwithstanding those with a right to be present, numbers must be kept to the minimum necessary." [39]

The chairperson must ensure that any information in reports submitted to it is understood by all the parties; that the views of the child and his/her parents are put forward; what is happening and the reasons for any decision are explained; and that the right to seek an appeal on review of the proceedings is known about.[40] This process is aimed at coming to a consensual decision.

This process could possibly be used instead of a juvenile court. The Family Group Conference could be kept for minor offenders and the Children's Hearing System for more serious offenders, with the most serious offenders proceeding to adult court. It is suggested that the Family Group Conference be adapted to contain members of the community in a panel as it is contained in this system. The social worker convening the Conference should act as the chairperson and should be compelled to ensure that the duties of the chairperson stated above are carried out.

---

[37] Panel Members are members of the community and are drawn from different age, income and occupation groups. They should also have knowledge and experience in dealing with children.

[38] The reporter receives and investigates referrals from any agencies or individuals and decides whether children and their parents should be brought before the hearing, or whether they should be offered voluntary help. S/he also has to decide whether there is enough evidence for the child to be referred and if there is a reason for compulsory measures of care.

[39] Op cit see note 35.

[40] Op cit see note 35.

It is submitted that in deciding on new juvenile justice legislation for South Africa, all three of the above should be considered in order to incorporate the best elements of them all. For instance, our Family Group Conferences could be structured as suggested above, but could also include the use of the police to a greater degree. The Family Group Conference could also use members of the community as is done in the South Australian model. It is necessary for South Africa to learn from other jurisdictions. This will enable our legislation to be based on models that have been tried and tested, albeit in other places.

5.4. Pre-Trial Community Service

One of the sanctions suggested which could be prescribed by the Family Group Conference is pre-trial community service. The child's suitability for this sanction could be assessed when the child is at the Reception and Assessment Centre. If this sanction is decided upon, the social worker running the Conference could, considering the assessment report, decide upon an appropriate placement. This should be done in consultation with the child so that the child is not placed in a situation where s/he would be unable to cope.

Pre-trial community service is an arrangement whereby children are given the chance to serve their community for a specified number of hours, in their spare time, over a specified period, without pay.[41] If this sanction is prescribed and accepted the case can be postponed and then the charges withdrawn, or the charges can be withdrawn immediately, only to be reinstated if the service is not successfully completed. It is important that children and their parents agree to this, and sign an agreement voluntarily, to this effect.

At the moment, community service is only an option through the court, and charges are only withdrawn once the service has been completed. Pre-trial community service should be taken out of the realm of the court and placed in the hands of those convening the Family Group Conference. Placements could be conducted by interested NGO's, who wish to become involved, in the attempt to keep as many children out of court as possible. This is, however,

---

[41] Shapiro, R 'Diversion from the Criminal Justice System and Appropriate Sentencing for the Youth'. Glanz, L (ed.) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 93.

not to suggest that community service should not be available as a sentence once the case has come before the court. In order to differentiate between the two, they could be called 'pre-trial community service' and 'community service' for after sentencing.

If the FGC is considering 'sentencing' the child to pre-trial community service, the child must be screened in order to determine whether s/he is a suitable candidate or not. In the future, this should be done at the assessment stage of the process. Here a recommendation could be made as to whether this would be a viable option or not, leaving the FGC to make the final decision as to whether they wish to institute this sanction or not. In determining suitability, the issues that will be considered are: The seriousness of the offence, whether the child is a first offender, his/her maturity and his/her ability to co-operate with a social worker, as well as the circumstances of the family.[42]

From April 1992 to March 1993, 135 cases of pre-trial community service for juvenile accused were reported by the Pietermaritzburg branch of NICRO, while the Cape Town branch reported 25 in the same period. The juveniles were placed at organisations like children's homes, the Society for the Prevention of Cruelty to Animals and public libraries.[43]

> "The advantages of pre-trial community service options are its flexibility, its emphasis on the child taking responsibility, and its involvement in the community. Of tremendous advantage to the offenders is the fact that they avoid going through a trial and do not get a criminal record."[44]

This diversion option appears to work very well, especially with juveniles who come from a home that is fairly stable and whose parents exercise a degree of supervision over them.

Another sanction that can be prescribed by the Family Group Conference is the Youth Offender Programme, also known as the Juvenile Offender School. This option is especially favoured for younger offenders. The courses offered are counselling, Street Law education

---

[42] Op cit see note 27 at 25.

[43] Op cit see note 27 at 25.

[44] Op cit see note 27.

and life-skills training. This programme is currently being run in consultation with the Department of Correctional Service in Pretoria, and by NICRO in conjunction with the State in the Cape and Durban regions.[45]

The children attend the School for six weeks, with a new course starting every two months. They attend from 3 to 5 o' clock in the afternoon on one day per week. This is so that the ordinary school life of the child is not disrupted. The parents attend during the first and last sessions. Here the children are able to discuss why they got involved in crime in the first place; the problems that they are experiencing at home; peer-pressure; communication; decision-making etc. When the parents attend, during the last session, they can all discuss what has changed at home.[46]

This option could also be used in conjunction with pre-trial community service. The aim, once again, is to keep children from going through the criminal justice process but at the same time requiring them to take responsibility for their offence/s and evaluate their behaviour. At the moment, it would appear that 76% of the offenders who completed this diversion option, did so successfully, but as of yet, no long term recidivism studies have been conducted.[47]

It is thus submitted that Referral and Assessment Centres should be set up in all centres where this would be viable and that Family Group Conferences should be set up to deal with cases where a child is arrested for a crime that is not listed in Schedule 2 to the Correctional Services Act[48]. It is only where a serious crime has been committed that the case should be referred to the prosecutor.

---

[45] Op cit see note 41 at 92.

[46] Op cit see note 41.

[47] Op cit see note 14 at 337-338.

[48] Act No. 8 of 1959 as amended. See Annexure for offences.

Chapter 6

Pre-Trial Detention and Progression of the Case to Court

6.1. Pre-trial detention

Once children have been arrested and charged with a serious offence, or have been through the suggested Family Group Conference which has failed for one reason or another, their cases will be handed over to the prosecutor who will then have to decide whether it is necessary for them to be detained until their trial or not.

It is submitted that pre-trial detention is only necessary in the most extreme cases. The "Beijing Rules" state[1]:

> "1. Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
> 2. Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care, or placement with a family or in an educational setting or home.
> 5. While in custody, juveniles shall receive protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they require in view of their age, sex and personality."

The danger of criminal contamination to those youth who are awaiting trial is especially high if they are detained. First and petty offenders would be the most affected by this. At the moment there is a lack of alternative facilities allowing for diversion instead of detention. It is admitted that in some cases children will have to be detained until their trials. This will depend upon the seriousness of the offence; the risk that they may not appear before the

---

[1] In Article 13.

court for their trial; as well as the fact that they can be seen to be a danger to the community. Children should be detained in a secure place of safety as provided for by section 29(5) of the Correctional Services Act 8 of 1959, as amended[2] rather than in a prison. Places of safety should always constitute the first choice and it is only if they have no beds available that children should be detained in prison.

The Inter-Ministerial Committee was requested in April 1996 by the Cabinet to investigate and report on the availability and suitability of Reform Schools, Schools of Industry and Places of Safety for the accommodation of children who are awaiting trial.

The IMC found that the number of children awaiting trial in Places of Safety had decreased after the Amendments to Section 29 of the Correctional Services Act on the 10 May 1996[3] as, now, children could be held in prison to await trial in certain circumstances. At the end of July 1996 the total number of children awaiting trial in prison was 545. The total numbers of children awaiting trial in:

* Reform Schools is 6
* Schools of Industry is 12
* Places of Safety is 875.

Out of a total number of 6127 children in facilities, 15% are awaiting trial.[4]

Detention hearings (the child's first appearance before the court) must always be held. Here the police and social worker must give reasons as to why they feel that the child should be detained until his/her trial. These hearings should be held within 24 hours for children under 14 and within 48 hours for children between the ages of 14 and 18 years.[5] If the presiding officer finds that there is no reason for a child to be detained, s/he should order that the child be released into the care of his/her parent or guardian. If the child does not have a parent or guardian, s/he could be released on his/her own recognisance or into the care of a social

---

[2] See discussion on Section 29 in Chapter 3.

[3] As discussed in Chapter 3.

5 [4] 'In Whose Best Interests?' The Inter-Ministerial Committee's Report on Places of Safety, Schools of Industry and Reform Schools (July 1996) 2.

[5] As provided for by Section 29(1) of the Correctional Services Act No. 8 of 1959.

worker who would then cause the child to be placed in a foster or children's home until his/her trial.

It is suggested that the presiding officer should also be able to order that the case be referred to a Family Group Conference; that the child undergo any of the diversion programmes that could be sanctioned by the suggested Family Group Conference; or that the child be required to enter any pre-trial diversion programme that s/he feels would be appropriate in the circumstances. It is important that the presiding officer be required to sign an order for the detention of a child, so that the discretion of the police to order detention of a child is limited. Presiding officers should also be required to give reasons in writing for their decision to detain a child until his/her trial. This is in order that interested parties, for example the child's parents, will be aware of why their child was detained and will, if they deem this necessary, be able to challenge the decision, by appealing against it. It is suggested that a Supreme Court Judge, in each jurisdiction, be appointed in order to deal with appeals against the pre-trial detention of juveniles.

It is essential that the period for which the child is detained while awaiting trial is kept to the shortest time possible. Section 29(5A)(d) of the Correctional Services Act provides that the highest priority should be given to the most expeditious processing of a person detained in a prison or place of safety.

In the United States of America, in order to be allowed to detain juvenile accused until their trials, the government is forced to show that there is a 'substantial probability' that they did commit the offence with which they are charged as well as that they will be a danger to the community and that nothing short of detention will avert that danger. Here detention is limited to 30 days and speedy trials are called for.[6] It is suggested that this attitude be adopted in South Africa and that the trials of all children in detention take place within 30 days of their first appearance in court and that they are brought to a conclusion in as short a time as possible.

---

[6] Wald, PM 'Pretrial detention for Juveniles'. Rosenheim, MK Pursuing Justice for the Child The University of Chicago Press Chicago (1976) 124-5.

Detention of minors while they are awaiting trial does little to lessen the overcrowding at the detention facilities. In the past children were often detained for longer pre-trial than post-trial periods. In addition, too often, the offence with which they were charged did not even merit a sentence of detention. This has been reformed and a Schedule has been set out defining exactly which offences are serious enough to warrant pre-trial detention.[7]

Some submitted alternatives to pre-trial detention are:

- placement in a children's home - especially when the child is likely to be deemed a child in need of care;
- release into the custody of his/her parents or guardian - this is especially viable when the child comes from a stable home and is not likely to flee before his/her trial;
- if the child is homeless, s/he could be placed in a street shelter;
- placement in a secure care facility, a different type of place of safety that only caters for children accused of crimes, to separate children in need of care from those accused of criminal offences;
- placement in a reform school or a school of industry;
- home supervision - a type of house arrest where the child's movements are monitored by a probation officer or through electronic means. This minimises any disruption to the child's school life or work. This can also be used as a sentence for convicted juveniles.
- placement in a group home - a type of foster home with a number of homes on a property manned by social workers, psychiatrists and foster parents who take care of the children. This should be an open facility where the children have a large degree of freedom.

It is submitted that the definition of guardian should be widened to include anyone with an interest in a specific child and anyone to whom the child feels an attachment. This would allow for children to be released into that person's care if they do not have parents or officially designated guardians into whose care they may be released. This would serve to minimise the need for detention purely because the child's parents or guardian cannot be found.

---

[7] See Schedule 2 to the Correctional Services Act.

The main problem with pre-trial detention is that it is very expensive, not to mention the fact that it is very disruptive to the lives of the children detained. It also causes psychological problems for the children, and they are often perceived as criminals after they have been detained.

> "Child psychologists and social workers agree that the post-traumatic stress disorders experienced by youth after incarceration without knowledge of the outcome of their case or the length of detention are difficult to treat and are surely a recipe for dehumanising young people."[8]

It is the experts belief that being held in the kind of awaiting-trial conditions in which children in South Africa are currently held destroys the child's connection between behaviour and consequences and makes children angry, frustrated and powerless.[9] The co-operation of many branches of the government including the police, justice department, correctional services and child welfare agencies will be essential in any attempt to eliminate pre-trial detention.

It is submitted that if juveniles do have to be detained until their trials, they should be held in a place which caters solely for juveniles. If this is not possible and they have to be held in the juvenile section of an adult prison, these sections should be changed in that they should be staffed by people who are trained to deal with juveniles, and that children should have access to proper educational and recreational facilities for the time that they are incarcerated whilst awaiting trial. It is essential that pre-trial detention only be used as a last resort and that all possible alternatives be considered before this means of ensuring children's attendance at trial is resorted to.

---

[8] Morris, M Justice for the Children: No Child Should be Caged An independent report by The Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape (1992) 52.

[9] Op cit see note 8.

6.2. Progression of the Case to Court

When the prosecutor considers the case on the day of the hearing, s/he has a number of options. S/he can choose to withdraw the charge (for example, if the child has successfully completed a diversion programme); suggest to the court that the child is a child "in need of care" and that the hearing should be converted to a children's court inquiry; or continue to prosecute the case.

It is important that the child's case be heard by a court specially designed for juveniles - a juvenile court. Provision is already made for the establishment of this court, but currently, it is merely a magistrate's court converted for the purpose of a juvenile hearing. It is submitted that a special court-room should be set aside at every magistrate's court for this purpose. This court should be designed to be child-friendly, not as formal as the current design of a court-room. This will require that the magistrate sits on the same level as the juvenile, not up on the bench, and that everything is designed to resemble a meeting rather than a trial. One large table with the magistrate at one end, the prosecutor and the defence on either side, and a place where witnesses can sit opposite the magistrate, is the suggested design. This design is more conciliatory than the current one and is also relatively cheap in that a normal conference table could be used, without incurring extra expense. This design could also be used in smaller centres where the normal court-room is currently merely 'reconstructed' for the hearing.

The juvenile court should continue to be held *in camera*. This means that no-one who is not directly concerned with the case would be admitted. Any information related to the trial should also not be published unless this is deemed by the presiding officer to be in the interests of justice. The juvenile court should also be less formal in proceedings than an adult court. This means that the language used should be language that the child understands, that is language appropriate to the age of the child, as well as the child's mother-tongue. This is essential in order that the child and his/her parents do not feel intimidated and unable to express themselves.

The role of all present should be explained to the children and their parents at the beginning of the trial, in order to reduce any confusion and any feeling that the prosecutor and the magistrate are conspiring against them. If the case is being conducted in a language other than a child's mother-tongue, everything that is said in court by any party should be translated for the child, especially conversations between the prosecutor and the magistrate. This also reduces the feeling of a conspiracy between the two. This may help the children to feel that they have had a fair and just trial as they have participated in it. The United Nations Convention on the Rights of the Child[10] requires that juveniles receive a fair trial. The Article states:

> "1. States Parties shall assure to the child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

It is important that children are given the right to be heard in court. In support of this one must take into account the Beijing Rules[11] which state that

> "[t]he proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."

When properly implemented, it is submitted that all of the above would combine together to make the juvenile feel that s/he has had a fair trial.

The juvenile court will proceed according to the normal rules of evidence and procedure, but there should be a number of special protections for the juvenile. The first protection is that of legal representation. It has already been submitted[12] that any accused juvenile should

---

[10] At Article 12.

[11] At Article 14(2).

[12] See discussion on legal representation in Chapter 3.

have an automatic right to legal representation from the time that s/he is arrested, *especially* when his/her case is likely to appear in court, as substantial injustice will result if the child appears before the court unrepresented.

Skelton[13] suggests three options for providing legal representation for juveniles. The first of these is Legal Aid. This could be problematic as the juvenile court requires a degree of specialised knowledge on the part of the attorney with respect to sentencing and diversion options. Not all attorneys have this knowledge. It is also very difficult to control the quality of the representation that the child will receive. Some attorneys put a great deal of effort into defending clients sent to them by Legal Aid, others do not. This system does however, have one advantage in that the juvenile could be represented by the attorney of his/her choice if that attorney is prepared to act on a Legal Aid brief.

The second option is that of setting up a Youth Advocacy Unit in which a separate branch of lawyers will be responsible for the representation of juveniles. The major problem with this suggestion is who will pay for this? Skelton especially favours the third option - the establishment of a public defender service especially for juveniles, paid for by the state. These defenders would have to be especially trained in looking after the needs of their juvenile clients.[14]

The third suggestion would be preferable to the other two as the current legal aid system could be easily amended to include a public defender system where specially trained attorneys are paid by the state to represent juveniles who are not able to afford representation. The current legal aid system does not work properly with respect to juvenile defendants as they are required to apply for legal aid, but may not qualify to receive it for a number of reasons. These attorneys are also not specially qualified to deal with juvenile accused. It is suggested that public defenders should be specially trained for this purpose. It is submitted that a

---

[13] Skelton, A Raising Ideas for the Creation of a Juvenile Justice System for South Africa A paper prepared for the "Children in Trouble with the Law" conference, organised by the Community Law Centre, University of the Western Cape, held in Cape Town (October 1993) 7-8.

[14] Op cit see note 13.

special branch of the public defender's office should be reserved solely for the defence of juvenile delinquents. It is imperative that juveniles are represented in court and thus those who are not able to afford their own representation should be represented by a public defender.

Attorneys who are charged with the defence of a juvenile must be properly trained to do a number of things. Firstly, they must be aware of the availability of diversion projects as alternatives to imprisonment and must not hesitate to ask the court for these as an alternative disposition. Secondly, they must check that the child has been properly assessed and that a social inquiry report has been submitted to the court. Thirdly, they must also investigate any complaints of intimidation of the child and that any confession elicited from the child was given freely and voluntarily by the child and that the parents were present (if s/he was not present him/herself). Attorneys would also be able to request that the hearing be converted into a children's court inquiry, if the prosecutor has not done so already. Children and their parents would have little or no knowledge of the above, thus it is submitted that children cannot be seen to have had a fair trial if they are not legally represented.

It is also submitted that juvenile cases should be adjudicated within a specific period of time and that the cases of children who are in custody pending the determination of their case, get priority over those cases where the defendant is not in custody, in the court role. It has been suggested[15] that the trial of children in custody should begin within 30 days of arrest and should be completed within 90 days. This is a reasonable amount of time and reduces the length of time children must remain in detention.

One of the questions which has been raised with relation to these points is whether the court will be able to cope with this new system or not. This is also dependent upon the introduction into South Africa of the diversionary measures discussed already. If these measures are implemented, it is submitted that less juveniles would reach the courts as they will have been diverted already. Thus the volume of cases will be lowered and the courts

---

[15] By the authors of Juvenile Justice for South Africa: Proposals for Police and Legislative Change. Published by the Members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town, Cape Town (November 1994) 25.

will cope quite easily. It is also submitted that with the implementation of the public defender system and the introduction of a separate court room for young offenders at each magistrates court, the court's job will be made at lot easier.

The personnel of the juvenile court should be specially trained for the job. They should be sensitive towards the background of the child - aware of the socio-economic circumstances from whence these children come. Prosecutors should be better trained to deal with juvenile offenders. It is submitted that if such training is available, prosecutors will be more aware of all the diversion options available to them, and will be more likely to divert the juvenile rather than to proceed with the case to court.

Presiding officers at the juvenile court should also be specially trained to deal with juvenile defendants. They should understand the psychology of children as well as being aware of the modern ideas in relation to the causes of crime. They should also be sympathetic towards the problems of children and adolescents as well as being personally aware of the methods of treatment in prisons and which institutions children may be committed to[16].

Walker[17] says that there are two options to be considered when attempting to ensure that those in charge of the juvenile court make the right decision. The first requires the careful selection and training of those who preside over the court. The other is to be content with the fact that presiding officers have a low degree of expertise, but to make their decisions more simple, and above all to ensure that those people who carry out the decisions are endowed with sufficient latitude to apply them in the manner dictated by their training and knowledge.[18]

It is submitted that in South Africa we should not be content with a low degree of expertise, but should attempt to train all presiding officers in juvenile courts to enable them to make

---

[16] Gross, F Who Hangs the Hangman? Juta and Co Ltd, Cape Town (1966) 84.

[17] Walker, N Sentencing in a Rational Society Penguin Press, Great Britain (1969) 186-7.

[18] Op cit see note 15.

the correct disposition based on all facets of the child, his/her family, the offence and the child's reasons for committing it.

It has also been suggested [19] that all cases in which a juvenile is convicted must go on automatic review. However, this would be very expensive and would need a great deal of the court's time: this protection should only be necessary where children are sentenced to imprisonment. Thus it is only where very serious crimes are involved that the conviction should have to be reviewed.

Two new rules of evidence need to be introduced as added protections in the juvenile court. The first of these is that any previous arrest or participation in any diversion programme shall not be allowed to be admitted in court.[20] In the case of adult offenders, previous convictions are inadmissible until conviction and it is submitted that this should also be so in the juvenile court. However, the judge should still be compelled to consider diversion as the first option, no matter what the previous conviction. It is not reasonable for children to be able to continue to participate in a great number of diversion programmes if they clearly are not benefitting from them. If they continue to commit crimes and are persistently diverted, these children may never learn to be law-abiding citizens. It is here that a term of imprisonment *could* be effective.[21] This is why previous arrests or diversions should be admitted after conviction in the determination of sentence.

The second special protection is one which attempts to avoid any forced confessions by the child by not allowing the admission of any confession from the child which took place when his/her parents, guardian or legal advisor were not present.[22] It is admitted that children may be more likely to make confessions more readily in the absence of their parents, but it

---

[19] Op cit see note 13.

[20] Op cit see note 13 at 27.

[21] This would depend on the social worker's evaluation.

[22] Op cit see note 13 at 27.

is suggested that a reliable adult[23] should be present to ensure that children are not coerced into admitting to something due to pressure by the police. Children are far easier to coerce than adults, thus it is submitted that this protection is essential to protect the best interests of the child.

It is also suggested that any admission or confession made to any social worker or probation officer during assessment should also not be admissible. Here a type of privilege should be introduced. This would make children more likely to confide properly in the social worker, allowing for a complete assessment, without the fear that what they say would be used against them in court.

Pre-trial confessions made by juvenile accused and their admissibility in court was considered in S v Kondile[24] The issue in this case was the fact that the accused had not been informed that they were allowed to call for the help of their parents before confessing. It was conceded that their right to representation and to remain silent was explained. The defence argued that the fact that their parents were not present may have influenced the accused's decision to confess and then this would have constituted undue influence. The court found that the fact that they were not given the opportunity to seek assistance from their parents was enough to show that their decision to confess was made as a result of undue influence and thus invalid.[25]

This decision, as well as the one in S v M [26] suggests that with respect to pre-trial procedures, it is important that the child's parents are found. As Sloth-Nielsen says:

---

[23] This could include the child's parents or legal guardian or even legal representative. A social worker or psychiatrist with an interest in the child's case could also be deemed to be sufficient (for example: the person assigned to assess the child).

[24] 1995 (1) SACR 394 (SEC).

[25] Sloth-Nielsen, J 'Juvenile Justice Review 1994-1995' (1995) 8 South African Journal of Criminal Justice 338-339.

[26] 1993 (2) SACR 487(A). Also discussed in Chapter 3.

> "The decision in S v Kondile reflects only upon the obligation to inform a juvenile accused about his/her right to assistance during pre-trial procedures. But if a juvenile chose to exercise that right, it would surely be incumbent upon the investigating officer to take the necessary steps to ensure the presence of such parent - irrespective of whether or not the parent or guardian can be 'traced without undue delay' as presently set out in s50(4) of the Criminal Procedure Act."[27]

Another additional protection is the suggested requirement that a social enquiry report be submitted to the presiding officer and both prosecution and defence at the beginning of the trial.[28] All children whose cases proceed to trial should have this type of assessment report prepared concerning them. The assessment report compiled at the Reception and Assessment Centre should form the basis of this report into the background and circumstances of children and their families. This will help the court decide how children should be treated, what sentence they should receive and also whether they can be deemed to be a child in need of care. The Streatfield Report[29] stated that:

> "[the] purpose of the social enquiry report should be to furnish the court with information about the social and domestic background of the offender which is relevant to the court's assessment of his[/her] culpability ... The report is also intended to indicate against this background some corrective measure by laying information about the offender and his[/her] surroundings which is relevant to the court's consideration of how his[/her] criminal career might be checked and expressing an opinion as to ... the likely effect on the offender's criminal career of probation or some other specified form of sentence."[30]

---

[27] Op cit see note 25.

[28] Freeman, MDA The Rights and Wrongs of Children Frances Pinter Publishers, London (1983) 87.

[29] Prepared in 1961.

[30] Cited in Freeman, MDA op cit see note 28.

It is very important that these reports are well compiled and delve very deeply into the background of the offender without making value judgements based on what are seen as the stereotypical causes of trouble. Social workers should take this task very seriously as the report may mean the difference between a custodial sentence which could severely affect the life of the child, and a sentence to a diversion programme.

One of the problems with relation to this is that at present there are not enough social workers to provide assistance to all the people in the country needing it, without even considering the number of juveniles needing assistance. It is suggested that a concerted effort should be made in order to increase the number of social workers in the country so that services like these can be performed. Bursaries to study Social Work should be offered and the pay for qualified social workers should also be increased. This will hopeful increase the amount of social workers, and decrease the load on those already in service, allowing them to assist more people in need, not just juveniles.

The presiding officer should have a variety of options available to him/her during the trial. It should not be necessary for the case to proceed to formal adjudication before s/he is able to exercise these options. The first of these options is the conversion of the trial to a children's court inquiry. Section 254 of the Criminal Procedure Act[31] provides that a juvenile court may convert the trial of an accused who is under the age of 18 into a children's court inquiry if the child is "in need of care".

A child is usually deemed to be in need of care if it appears to the presiding officer that the child does not have a parent or guardian or that it is in the interests of the safety or the welfare of the child for him/her to be deemed so. Despite the fact that this describes many of the children appearing before the juvenile court, juvenile court cases are converted to children's court inquiries in only about 2-4% of the cases that appear in the juvenile court.[32] It is suggested that in all cases where the social inquiry report has found the child to be in need of care, the presiding officer should follow this recommendation and convert the trial

---

[31] Act No.51 of 1977.

[32] Op cit see note 6 at 40.

into an inquiry. As this conversion process can cause a great number of delays, it is submitted that, especially when the child is in detention, emphasis should be put on bringing the matter to its conclusion as soon as possible.

Skelton[33] proposes that all children under the age of 14 should go through a children's court inquiry, whether or not they have a parent or guardian, and regardless of the seriousness of the offence. The learned author suggests that in cases of serious offences for children over the age of 14, where the child has no parent or guardian, a children's court inquiry should be held first, but that the presiding officer of the children's court could recommend that the matter then proceed to the juvenile court.

It is submitted that this would be time-consuming and would be a pointless exercise if the child would end up being sentenced by the juvenile court anyway. The children's court should be there to keep children out of the criminal justice system, not to refer children to it. As for the proposal that *all* children under 14 should go through the children's court inquiry; this author finds to possible to accept with respect to minor offences, but not when really serious offences are being adjudicated upon: Here the case should go before the juvenile court. It is submitted that with the introduction of more social workers, their loads will be lessened and they will be able to do their jobs properly. Therefore, the necessity for this will be done away with, as the social worker who assessed the child would have already recommended to the Family Group Conference that the child should be diverted to the Children's Court. It is submitted that this suggestion would be far too time-consuming and expensive. The money that would be used here could rather go towards payments in order to increase the number of social workers - something that the whole country will benefit from.

Other options for the presiding officer should be: To place the child on informal probation; recommend that the child be placed in any available diversion programmes, as recommended by the social enquiry report or as decided by the presiding officer; send the matter back to the Family Group Conference for adjudication in that forum; or even in minor cases that

---

[33] Op cit see note 13 at 4-5

have managed to slip through the net, send the case back to the police in order for them to formally caution the child. If the requirements are followed to the presiding officer's satisfaction, the charges should be withdrawn and the case dropped. If the presiding officer does deem it necessary, however, s/he must continue the case, make a determination of guilt and then either sentence the offender or release him or her.

It has been suggested that pre-trial detention only be used in cases where serious crimes have been committed. The recent amendment to the Correctional Services Act[34] has allowed for this to take place. It is however, submitted that, in all cases involving pre-trial detention, detention in a new look "place of safety" should be the first option. Diversion programmes should also be the first option for the prosecutor when deciding on whether to put the case before the court. Keeping children out of prison and out of court as far as possible, will go a long way towards lessening any stigma placed upon them by their arrest. It also makes them easier to treat and it is hoped that this treatment will keep them from recidivating and thus from ever appearing before the court again.

[34] Correctional Services Amendment Act No. 14 of 1996.

Chapter 7

Diversion after sentencing: Keeping juveniles out of prison

In every case the courts must decide whether or not the offence was in fact committed and whether the accused child is guilty of its commission, or whether the child is in need of care. Having made this decision, the court must either refer the child to a children's court inquiry or make a decision on what sentence is appropriate. The courts should always, as far as is possible, try not to sentence the child to imprisonment. It is better to try to reform juveniles in their homes or communities than taking them away and placing them in an institution. Here their lives will be disrupted and they will emerge knowing a great deal more about crime and criminal behaviour than they did before they entered the institution.

The majority of the crimes committed in South Africa are economic crimes. The same figure is true with respect to juveniles.[1] How many of these children are stealing in order to live? These children should *not* be sentenced to imprisonment. This serves to emphasise the need for social enquiry reports as an aid to the presiding officer when s/he comes to make his/her final disposition. The presiding officer must be made aware of the fact that the juvenile is merely stealing to live, in order that s/he is able to make a fair disposition which is based upon the facts but also includes a consideration of the circumstances of the juvenile.

The IMC Interim Policy Recommendations[2] states that it costs approximately R75 per day to maintain each prisoner in a State Residential Facility. The cost to run 53 of the 60 State facilities (Education and Welfare Departments) each year is estimated at R 200 943 552. This does not even consider the psychological costs to the children and the future costs to society.[3] It can be seen from this that the costs of incarceration are extremely high, not only

---

[1] See Table of Convictions for statistics.

[2] November 1996 at 90.

[3] 'Justice for the Children: No Child Should be Caged' An independent report by The Children's Rights Research and Advocacy Project, Community Law Centre, University of

financially. It would be infinitely cheaper to keep children out of residential facilities and to rather give them alternative sentences.

The IMC reiterates suggestions[4] that before making his/her final disposition, the presiding officer should have at his/her disposal, a pre-sentence report which sets out the background and circumstances under which the young offender is living as well as the circumstances under which the crime was committed. The probation officer or a social worker attached to the Reception and Assessment Centre should compile this report, which will be based on the information received during the assessment process.

It is essential that probation officers and social workers are properly trained to provide succinct reports based on a complete assessment of all the important issues. They should also be trained to suggest creative sentences to put before the presiding officer. This will assist the presiding officer in making a disposition which will be the most beneficial to the young offender.

The IMC suggests a set of principles which should guide all presiding officers in the making of their dispositions. These are:

1. The sentence should be in proportion to the gravity of the offence, taking into account the particular circumstances of the young person.
2. Restriction of personal liberty shall be imposed only after careful consideration, and then limited to the minimum possible.
3. Deprivation of liberty shall not be imposed except as a last resort, and then only in cases where the young person has been found guilty of a gravely serious offence involving violence, or has been repeatedly convicted of other serious offences.
4. The relevant age for purposes of sentencing should be the age at the time of the commission of the offence, not the age at the time of sentencing.[5]

---

the Western Cape, Cape Town (22 October 1992) 23.

[4] As discussed in Chapter 3 and Chapter 6.

[5] IMC Draft Discussion Document for the Transformation of the South African Child and Youth Care System at 40.

These principles are the introduction of a "standardised sentencing procedure" for presiding officers. This is a great step forward. If these guidelines are followed, it is hoped that a sentencing norm will be created, with similar sentences being imposed for similar offences.[6]

It is also suggested that presiding officers should include the opinions and suggestions of people close to the juvenile, as well as the juvenile him/herself, in considering sentencing options. Family Group Conferences could possibly be used at this stage in the future.

The IMC recommends that more use should be made of sentencing options which do not involve incarceration. It suggests that correctional supervision should be used for offenders who are convicted of serious offences as it allows them to continue with their schooling and family life, but still places strong restrictions on their liberty. Where the juvenile cannot be sentenced to correctional supervision due to his/her family circumstances, a suspended prison term with special conditions such as attendance at a centre or programme or supervision by a suitable person (in addition to the normal conditions relating to recommission of the offence) could provide an effective sentence.[7]

It is submitted that the above suggestions could be viable in the case of property offenders, but that this would not be a good option for the punishment of offenders convicted of crimes against the person of another. It is suggested that for serious offenders, group homes[8] would be the first option, and that it would only be those offenders who have been deemed, during their assessment, to be a danger to society, that should be imprisoned. If the juvenile cannot be sentenced to correctional supervision, attendance at a group home for a certain period of time would, it is submitted, be a better punishment that a suspended prison sentence.

---

[6] As has been previously discussed.

[7] Op cit see note 5 at 42.

[8] As will be discussed later in this chapter.

Finally, the IMC suggests that it is only in the most serious cases where the safety and security of the community is at stake that a term of imprisonment should be imposed.[9] This should also only be the last resort. The length of imprisonment should always be proportionate to the offence, but must still keep in mind the prospects of rehabilitation of the young offender.

7.1. **Principles of Sentencing**

When determining sentence, seven guiding principles of sentencing must be taken into account. These are: Proportionality; accountability; family group preservation; time frames appropriate to children; possible need for treatment or counselling; and decarceration.[10] It is very important that the sentence is proportionate to the crime and that it considers the welfare of the child. The age of the juvenile at the time that s/he committed the offence is the age that should be relevant when sentences are considered. The punishment that is imposed on a child should also never exceed that likely to be imposed on an adult. The court should always be encouraged to opt for diversion rather than imprisonment.

It is far more important to reform offenders than it is to avenge the offence. As Gross says:

> "The old and effete doctrine of retributive punishment must be dispensed with in the juvenile court, where the watch-words should be reclamation and training, not retribution. The magistrate's duty is not to exact reparation for society, but to take all possible steps to avoid a repetition of the offence and to prevent the formation of undesirable behaviour patterns. It is up to the magistrate to make the child feel that he has had a patient hearing and that the decision of the court is a fair one."[11]

---

[9] It is submitted that this should always be the case.

[10] Juvenile Justice for South Africa: Proposals for Policy and Legislative Change Published by the Members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town, Cape Town (November 1994) 30.

[11] Gross, FA Who Hangs the Hangman? Juta and Co Ltd, Cape Town (1966) 85.

It is also important that children be encouraged to accept that they are accountable for their behaviour.

7.2. Problems with Sentencing

It is important that the presiding officer, in contemplating a sentence, takes the following into account: Imprisonment requires the removal of children from their families and communities. This creates a disruption in the children's lives, and once they are released, they often find it very difficult to be accepted back into the community. They are often also labelled as delinquents, thus in many cases, they will live up to this label and continue with their delinquent activities. Their school life is disrupted, and their lack of education along with their criminal records, make it very difficult for them to obtain suitable employment. This can often lead to a criminal career as these children then have no legal means by which to provide for themselves.

Pinnock, Skelton and Shapiro[12] feel that the family/community is central to the well-being of the child. Thus in any decision with respect to sentencing, they suggest that consideration be given to:

(1) ensuring that the family/community is involved with any decisions that will affect the child;

(2) how the decisions with respect to the future of the child will affect the family/community;

(3) causing the relationship between the young person and the community to be strengthened;

(4) giving the family/community support in order that it is able to deal with the offending juvenile itself; and

(5) keeping any disruptive intervention into family/community life to a minimum.

Sentencing should be more community-orientated, and any residential care should be concentrated in small group homes that are placed within the community.[13]

---

[12] Pinnock, D; Skelton, A and Shapiro, R 'New Juvenile Justice Legislation for South Africa: Giving Children a Chance' (1994) 3 South African Journal of Criminal Justice 346.

[13] Op cit see note 12.

Another problem with sentencing is that vastly different sentences are imposed on offenders who have committed very similar crimes under very similar circumstances. This tends to result in a lack of respect for the criminal justice system. To combat this, judicial officers should decide upon a consensus on which to base their sentences. This is not to say that the sentences should be the same, but that the standards on which they are based should be.[14] Another way in which to enhance the predictability of the offence is through the submission of a social enquiry report. This is in order that people with similar backgrounds and similar reasons for committing the same crime, will get similar sentences.[15] A sentencing tribunal or council could also help with this problem. The judicial officer along with a mental health expert, a social worker and possibly an educator could all confer in order to decide upon an appropriate sanction.[16] These people could be those already assigned to the suggested Reception and Assessment Centre making it inexpensive to bring them to court on the required day.

It is admitted that there are a number of juveniles who are a danger to society, and in order to protect the community, these offenders must be imprisoned. But, these juveniles are less than half of the total number of children who currently appear before the juvenile court. For the majority, who could be better dealt with by keeping them in society, alternative forms of punishment, especially community-based sentences should be the first choice.

7.3. Sentencing Options

Section 297 of the Criminal Procedure Act[17] provides for a number of sentencing options which do not include the imprisonment of the offender. These are:

---

[14] Graser, R 'Sentencing as a Rational Process'(1975) 4(2) Crime, Punishment and Correction, NICRO Criminological Journal 28.

[15] This would depend, however, on the number of previous convictions that each different defendant has. A first offender would no doubt get a lighter sentence than an offender who has a number of previous convictions.

[16] Op cit see note 14.

[17] Act No. 51 of 1977.

Postponement of passing of sentence for a period not exceeding five years. This can be unconditional or subject to the following conditions:

(a) compensation

(b) the rendering to the aggrieved person of some benefit or service in lieu of compensation

(c) the performance of community service

(d) submission to instruction or treatment

(e) submission to the supervision and control of a probation officer

(f) the compulsory attendance or residence at some specified centre for a specified purpose

(g) good conduct

(h) any other matter

These options can also be used as sentences on their own without any conditions, such as postponement of sentencing attached to them. Other options are:

- caution (with or without conditions) **(Suggested)*
- referral to a Family Group Conference **(Suggested)*
- correctional supervision.

Participation in some diversion programmes can be seen to fall under "the compulsory attendance or residence at some specified centre for a specified purpose."[18] Referral to a Family Group Conference is not currently on the statute books, but it is a further suggested sanction. The child may also be sentenced for a period of time to a Reform School or school of industry. It is submitted that sentences to a new "place of safety"[19] should also be an option. These options along with the ones that are currently available, give the court a wide variety of sentences that can be imposed on juvenile offenders. Imaginative use of these should allow for suitable punishment of the offender without needing to resort to imprisonment. Emphasis should be on those programmes which allow children to remain at home and at school, and which encourage them to accept responsibility for their actions.

---

[18] Section 267(2)(f) of the Correctional Services Act 51 of 1977.

[19] As will be discussed later.

In S v Williams[20] the court endorsed the development of alternative sentencing and diversion programmes by the state and NGO's. Here the court actively encouraged non-custodial sentencing options. It appears, even though it was not referred to in the judgment, that the court had considered s 40(4) of the United Nations Convention on the Rights of the Child, which provides that:

> "A variety of dispositions, such as care; guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence."[21]

Emphasis on the use of community-based sanctions has increased over the years. Internationally, people appear to prefer the suggestion that institutions should be reserved for those juveniles who represent a threat to society, and that these institutions should be specifically designed for young people. In Britain, the community-based sanctions have been 'toughened up'. The number of hours of community service have been increased. Fines have also been increased, along with the introduction of the consideration of the means of the parents with a view to making them liable. Britain has also recently introduced a curfew order, under which the child's movements are restricted. This can be enforced by electronic monitoring if physical monitoring is not practical.[22]

These changes to the British Juvenile Justice System show the commitment of the government to the idea of "just desserts" as well as the concerns about the costs of imprisonment and its desire to reduce government expenditure. Some of the changes also take into consideration the requirement of those who have been victimised by these juveniles. Emphasis on the

---

[20] 1995 (3) SA 632 (CC). This case dealt with the abolition of whipping as a means of punishment, declaring it unconstitutional as it violated the principle that no-one should be subjected to cruel, unusual or inhuman punishment.

[21] Sloth-Nielsen, J 'Juvenile Justice Review 1994-1995' (1995) 8(3) South African Journal of Criminal Justice 341-2.

[22] Gelsthorpe, L and Morris, A 'Juvenile Justice 1945-1992'. Maguire, M (et al) (eds) The Oxford Handbook of Criminology Clarendon Press, Oxford (1994) 982.

parents' responsibility for the offences of their children and on shared responsibility has also been increased.[23] It is submitted that South Africa could do well to learn from this system and consider a means of holding parents responsible for the offences of their children - not financially, but through other means. This would have to be further researched and contemplated before it could be considered as an option.

In California, the legislature recently amended the purpose clause of the juvenile court law in order to emphasise public protection and accountability. The new language of the statute provided that minors who came under the jurisdiction of the juvenile court for criminal offences were:

> "in conformity with the interests of public safety and protection (to) receive care, treatment and guidance which is consistent with their best interest, which holds them accountable for their behaviour, and which is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objects of the (juvenile court)."[24]

Here punishment was defined to include the imposition of a fine, compulsory community service, supervision under probation or parole, confinement to a county juvenile treatment facility, juvenile hall, or commitment to the California Youth Authority. The legislature also specified that punishment could not be 'retribution'.[25]

In the state of Massachusetts, the District Youth Service closed all institutions in 1977 due to the fact that the treatment provided was proving to be so ineffective. Here, four alternative types of treatment were instituted. These were:

(1) Group homes: units housing 10-15 juveniles who are attending local schools or holding down jobs. The unit functions like a family, is community orientated and helps to stabilise juveniles who cannot function properly in their own homes.

---

[23] Op cit see note 22.

[24] Elin-Blomquist, M and Forst, ML 'Moral and Practical Problems with Defining the Goal of the Juvenile Justice System as Accountability' (1993) 14 Journal of Juvenile Law 31

[25] Op cit see note 24.

(2) Therapeutically oriented homes: here individual, family and group treatment are concentrated on. In-house education and training facilities are provided. It seems that unmotivated juveniles do not benefit from this programme and those children who run away are not re-accepted, as self-motivation is necessary for the system to be effective.
(3) Modified concept houses: units designed for small groups of youth with drug or alcohol problems. The approach by which the children are treated involves confronting the individual with his/her problems. This system requires the willingness on the part of the children to be treated and a desire to reform.
(4) Residential schools: boarding schools which are set up on cottage principles and which are well-structured to meet the needs of juveniles who display uncontrollable behaviour.[26]

These are a few examples of the community-based programmes in place in the USA. The emphasis there has been on diversion in the past years, and these examples illustrate this. Even where it is necessary for the youth to be institutionalised, these institutions are usually 'open' facilities with treatment of the offender as their aim. 'Closed' facilities for juveniles are only used for juveniles convicted of serious offences.

It is important to remember that offenders are not alike. Their offences differ, as do their reasons for the commission of the crime. Some juveniles commit offences in order to be accepted into a certain peer group; others offend due to the fact that there is no other way for them to live (for example, stealing food in order to feed their families); still others are merely rebelling against their parents or against society. It is here that the importance of assessment of offenders when they are arrested is emphasised. It is essential that the sentence take the cause of the offence into account. It is also essential that the right sentence be selected for each child - the one that will have the most benefit for him/her.

---

[26] Bakal, Y and Polsky, HW 'Reforming Corrections for Juvenile Offenders' DH Heath and Co, Massachusetts (1969) cited in Botha, MJ The Needs, Values and Personal Relations of Juvenile Delinquents as a Basis for Differential Treatment. Thesis submitted in fulfilment of the requirement for the degree of Master of Education, University of Cape Town, Cape Town (1982) 239-241.

Community-based options range from minimal intervention into the life of the child, such as community service, to maximum intervention, such as residential lock-up care ('closed' facility). It is suggested that all residential facilities should be kept as small as possible. Community assistance should be utilised, whether on a volunteer basis or in the form of a paid expert. This helps to develop positive community ties and enables the community to be actively involved in combatting delinquency. By involving the community, it becomes more aware of the crime problem, which may also allow for the creation of a more positive attitude towards the treatment of offenders.

7.3.1.Community Service

Community service is one of the most commonly used diversion options. It is popular because it involves none of the dangers that detention in a juvenile institution pose to a young offender; the least of these being education in crime. It allows the child to remain at school or at work, as well as benefiting the community. It also helps to avoid any imposition of fines as an alternative to custodial sentences. The juvenile does not become a financial burden on the state and remains a productive member of society. There is also no disruption to the family. These programmes allow offenders to make their retribution to society.

It is important that the correct type of offender be selected for any specific placement within this programme, as indiscriminate placement of offenders will:

> "(a) make participating agencies reluctant to accept offenders for placement;
> (b) in the eyes of the sentencer discredit the system as a viable alternative for imprisonment; and
> (c) defeat the principle of sentencing, namely that it 'should be to maintain a proper balance between the interest of society in its own protection and the interest of the individual offender with regard to receiving a just punishment'[27]."

---

[27] Rabie, MA and Strauss, SA Punishment: An Introduction to Principles (1979) at 51 cited in Howes, F 'Community Service as Community Orientated Punishment'(1984) 8(2) South African Journal of Criminal Law and Criminology 134.

There appear to be certain characteristics of a person which will put his/her suitability for community service into doubt. These are:

(1) the absence of a settled home address or some other area of stability such as work or family commitment;
(2) strong addiction to drugs or alcohol;
(3) offence which involved serious or habitual violence or sexual deviance;
(4) total lack of motivation to carry out the order;
(5) domestic or work commitments that appeared likely to interfere with the offender's ability to perform an order within 12 months;
(6) evidence of mental illness or severe mental disturbance;
(7) a physical handicap which could not be accommodated within available work placements;
(8) the existence of problems which, in the social worker's judgement, indicate a need for long-term casework;
(9) unreliability in reporting during a previous period of probation.[28]

Once offenders have been sentenced to community service, they must be carefully matched to an available programme. The work should have a positive effect on the juveniles and should allow them to use any practical skills that they may have. It should make offenders feel that their work is useful and that they are making a contribution to society. It has been suggested that the work should have some relevance to the crime[29], but in South Africa, at the moment, there is a shortage of available placements, so this will not always be possible. This should however, not steer the court away from using community service as a sanction - the currently available placements should merely be used instead.

In Botswana, a community service programme called Extra Mural Labour (EML) is currently in place. Here an offender who would have been imprisoned is employed in public work or service. EML will only be given to a first offender whose sentence does not exceed six months, and who has not committed a violent crime. It is also important that a work place

---

[28] Young, W Community Service Orders (1979) at 131-132 as cited in Howes, F op cit see note 27 at 134-135.

[29] Howes, F op cit see note 27.

is available and that the public authority and the workers are willing to work with the offender.[30]

> "... when EML is used as an alternative to imprisonment it has an added advantage of removing certain persons from the mainstream of imprisonment. This in itself ensures that the contaminating effects of imprisonment are minimised. This is particularly true in the case of first offenders. Another objective or advantage that can be identified in relation to EML is the possible cost-saving implications involved. A person who performs EML with a public authority renders a service or does some work which does not attract any remuneration. Productivity may in this way be increased, resulting in generating income for the public authority concerned."[31]

If this option can work in Botswana, it is submitted that it would also work in South Africa. It is, however, suggested that the juvenile sentenced to this type of diversion option is not given a sentence of six months or under, but is merely diverted to this programme without actually being sentenced at all. The other requirements could, however, be used.

7.3.2.Correctional Supervision

Another community-based sanction is that of correctional supervision. At the moment this is not widely used due to a lack of community involvement as well as due to the fact that the community structures are too inadequate to implement it properly. S v Williams[32] discussed this as an alternative sentence. It has been in force as an alternative sentence since 1993, but it is submitted that it is still not used enough. It is suggested that this should replace institutionalisation in as many cases as possible. Naude suggests that community-based correctional supervision should be a sentencing alternative for all persons who can be seen

---

[30] Frimpong, K 'Searching for alternatives to imprisonment: An African Experiment' (1992) 3 South African Journal of Criminal Justice 249.

[31] Op cit see note 30.

[32] Op cit see note 20.

to be suitable candidates, but also stresses that special attention should be given to first offenders as they have more of a chance of reforming within the community.[33]

All offenders sentenced to correctional supervision will be subject to the conditions imposed by the court as well as those specified by the probation officer assigned to the case. Any, or all, of the following conditions may apply:

(1) Monitoring: this can be exercised through visits to the offender's home or place of work, meetings with the probation officer at his/her office, telephonically, through visits by voluntary members of the community, or through electronic monitoring.

(2) Community service: all offenders placed under correctional supervision would be required to give up a certain number of their free hours to community service.

(3) House arrest: here the offender will not be allowed to leave his/her home unless this is sanctioned by the probation officer. (for example; after school or work, the juvenile must remain at home). This is only used when intensive supervision is required. Monitoring can take place as suggested above.

(4) Employment: the offender can be made to obtain full-time employment (if not at school) or part-time employment. The Department of Correctional Services should assist in this if the offender is unable to find suitable employment on his/her own.

(5) Reparations to the victim: the court may order that part of the offender's income go towards paying reparation to the victim in regular monthly instalments. This would be especially viable in cases of theft or burglary.

(6) Correctional programmes: the probation officer may refer the offender to certain programmes, for example, programmes for alcohol or drug dependence; training programmes to enhance employment opportunities; programmes focusing on the teaching of interpersonal skills; personal development, community responsibility, etc.[34]

Naude[35] suggests three categories of correctional supervision which can be used:

---

[33] Naude, CMB 'Correctional Supervision : Alternative Community-Based Sentencing Options for South Africa' (1991) 4(2) Acta Criminologica 16.

[34] Op cit see note 33 at 16B-17A.

[35] Op cit see note 33 at 17A-17B.

(a) Intensive correctional supervision which involves house arrest, restriction of movement, no alcohol abuse, participation in correctional programmes, no interaction with unsuitable persons, reparation to the victim and community service.

(b) Medium correctional supervision for people who have been able to adhere to the conditions of intensive supervision or offenders who are immediately placed in this category. The same programmes applicable to intense supervision are relevant here, but monitoring and restrictions of movement are more flexible.

(c) Minimum correctional supervision is used for offenders who are nearing the end of their correctional supervision. These offenders should have successfully completed their programmes, have repaid the victims and appear that they will not commit crimes in the future.

If, at any time, the probation officer feels that the offender needs stricter or less strict supervision, s/he may adjust the supervision to a higher or lower level. If the offender does not adhere to the conditions of the correctional supervision, the probation officer may warn him/her; change the conditions of the correctional supervision; or refer the matter back to the court so that the court can impose a more appropriate sanction.[36]

It is essential that a stable community exists in which correctional supervision can be implemented.[37] Communities which are unstable or characterised by high unemployment are not suitable for correctional supervision. For successful implementation, active community involvement and the extensive involvement of the private sector are also essential.

This is a very good option for a community-based diversion sentence. It cannot be seen as a soft option. The offender is seen to be suitably punished by the deprivation of his/her liberty without any of the dangers attached to incarceration. S/he is also able to pay the victim back as well as receiving treatment and training in the suggested programmes that would be offered by the Department of Correctional Services. No schooling is lost and employment is gained to keep the offender from being forced to turn to crime in order to

---

[36] Op cit see note 33.

[37] Op cit see note 33.

support him/herself. All of the above will hopefully lead to the elimination of recidivism in those who are sentenced to correctional supervision.

A sentence to probation could serve as an alternative to full-blown correctional supervision. Here the offender would remain at liberty on the condition that s/he regularly meets with his/her probation officer. Community service could be combined with this, or it could be used on its own. With probation it is important that the child receives the support and counselling which is necessary to help him/her to avoid recidivism.

Further alternatives to institutionalisation (as mentioned above) are:

- A caution[38]
- The referral of the case back to the suggested Family Group Conference where a sanction can be decided upon.
- Postponed sentence. Here the child could be released, on good conduct, into the custody of his/her parents without having been sentenced, and the condition added that sentencing is postponed or suspended for a certain period of time. If the child is not arrested for an offence until after that period has expired, the court will not impose any other sanction.
- Submission to instruction or treatment, where the offender is sentenced to undergo a programme or counselling or to participate in and successfully complete the Youth Offender School.
- Rendering of benefit or service to an aggrieved person. Here the child could be sentenced to pay reparation to the victim or actually perform a service for the victim. The appropriate service should be determined by the court as well as the length of time for which it is to be performed, in order to reduce the chances of any abuse of the system.

An attendance centre order, as used in Britain, is similar to the Youth Offender School, but appears to be a lot stricter. Here the young offender must attend the centre, which is usually in a police station or school, for certain periods in his/her spare time.

---

[38] As has been discussed before, only here it will be issued by the presiding officer not a police officer, and will be formally recorded.

> "In a typical case, he will be ordered to attend for a total of twelve hours, two hours on each of six Saturday afternoons, and will spend his time on physical training, craftwork and 'fatigues'." [39]

Offenders will not be sent to this type of centre if they have previously been incarcerated in order to reduce the risk of them contaminating other offenders with their advanced criminal knowledge. The Youth Offender School could use this type of programme for dealing with more serious offenders, thus opening its doors to the diversion of a lot more young people.

7.4. Group Homes

This varies from 'open' care where the juvenile is not locked up or supervised constantly, to 'closed' care, where the juvenile is placed in a locked secure care facility. 'Closed' care is the equivalent to incarceration in a juvenile prison and should only be resorted to as a final measure in cases of chronic delinquents or for those delinquents convicted of the commission of serious offences involving violence against the person of another. 'Open' care facilities should be utilised as far as is possible but only in the case of children who cannot be assisted by diversion programmes which allow them to remain in their own homes. It will thus be necessary to establish small community-based houses which can act as 'open'-care facilities, as well as to have secure care facilities available in each area.

Confinements in these group homes, which cater for a small number of juveniles, serve to eliminate all contact with adult offenders as well as reducing the exposure of first or non-violent offenders to other offenders who will teach them about violence and how to commit further and more advanced crimes. These group homes will also be able to offer conditions far better than those in juvenile institutions. An example of the group home would be the new-look "place of safety".

---

[39] McLean, JD and Wood, JC Criminal Justice and the Treatment of Offenders Sweet and Maxwell, London (1969) 203-204.

7.4.1. Places of safety

At the moment, places of safety are governed by the Child Care Act[40] to act as temporary holding places for children who are awaiting trial or those awaiting placement in another facility. Here children accused or convicted of an offence are held together with those children who are merely in need of care who await placement in a children's or foster home. These children are exposed to negative influences from the juvenile delinquents which can often cause them to become delinquents when they leave. Minor offenders are also held together with serious offenders, from whom they learn further criminal behaviour. It can be seen that a new system needs to be developed here.

It is submitted that places of safety should only house children in need of care who await placement in a children's home or foster home. Group homes should be constructed as 'places of safety' for those children who are detained while awaiting trial. These could be under the control of the staff of the current places of safety, but the children should not be placed in the same facility. Separate group homes should also be established for those children who have been sentenced to an 'open'-care facility. These homes should enlist the help of the community and be seriously involved in the community. This could be an expensive procedure, but it is submitted that in the future there will be very few children sentenced to institutionalisation, as most will be diverted beforehand, thus reducing the number of homes that will have to be built. Reducing the numbers of children sentenced to imprisonment will also release more funds for this purpose. They may be expensive to build and run, but they will be an investment in the reduction of crime in South Africa.

Children who have committed offences for which they have been sentenced to community service or correctional supervision, or to undergo a treatment programme, but who appear to have no parents or whose parents are not able or unfit to care for them, could also be placed in these group homes. It is, however, suggested that they be placed in the same home as the children who are awaiting trial, but that all attempts are made to keep them separate from one another (for example in separate parts of the home). This is due to the fact that they will probably not be the type of offenders who deserve a sentence to an 'open'-care, but

---

[40] Act No. 73 of 1983.

merely need a place to stay while they complete their sentence. At the same time, the staff of the 'place of safety'; could be looking toward placement of that child in a foster home or even a children's home once his/her sentence has been completed.

These group homes should have a set of 'parents' who look after the daily needs of the juvenile, as well as access to a mental health professional who visits the home and provides counselling to the children. The children should be encouraged to continue their schooling, but should also be provided with job training. Life skills programmes and programmes which encourage the learning of interpersonal skills should also be available. In order to reduce expenses, these programmes could be offered in the evenings at a central place where all the children from the group homes in the greater area could be instructed together.

It is submitted that although these group homes could be expensive to construct and maintain, keeping children in need away from juvenile offenders; as well as keeping children awaiting trial from being corrupted by those convicted of an offence, would lead to less criminals being produced in the future. The juvenile's schooling would also not be disrupted and s/he would receive training on how to cope in society, as well as being trained in skills which will make the juvenile more marketable and more likely to obtain employment after his/her release.

7.4.2. Reform Schools and Schools of Industry

The final form of sentence that must be considered is a sentence to a reform school or to a school of industry.

> "The existence of schools of industry and reform schools indicate that the prevention of juvenile offending has failed to a certain extent. These schools, few as they are, have an important role to play in the future as there will always be a need to provide juveniles with residential care. However, it must be mentioned ... that in order to be effective, these schools must work

in conjunction with the family, the community and other agencies involved in the rehabilitation of juvenile offenders."[41]

The role of these schools is to prevent recidivism by correctional and educational means. Most of the children sent here are environmentally deprived by poverty and isolation (be it geographical or cultural) which tends to cause their normal development to be curbed. These handicaps can be counteracted to a certain extent.[42]

These schools are managed as educational centres and have the same curricula as the other schools in the country. Here the school education begins at a level which can be managed by the child. The child is given the opportunity to enjoy the kind of success within his/her peer group that s/he would not get at an ordinary school. During their stay, the children are also given a balanced diet, clothing and shelter. They are under 24 hour supervision by fully trained personnel. This allows for the personnel to understand the child better as well as providing for educational intervention.[43]

In a reform school, the average period of stay is 18 months. The pupil is only released on licence at the end of each academic year, though. Once released on licence, the child is placed in the custody of his/her parents or the care of a person approved by the probation officer. The child remains under probationary supervision for a period not exceeding two years, during which the probation officer submits reports to the school on the pupil's adjustment into the community. If the pupil does not adjust favourably, his/her licence may be revoked and s/he will have to return to the school for a further period.[44]

---

[41] Ndlovu, S 'The Role of Correctional Facilities in Juvenile Corrections'. Glanz, L (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 97-98.

[42] Op cit see note 41 at 98.

[43] Op cit see note 41.

[44] Botha, MJ op cit see note 26 at 234 and 237.

Again, it must be stressed that separate facilities for children in need of care and juvenile offenders must be provided as these groups are distinct and require different social and educational services. Perhaps children in need of care could be allowed to remain at 'places of safety' and attend local schools rather than being forced to attend reform schools or schools of industry. In this way, these two options can be kept solely for juvenile offenders as a harsh punishment, but one which is better than incarceration. Again, only serious or chronic offenders should be sentenced to this kind of punishment.

The general conditions and standard of care, education, development and treatment which exist in the majority of the facilities visited by the IMC, did not measure up to the standards set by the CRC, the UN Rules for Juveniles Deprived of their Liberty, international child and youth care practice, and the South African Constitution.[45]

The methods of discipline in nearly every place visited were punitive and startlingly inappropriate, and are in contravention of the universal standards, the Bill of Rights in the South African Constitution, and the Child and Youth Care Code of Ethics. There is not enough opportunity for the young people to put forward their side of the story and to protest their innocence.[46]

Family preservation and ecological work is understood to be the basis of working with young people at risk. There were, however, many problems in the facilities visited by the IMC which work against family preservation and reconstruction. One of these problems relates to the distance which many children are placed away from their homes due to the lack of available placements close to home. reconstruction difficult, if not impossible.
Reconstruction work (working with the family to ensure the child is returning to a viable situation) is also very limited due to distances between the facilities and the families. Another problem with respect to reconstruction is the lack of social workers in facilities, as

---

[45] 'In Whose Best Interests' - IMC Report on Places of Safety, Schools of Industry and Reform Schools (July 1996) 11.

[46] Op cit see note 45 at 13.

well as the lack of cooperation with and from social workers in the communities who should be rendering services to the family.[47]

> "Many of the children in the facilities visited were considered, even in the opinion of staff members interviewed, to have been wrongly placed. In Reform Schools, generally considered as an alternative to prison for youthful serious offenders, there were found to be a majority of children who had committed economic crimes. Only approximately 20% of the cases perused were serious violent crimes. In some Reform Schools 50% (and in one Reform School 80%) of the pupils were referrals from Schools of Industry."[48]

Almost all children in Schools of Industry are victims of neglect or abuse. They are children who can be seen to be in need of care, and in many cases could have been accommodated in Children's Homes if these programmes had the resources and capacity, or could have been kept in the community if community based services could have been provided.[49] At present there is no screening process to determine which offenders should go where. It is submitted that this should be introduced and also that those people who refer children to these facilities be required to visit the facility at least once a year in order that they are aware of the conditions to which they are sentencing the young person.

Reform Schools have the appropriate security to contain young people securely. Places of Safety and Schools of Industry are proud of the fact that they only use the minimum restraint, and the principals of these facilities indicated a reluctance to secure the facilities. They felt that this would not be in the best interests of the children already living there. This is another reason why it is essential that group homes are built as soon as possible. It is imperative that different types of children are accommodated separately and have as little contact with each other as possible in order that criminal contamination does not occur.

---

[47] Op cit see note 45 at 19.

[48] Op cit see note 45 at 19.

[49] Op cit see note 45 at 19.

The IMC recommends that additional probation posts be created as urgently as possible in areas where they are needed most, that all probation officers be appropriately trained, that sufficient family finders are employed in each province, and that sufficient 24 hour reception and referral centres are established as soon as possible.[50] This is a laudable suggestion and it is suggested that this should be implemented as soon as possible to relieve the pressure on the social service and the police.

7.5. The Criminal Record of the Juvenile

The last thing to be considered when discussing sentencing is the provision for the criminal record of the juvenile. It is submitted that any juvenile who is sentenced to any form of diversion or institutionalisation *by the court* should have this recorded on computer. These records should be able to be accessed by any police officer, personnel at the Reception and Assessment Centre or social worker, upon request. This helps in making an accurate assessment after the child has been arrested as to whether s/he is unsuitable for diversion because of previous arrests. This computer network must be set up and should be easily accessed by those mentioned above.

It is suggested, though, that this criminal record, or any record of diversion, should fall away when the juvenile reaches the age of 18 and proceeds to the jurisdiction of the adult criminal court. It is only in cases of serious offences, that the record should be retained. It is suggested that the offences which currently form Schedule 2 of the Correctional Services Act[51] be the offences for which the record is retained.[52] The reason for this is that children who have been sentenced to diversion will not be penalised for their juvenile crimes for the rest of their lives. This is in order that they will be able to apply for employment without having to disclose that they were convicted of a crime, making them more likely to obtain that employment and able to live a law-abiding life without any need to resort to crime again.

---

[50] Op cit see note 45 at 23-24,

[51] Act No. 8 of 1959, as amended.

[52] See Annexure for offences.

It is essential that in sentencing the offender, the presiding officer opts for diversion whenever this is possible. The judicial system must attempt to divert as many offenders from imprisonment as possible, in order to keep the recidivation numbers down. South Africa has an exceptionally high crime rate - many of those criminals have been to prison and been released, only to continue with a life of crime. Incarceration does not work to reform and rehabilitate offenders; it is merely used to punish offenders for the injuries that they have inflicted upon society. In the case of juvenile offenders, it also can be said to do more harm than good. It is for this reason that diversion sentences should, in the majority of cases, be the first choice.

Chapter 8

Conclusion

In order for a fully workable juvenile justice system to be instituted in South Africa, many changes to the current system need to be made. But even before actual legislative change is made, it is imperative that the government start to implement changes in the socio-economic situation of all people in the country. By uplifting the environment in which people live, providing jobs and houses, people will enjoy a better standard of living and will have far less need to turn to a life of crime in order to survive.

The suggestion and recommendations made by the IMC are, as a whole, extremely viable. It is essential that diversion programmes are begun, as soon as possible (even if only as pilot projects), in the places that need them most.[1] Thus, it is submitted, that legislation which provides for the above suggestions to be implemented, must be introduced.

A new juvenile justice system for South Africa is in the making, but it is important that the country does not wait for the final outcome, but starts implementing diversion programmes immediately. This is especially true with respect to prevention programmes. As has been said before, the sooner we start to educate children about crime and as to why they should not commit a crime, the sooner this would be absorbed by the children and the sooner the juvenile crime rates in this country would be lowered. The suggestions and recommendations discussed above should be implemented as soon as possible to keep children out of prison and to reduce the overwhelmingly high crime rate in South Africa.

During the period in which these socio-economic changes are being instituted, the search for new and workable legislation must begin. The suggestions and recommendations made by the Inter-Ministerial Committee on Young People at Risk and by the Draft White Paper on

---

[1] For example, Soweto, Kwa-Mashu, Katlehong and other townships all over the country where the majority of the children who can be deemed to be at risk of becoming delinquent, reside.

Social Welfare should form the basis for this legislation. Any laws which are instituted should be easily understandable and must be able to be put into practice as soon as possible. South Africa has a definite need for the law relating to juveniles to be revamped. A system which has diversion as its basis needs to be introduced - one which diverts children rather than forcing them to undergo the traumatising experience of entering the criminal court system.

The Correctional Services Amendment Act[2] only has one year's tenure. This may be extended by the State President for a further year if he deems this desirable. It is submitted that the Act should remain in place for as long as it is required in order for places of safety to be made more secure and able to cope with the influx of children that will occur if children are not allowed to be held in prisons, police cells and lock-ups. It is also suggested that the Act be retained until the new juvenile justice system becomes a reality - when group homes have been built and diversion is being practised as the order of the day. When this has occurred, it is hoped that there will be far less juveniles in need of pre-trial detention and even less in need of incarceration. The Act could then be reviewed and an appropriate course decided upon with respect to its retention or abolition.

It is essential that prevention programmes are begun immediately. Children at school are a captive audience. They are also at a stage where their minds are pliable and able to be positively and negatively influenced. If the positive influences are stronger than the negative ones, it is hoped that children will be encouraged to abstain from a life of crime. By introducing prevention programmes in the schools there is a greater likelihood that children will become aware of the disadvantages of criminal activities and will thus not pursue or continue to pursue them. It is far better to prevent a child from committing a crime than to try and cure that child once s/he has committed a crime.

It is imperative that all personnel who come into contact with juveniles are properly trained to perform this task in a manner which considers the child's and society's best interests as well as taking into account the rights of the child at all times. Juvenile court magistrates

---

[2] Act No 14 of 1996.

must be appointed for their knowledge and ability to handle children and should be specially trained in this sphere.

It is important too, that the community is involved in any diversion programmes set up by the State or any interested NGO's. Community backing will provide added assistance and support for these programmes. Acceptance by the community of its responsibility to aid in the reduction of crime will make the implementation of programmes easier. It is also hoped that this will result in community support for offenders making it easier for them to be rehabilitated in their homes with the aid of the community.

Diversion programmes have been seen to work. In the year 1994/5, a total of 3565 cases were referred to NICRO for participation in diversion programmes. 3355 (94.11%) were accepted by NICRO and of these 2725 (76.44%) completed successfully. The offence profile of the cases referred was:

- 76.63% were referred for property offences;
- 7.33% were referred for offences against a person; and
- 16.04% were referred for so-called victimless offences.[3]

It is admitted that no long-term recidivation studies have yet been carried out with respect to determining the numbers of juveniles who recidivate after progressing through a diversion programme. However, studies that have been carried out with respect to those children sent to Borstal Training in the United Kingdom show a high recidivism rate.[4] As Borstal is similar to imprisonment, one can assume that the recidivism rate for those juveniles who have been incarcerated in South Africa would be much the same.

One of the main problems with respect to children in South Africa is the fact that those children who have been incarcerated, are released into the same circumstances they were in before they were sent to prison. They are far behind in their education and have been

---

[3] The Inter-Ministerial Committee's Draft Discussion Document on Young People at Risk at 32.

[4] See discussion in Chapter 2.

educated by other inmates in further criminal conduct. They also have a criminal record which makes it increasingly difficult for them to obtain employment. As these ex-convicts now have no means available to them in order for them to survive, they often have to return to criminal activities.

There are no statistics available for the success of prevention programmes, but these programmes work with children at risk who have not yet committed a crime. One can never say without any doubt that any specific child would have committed a crime but due to prevention programmes has not, therefore success cannot unequivocally be proved. It is thus submitted that even though the success of these programmes can never be defined in figures, they should not take second place to tertiary prevention programmes[5]. It is important that children are made aware of how they can avoid becoming criminals and the punishments that will follow if they are convicted of a crime. This will aid a great number of children and hopefully encourage them to remain law-abiding citizens.

It is imperative that as much as possible is done to keep children out of prison. Prisons are universities of crime. Children leave prison uneducated, unable to obtain employment and in many cases, unable to cope with the world outside. Family relations are often destroyed and the child also finds it very difficult to be re-accepted by his/her community. S/he will always retain the stigma of being a convicted criminal or ex-convict. All of the above combine to make the child far more receptive to the commission of further criminal offences.

It is submitted that it is essential that diversion programmes are instituted immediately to prevent young people from coming into contact with the law at all, if this is remotely possible, otherwise to keep them from progressing into the criminal court system. It is also imperative that legislation which provides for diversion and prevention programmes is introduced immediately in order for these programmes to have the force of law behind them as well as to make them available to presiding officers as alternatives to the currently available sentences. The juvenile justice system need to be overhauled and it must be done as soon as possible!

---

[5] Those which attempt to prevent a juvenile recidivating after s/he has been convicted of a crime.

as well as to make them available to presiding officers as alternatives to the currently available sentences. The juvenile justice system need to be overhauled and it must be done as soon as possible!

It is ultimately essential that in all cases where this is possible, children are diverted from prison. Only serious offenders who are convicted of crimes against the person of another or juveniles for whom diversion has repeatedly failed after the commission of many relatively serious crimes should ever end up in a prison. These will only be cases where the interests of society require that these juveniles be incarcerated. Otherwise, all juveniles should be diverted - from the criminal court system where possible, but especially from prison.

BIBLIOGRAPHY

ACLU Fact Sheet on Juvenile Crime: 14/5/96, at http://www.aclu.org/congress/juvenile.html

Allen-Mills, T 'The Playtime Murders' Sunday Tribune, (The Other Mag) (February 11, 1986) 5.

'A National Strategy for preventing juvenile offending in South Africa'. Glanz, L (ed) Preventing Juvenile offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 113-135.

Asquith, S and Hill, M (eds) Justice for Children Martinus Nijhoff Publishers, Dordrecht (1994) 6-15, 144-153, 117-131, 59-72.

Botha, MJ The Needs, Values and Personal Relations of Juvenile Delinquents as a Basis for Differential Treatment. Thesis submitted in fulfilment of the requirements for the degree of Master of Education, University of Cape Town (1982).

Bosman-Swanepoel, HM and Wessels, P A Practical Approach to the Child Care Act Digma Publishers, Pretoria (1995).

Cilliers, C and du Preez, G 'International Co-operation in Crime Prevention and Criminal Justice for the Twenty-First Century' (1991) 4(1) Acta Criminologica Printed by UNISA 14-20.

Cochrane, R 'Statistics' (1995) 8(3) South African Journal of Criminal Justice Juta & Co Ltd, Cape Town 349-366.

Constitution of the Republic of South Africa Act No 200 of 1993.

Correctional Services Amendment Act No 14 of 1996.

Correctional Services Amendment Act No 17 of 1994.

Correctional Services Act No 8 of 1959.

Crime Time Bomb. US News on Line 25/3/96. at http://www.usnews.com/usnews/ISSUE/CRIME.HTML

Criminal Procedure Act No. 51 of 1977.

Child Care Act No 54 of 1983.

Draft White Paper for Social Welfare Government Gazette 2 February 1996, Vol 368. No 16943, Section 4.

Elin-Blomquist, M and Forst, ML 'Moral and Practical Problems with Redefining the Goal of the Juvenile Justice System as Accountability' (1993) 14 Journal of Juvenile Law Published by the Verne Law Review Inc., California 26-46.

Ezell, M 'Juvenile Arbitration: Net Widening and Other Unintended Consequences' (1989) 26 Journal of Research in Crime and Delinquency Sage Publications Inc., New York 358-377.

Farrell, RH and Nelson, JF 'A Sequential Analysis of Delinquency' (1978) 6 International Journal of Criminology and Penology Academic Press, London 255-268.

Fishman, G 'The Paradoxical Effect of Labelling' 1976 (4) International Journal of Criminology and Penology Academic Press, London 1-7.

Freeman, MDA The Rights and Wrongs of Children Frances Pinter Publishers London (1983) 66-96.

Freeman, MDA 'Getting Tough with Young Thugs: Britain's New Proposals for Dealing with Juvenile Delinquency' (1980) 4 South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 146-149.

Frimpong, K 'Searching for Alternatives to Imprisonment: An African Experiment' (1992) 3 South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 233-235.

Frosh, SB 'Constructive Alternatives to Prison Sentencing' (1982) 6 South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 18-26.

Geimer, WS 'Education and Uncertainty: Reflections upon the 8th National Conference on Juvenile Justice' (1982) 6 Journal of Juvenile Law Published by Verne Law Review Inc, California 36-48.

Gelsthorpe, L and Morris, M 'Juvenile Justice 1945-1992'. Maguire, M, Morgan, R and Reiner, R (eds) The Oxford Handbook of Criminology Clarendon Press, Oxford (1994) 949-985.

Grant, E 'Protective Custody of Juvenile Witnesses' (1989) 5(2) South African Journal on Human Rights Juta and Co Ltd, Cape Town 221-229.

Graser, R 'Sentencing as a rational process' (1978) 4(2) Crime, Punishment and Correction. NICRO Criminological Journal 26-41.

Gross, FA Who Hangs the Hangman? Juta & Co Ltd, Cape Town (1966).

Hammarberg, T 'Justice for Children through the UN Convention'. Asquith, S and Hill, M (eds) Justice for Children Martinus Nijhoff Publishers, Dordrecht (1994) 59-72.

Hansson, D and Theron, R 'The South African Legal System: Statistics 1988-1989 (1989) 2(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 351-353.

Hansson, D 'Selected Statistics' (1990) 3(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 312-326.

Hansson, D 'Selected Statistics' (1991) 4(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 364-371.

Hansson, D 'Selected Statistics on the South African Criminal Justice System' (1992) 5(3) South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 323-324.

Hansson, D 'Statistics' (1994) 7(3) South African Journal of Criminal Justice Juta & Co Ltd, Cape Town 364-381.

Hansson, D and Van Zyl Smit, D (eds) Towards Justice? Crime and State Control in South Africa Oxford University Press, Cape Town (1990).

Hollin, CR, Epps, KJ and Kendrick DJ Managing Behavioural Treatment: Policy and Practice with Delinquent Adolescents Routledge Publishers, London (1995) 1-24.

Howes, F 'Community Service as Community Orientated Punishment' (1984) 8(2) South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 131-135.

Hutchinson, L. 'Born Bad? The Effects of a Dysfunctional Society on the Youth' (1995) 11 Earthyear 50-53.

Inter-Ministerial Committee on Young People at Risk 'In Whose Best Interests' Report on Places of Safety, Schools of Industry and Reform Schools (July 1996).

Inter-Ministerial Committee on Young People at Risk Interim Policy Recommendations (November 1996).

Inter-Ministerial Committee on Young People at Risk Document on the Transformation of the South African Child and Youth Care System (November 1995)

Justice for the Children: No Child Should be Caged. An independent report written by The Children's Rights Research and Advocacy Project, Community Law Centre, University of the Western Cape, Cape Town (22 October 1992).

Juvenile Delinquents and Status Offenders: Court Processing and Outcomes December 1995 at http://www.state.va.us/d...mmary/rpt181/juvjust.html

Juvenile Justice for South Africa: Proposals for policy and legislative change. Published by the members of the Juvenile Justice Drafting Consultancy, Institute of Criminology, University of Cape Town, Cape Town (November 1994).

The Juvenile Justice Home Page at http://home.earthlink.net/~ehumes/homejuv.html

Kadish, SM (ed) Encyclopedia of Crime and Justice The Free Press, New York (1983) 30-35, 172-174, 265-277, 366-368, 584-590, 961-990, 1364-1373 and 1207-1212.

Knowler, G 'Children to be Detained at Westville Prison' and 'Excelsior Place of Safety's Rocky Road' Natal on Saturday (February 3, 1996) 9.

Lemmert, EM 'Diversion in Juvenile Justice: What Hath Been Wrought' (1981) 18 Journal of Research in Crime and Delinquency Sage Publications Inc, New York 34-45.

Letting in the light: Seeking justice for the children of South Africa. A workbook for children in trouble with the law, and their families, friends and advocates. Published by The Children's Right Research and Advocacy Project, Youth Advocacy Unit, Community Law Centre, University of the Western Cape (June 1993).

Luger, M Innovations in the Treatment of Juvenile Offenders (The Future of Corrections.) Published by the American Academy of Political and Social Science (1969) 61-70.

McCurdie, J Children's Rights (Developing Justice Series) Published by the Social Justice Resource Project (SJRP) and the Legal Education Action Project (LEAP), Institute of Criminology, University of Cape Town (September 1992).

McDonald, R 'Face to Face Justice' Good Weekend (18 May 1996) 17-23

McGoldrick, JM 'Breed v Jones: The Domesticated Juvenile Court, A Pyrrhic Victory' (1977) 1 Journal of Juvenile Law Verne Law Review Inc, California 1-22.

McLachlan, F 'Innovative police strategies to deal with young people in trouble'. Glanz, L. (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 69-73.

McLachlan, F Children in Prison in South Africa Published by the Institute of Criminology, University of Cape Town (1984) 21-34.

McLachlan, F Children: Their Courts and Institutions in South Africa Published by the Institute of Criminology, University of Cape Town (1986) 31-58.

Mclean, JD and Wood, JC Criminal Justice and the Treatment of Offenders Sweet and Maxwell, London (1969) 175-213.

McQuoid-Mason, DJ 'Solving the Crime Problem: Prevention or Rehabilitation? - Possible New Directions' (1981) 5(1) South African Journal of Criminal Law and Criminology Butterworths, Cape Town 3-15.

Midgley, J Children on Trial (South African Studies in Criminology), Published by NICRO, Cape Town (1975).

Morris, M The Search for Justice in a Juvenile Justice System Papers and Reports of a conference ("Putting Children First") convened by the Community Law Centre, University of the Western Cape, Cape Town (June 1992).

Morris, A and Mc Isaac, M Juvenile Justice? The Practice of Social Welfare Heineman Publishers, London (1978) 138-156.

Murrell, ME and Lester, D Introduction to Juvenile Delinquency Macmillan Publishing Co, New York (1981) 222-242.

Naude, CMB 'Correctional Supervision: Alternative Community-Based Sentencing Options for South Africa' (1991) 4(2) Acta Criminologica Printed by UNISA 14-18.

Ndlovu, J 'The Role of Residential Facilities in Juvenile Corrections'. Glanz, L. (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 97-99.

O'Donnell, D 'Alternatives to imprisonment of children'. Tomasevski, K (ed) Children in Adult Prisons: An International Perspective Frances Pinter Publishers, London (1986) 136-149.

Office of Juvenile Justice and Delinquency Prevention at http://gopher.usdoj.gov/ojp/ojjdp.html

Osgood, DW and Weichselbaum, HF 'Juvenile Diversion: When Practice Matches Theory' (1984) 21 Journal of Research in Crime and Delinquency Sage Publications Inc., New York 33-55.

Palmer, TB and Lewis, RV 'Differentiated Approach to Juvenile Diversion' (1980) 17 Journal of Research in Crime and Delinquency Sage Publications Inc., New York 209-225.

Parker, S 'The Best Interests of the Child - Principles and Problems'. Alston, P (ed) The Best Interests of the Child (Reconciling Culture and Human Rights) Clarendon Press, Oxford (1994) 26-40.

Paul, LJ 'New approach to juvenile crime problem' The Northglen News (June 28, 1996) 1-2.

Pegge, JV 'Creating a Balance between Rehabilitation and Prevention' (1979) 2 South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 176-182.

Pinnock, D, Skelton, A and Shapiro, R 'New Juvenile Justice Legislation for South Africa: Giving Children a Chance' (1994) 7(3) South African Journal of Criminal Justice Juta & Co Ltd, Cape Town 338-347.

'Plea to release all prisoners aged under 14' Eastern Province Herald (Friday August 30, 1996) 3.

Reid, TD 'Community Service as an Alternative to Imprisonment: A Judicial Perspective' (1984) 8(2) South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 126-130.

Robison, J and Smith, G 'The Effectiveness of Correctional Programmes'. Giallombardo, R (ed) Juvenile Delinquency John Wiley and Sons Inc. (Publishers) New York (1972) 585-597.

Said, S and Eksteen, J 'How the Courts Should Work'. Glanz, L (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 79-82.

Sempe, R 'Processing juveniles through the court system'. Glanz, L (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 75-78.

Shapiro, R 'Diversion from the criminal justice system and appropriate sentencing for the youth'. Glanz, L (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 89-95.

Shapiro, R The Need for a Comprehensive Juvenile Justice System NICRO National Consultant: Restorative Justice (25 July 1994) (Article).

Skelton, A Children in Trouble with the Law: A Practical Guide Lawyers for Human Rights (Publishers) Pretoria (1993) 4-41.

Skelton, A 'Developing a Comprehensive Juvenile Justice System in South Africa'. Glanz, L (ed) Preventing Juvenile Offending in South Africa (Workshop Proceedings) HSRC Publishers, Pretoria (1994) 103-108.

Skelton, A Raising ideas for the creation of a juvenile justice system for South Africa. A paper prepared for the "Children in Trouble with the Law" Conference organised by the Community Law Centre, University of the Western Cape, held in Cape Town (October 1993).

Skelton, A 'Rethinking the Issue' Rights (May 1996) 20-24.

Skelton, A 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice'. Keightley, R (ed) Children's Rights Juta and Co Ltd, Cape Town (1996) 180-196.

Sloth-Nielsen, J 'Juvenile Justice Review 1994-1995' (1995) 8(3) South African Journal of Criminal Justice Juta & Co Ltd, Cape Town 331-343.

Sloth-Nielsen, J 'No Child Should be Caged - Closing Doors on the Detention of Children' (1995) 8(1) South African Journal of Criminal Justice Juta & Co Ltd, Cape Town 47-59.

Steytler, N 'Shoplifting by Juveniles - A Case for Diversion' (1984) 8 South African Journal of Criminal Law and Criminology Juta and Co Ltd, Cape Town 55-68.

Thorpe, DH, Smith, D, Green, CJ, and Paley, JM Out of Care: The Community Support of Juvenile Offenders George Allen and Unwin Publishers, London (1986) 96-113.

Tomasevski, K 'Rights of the child approach to child delinquency'. Tomasevski, K (ed) Alternatives to Imprisonment of Children Frances Pinter Publishers, London (1986) 8-35.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

United Nations Convention on the Rights of the Child.

Van Dokkum, N 'Unwelcome Assistance: Parents Testifying Against Their Children' (1994) 7 South African Journal of Criminal Justice Juta and Co Ltd, Cape Town 213-221.

Wald, PM 'Pretrial detention for Juveniles'. Rosenheim, MK Pursuing Justice for the Child The University of Chicago Press, Chicago (1976) 119-137.

Walker, N Sentencing in a Rational Society Penguin Press, Great Britain (1969) 174-189.

Warren, MQ The Case for Differential Treatment of Offenders (The Future of Corrections) Published by the American Academy of Political and Social Science (1969) 47-59.

Whitehead, JT and Lab, SP 'A Meta-Analysis of Juvenile Correctional Treatment' (1989) 26 Journal of Research in Crime and Delinquency Sage Publications Inc., New York 276-295.

Wooldredge, JD 'Differentiating the Effects of Juvenile Court Sentences on Eliminating Recidivism' (1988) 25 Journal of Research in Crime and Delinquency Sage Publications Inc., New York 264-295.

Van Zyl Smit, D 'The Juvenile in the Arms of the Law'. Youth, Alienation and Deviance (Lectures presented at the 1985 Summer School). Printed and Published by the Centre for Extra-Mural Studies, University of Cape Town (1985) 36-46.

ANNEXURE

Those sections of the various Acts relevant to Juvenile Justice.

1. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT NO. 200 OF 1993

Section 8: Equality

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of the provision, on one or more of the following grounds in particular: race; gender; sex; ethnic or social origin; colour; sexual orientation; age; disability; religion; conscience; belief; culture or language.

Section 10: Human Dignity

Every person shall have the right to respect for and protection of his or her dignity.

Section 11: Freedom and security of the person

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Section 25: Detained, arrested and accused persons

(1) Every person who is detained, including every sentenced prisoner, shall have the right -

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention;

(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

(d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and

(e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which she or he has as a detained person, have the right-

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise.

(3) Every accused person shall have the right to a fair trial, which shall include the right-

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

(b) to be informed with sufficient particularity of the charge;

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;

(f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

(g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;

(h) to have recourse by way of appeal or review to a higher court than the court of first instance;

(i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and

(j) to be sentenced within a reasonable time after conviction.

Section 30: Children

(1) Every child shall have the right -

(a) to a name and nationality as from birth;

(b) to parental care;

(c) to security, basic nutrition and basic health and social services;

(d) not to be subjected to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his/her education, health or well-being.

(2) Every child who is in detention shall in addition to the rights which s/he has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his/her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 and in all matters concerning such child, his/her best interests shall be paramount.

2.THE CHILD CARE ACT NO. 74 OF 1983

Section 28: Places of Safety

(1) The Minister may, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for the purpose, establish and maintain places of safety for the reception, observation, examination and treatment under this Act, and the detention of children awaiting trial or sentence.

Section 53:

(2) If a minor living with his parent or guardian has, by virtue of an order made under this act or the Criminal Procedure Act, been placed under the supervision of a social worker, the parent or guardian shall exercise his right of control over the minor in accordance with any directions which he may have received from the said social worker.

3.THE CORRECTIONAL SERVICES ACT NO.8 OF 1959

Section 20: - Establishment of Prisons

(1) The minister may, by notice in the Gazette, establish prisons

(b) for the detention training and treatment of -

(i) juveniles liable to detention in custody

Section 28: Detention of prisoners in police cells or lock-ups

There may be detained in any police cell or lock-up -

(a) any person sentenced in a district where no prison has been established or at any place where no prison exists; and

(b) any prisoner who under the authority of the Commissioner, is temporarily removed to a police cell or lock-up;

Provided that no such person shall be so detained unless his detention in a prison is not practicable, or so detained without the authority of the Commissioner for a longer period than one month.

Section 74A: Transfer of convicted juveniles from prison to reform school

The Commissioner may, in consultation with the Director-General as defined in the Child Care Act 1983 (Act No. 74 of 1983), by order in writing transfer any person under the age of 21 years who is undergoing in any prison a sentence of imprisonment, to a reform school governed by the Child Care Act, 1983, and from the date of that order that person shall be deemed to have been sent to that reform school under section 290 of the Criminal Procedure Act, 1977 (Act no. 51 of 1977).

4. THE CORRECTIONAL SERVICES ACT NO.8 OF 1959, SECTION 29, AS AMENDED BY THE CORRECTIONAL SERVICES AMENDMENT ACT NO. 17 OF 1994 AND THE CORRECTIONAL SERVICES AMENDMENT ACT NO. 14 OF 1996[1]

Detention of unconvicted young persons and women.

Section 29:

(1) Notwithstanding anything to the contrary in any law contained

(a) but subject to subsection (2), an unconvicted person under the age of 14 years

(b) but subject to subsections (2) and (5), an unconvicted person who is 14 years or older but under the age of 18 years, shall not be detained in a prison or a police cell or lock-up.

(2) A person referred to in paragraph (a) or (b) of subsection (1) may be detained in a police cell or lock-up after his/her arrest until s/he is brought before a court within a period not exceeding 24 hours, **in respect of a person referred to in paragraph (a) of that subsection and not exceeding 48 hours in respect of a person referred to in paragraph (b) of that subsection,** if -

(a) such detention is necessary and in the interests of justice; and

(b) the person concerned cannot be placed in the care of his/her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983), for the period in question.

---

[1] Sections amended by the Correctional Services Act 14 of 1996 are shown in bold.

(3) Where a person is detained in a police cell or lock-up as contemplated in subsection (2) the member of the South African Police Service or the peace officer responsible for ordering such detention shall -

(a) provide the court before which the person first appears with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up and to keep him/her there until his/her first appearance before the court; or

(b) if the person is released before he or she appears in a court, provide the magistrate of the magisterial district in which the detention took place with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up.

(4) The report referred to in subsection (3)(b) shall be submitted to the magistrate referred to in the said subsection not later than one court day of the person concerned being released from detention.

(5) (a) A person referred to in subsection (1)(b) who is accused of having committed an offence shall before his or her conviction and sentence, not be detained in a prison or police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983) is available for his or her detention: Provided that such a person may only be detained in a prison (but not a police cell or lock-up) if he or she is accused of having committed an offence or category of offences mentioned in Schedule 2, or any other offence in circumstances of such a serious nature as to warrant such detention: Provided further that such person shall be brought before the court that made the order of such detention every 14 days to enable such court to reconsider the said order.

(b) In the absence of the said presiding officer any other presiding officer of that court may, after consideration of the evidence recorded and in the presence of

the said person, make such order as the presiding officer who is absent could lawfully have made in the proceedings in question if he or she had not been absent.

(5A)(a) In considering whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of a person referred to in subsection (1)(b) in a prison (but not a police cell or lock-up) the presiding officer shall, in addition to any factor which he or she deems necessary, take into account the following factors, namely-

(i) the substantial risk of absconding from a place of safety mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983);

(ii) the substantial risk of causing harm to other persons awaiting trial in a place of safety; and

(iii) the disposition of the accused to commit offences.

(b) Before the detention of a person in terms of subsection (5) is ordered, oral evidence shall be presented by the State with regard to the factors referred to in paragraph (a).

(c) A person detained in terms of subsection (5) shall as soon as possible after his or her arrest be afforded the opportunity to obtain legal representation as contemplated in section 25 of the Constitution and section 3 of the Legal Aid Act, 1989 (Act No. 22 Of 1989).

(d) The highest priority shall be given to the most expeditious processing of the trial of a person detained in terms of subsection (5).

(5B) The Minister of Correctional Services shall as soon as possible after the commencement of this Act, ensure that regulations regarding the treatment and conditions of detention of awaiting trial persons under the age of 18 years are brought into line with relevant internationally recognised human rights standards and norms.

(6) A person referred to in subsection (2) or (5) who is detained in a prison or a police cell or lock-up or who is being moved in custody to or from a court or who, while in custody,

attends a court or preparatory examination, shall be kept separate from any person over the age of 18 years who is in custody: Provided that he or she may be permitted to have contact with such a person in custody who has been or is to be charged jointly with him or her, if the member of the Department in charge of the prison or the member of the South African Police Service in charge of the police cell or lock-up in which he or she is detained, is of the opinion that such contact will not be detrimental to him or her.

(7) When a woman under the age of 18 is detained or in custody as aforesaid, she shall be under the care of a woman.

(8) For the purpose of this section, an unconvicted person shall be construed as a person who has not been convicted or sentenced.

The following schedule is hereby substituted for Schedule 2 to the Correctional Services Act, 1959:

Schedule 2

(Section 29 (5))

Murder

Rape

Robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved

Assault with intent to do grievous bodily harm, or when a dangerous wound is inflicted

Assault of a sexual nature

Kidnapping

Any offence under any law relating to the illicit conveyance or supply of dependence producing drugs

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

[Section 1(a) of this Act shall cease to have effect after the expiry of a period of one year from the commencement thereof: Provided that Parliament may at the expiry of the one year period, extend the period for one further year.]

5. THE CHILDREN'S CHARTER OF SOUTH AFRICA[2]

Adopted by the Children's Summit of South Africa on 1 June 1992

Article 1

1. All children have the right to the protections and guarantees of all the rights of the Charter and should not be discriminated against because of his/her or his/her parents or family's colour, race, sex, language, religion. personal or political opinion, nationality, disability or for any other reason.

Article 3

2. All children have the right to be heard in court rooms and hearings affecting their future rights and protection and welfare and to be treated with the special care and consideration within those court rooms and hearings which their age and maturity demands.
3. All children have the right to free legal representation if arrested.

Article 5

1. All children have the right to be protected from all types of violence including: physical, emotional, verbal, psychological, sexual, state, political, gang, domestic, school, township and community, street, racial, self-destructive and all other forms of violence.
2. All children have the right to freedom from corporal punishment at school, from the police and in prisons, and at home.
6. All persons have the duty to report all violence against, abuse of and neglect of any child to the appropriate authorities.
10. All children have the right to be protected from violence by the police and in prisons.

---

[2] McCurdie, J Children's Rights Developing Justice Series. SJRP and LEAP - Institute of Criminology, University of Cape Town (September 1992) 18-25

14. Children have the right to a special children's court and medical facilities to protect them from violence.
16. No child should be held in prison or police cells at any time.

Article 6

3. All children have the right to clothing, housing and a healthy diet.
4. All children have the right to ... a clean living environment.

Article 7

1. All children have the right to adequate health care and medical attention both before and after birth.

Article 8

2. All children have a right to education which is in the interest of the child and to develop their talents through education, both formal and informal.
5. All children have the right to play and to free and adequate sports and recreational facilities so that children can be children.

Article 9

1. All children have the right to be protected from child labour and any other economic exploitation which endangers a child's mental, physical. or psychological health and interferes with his/her education so that s/he can develop properly and enjoy childhood.

Article 10

1. No child should be forced to live on the streets.
2. Homeless children have the right to be protected from harassment and abuse from police, security guards and all other persons and every person has the duty to report any abuse or violence against children.

6. THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE ("THE BEIJING RULES")

Adopted By General Assembly resolution 40/33 of 29 November 1985

5. Aims of Juvenile Justice

1. The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

7. Rights of Juveniles

1. Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

10. Initial Contact

1. Upon the apprehension of a juvenile, her or his parents or guardian shall be notified of such apprehension, and where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.
3. Contacts between the law enforcement agencies and a juvenile shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case.

11. Diversion

1. Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority,...
2. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings,...

3. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
4. In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

13. Detention Pending Trial

1. Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
2. Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.
5. While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality.

14. Competent Authority to Adjudicate

1. Where the case of a juvenile offender has not been diverted ... she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.
2. The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

15. Legal Counsel, Parents and Guardians

1. Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.
2. The parents or the guardian shall be entitled to participate in the proceedings and my be required by the competent authority to attend them in the interests of the juvenile.

16 Social Inquiry Reports

1. In all cases except those involving minor offenses, before the competent authority renders a final disposition prior to sentencing, the background and the circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.

17. Guiding Principles in Adjudication and Disposition

1. The disposition of the competent authority shall be guided by the following principles:
   (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
   (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
   (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of a persistence in committing other serious offenses and unless there is no other appropriate response;
   (d) The well-being of the juvenile shall be the guiding factor in the consideration of her of his case.

18. Various Disposition Measures

1. A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible. Such measures, some of which may be combined, include:
   (a) Care, guidance and supervision orders;
   (b) Probation;
   (c) Community service orders;
   (d) Financial penalties, compensation and restitution;
   (e) Intermediate treatment and other treatment orders;
   (f) Orders to participate in group counselling and similar activities;
   (g) Orders concerning foster care, living communities or other educational settings;
   (h) Other relevant orders.

2. No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

19. Least Possible Use of Institutionalisation

1. The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

24. Provision of Needed Assistance

1. Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such a lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process.

26. Objectives of Institutional Treatment

1. The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.
2. Juveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and physical - that they may require because of their age, sex and personality and in the interests of their wholesome development
6. Inter-ministerial and inter-departmental co-operation shall be fostered for the purpose of providing adequate academic or, as appropriate, vocational training to institutionalised juveniles, with a view to ensuring that they do not leave the institution at an educational disadvantage.

7. THE UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY.

Adopted by General Assembly Resolution 45/113 of 14 December 1990

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules...

3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.

18.(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of justice.

29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.

30. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. ...

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.

38. Every juvenile of compulsory school age has the right to education suited to his/her needs and abilities and designed to prepare him/her for return to society. ...

39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.

40. Diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juveniles has been institutionalised.

41. Every detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for the juveniles, who should be encouraged and enabled to make full use of it.

42. Every juvenile should have the right to receive vocational training in occupations likely to prepare him/her for future employment.

43. ...juveniles should be able to chose the type of work they wish to perform.

44. All protective national and international standards applicable to child labour and young workers should apply to juveniles deprived of their liberty.

45. Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour, if possible within the local community, as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities. ... The organisation and methods of work offered in detention facilities should resemble as closely as possible those of similar work in the community, so as to prepare juveniles for the conditions of normal occupational life.

46. Every juvenile who performs work should have the right to an equitable remuneration. ... Part of the earnings of a juvenile should normally be set aside to constitute a savings fund to be handed over to the juvenile on release.

59. Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. ...

79. All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.

80. Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles. These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself/herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community.