

DISCOURSES AND PRACTICES OF
DIVERSION: POLICY AND PRACTICE OF THE
CHILD JUSTICE SYSTEM

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ABSTRACT

Diversion is one of the programmes instituted within the Child Justice System. Its aim is to make punishment more rehabilitative and restorative. Prior to the Child Justice Bill, juvenile offenders were prosecuted under the Criminal Procedure Act (CPA). In the absence of any provision and consideration for children and their context, the CPA proved to be too harsh when prosecuting juvenile offenders. It is within this context that the need for reform of the CPA was sought, a search for procedure which would solely deal with child offenders and which would be more suited to child offenders. In an attempt to explore this process, the present study investigates diversion as a programme designed for dealing with child offenders within the Child Justice System and perspectives of deviance which underlie diversion. Broadly, the focus of the research has been on the following issues: how the probation officers interpret the different criteria from the Child Justice Bill 70 of 2003 and subsequently the Child Justice Bill 70 of 2007 in order to select the most appropriate form of diversion, understanding of the Child Justice System, how this justice system works and what the justice personnel look for when deciding on an appropriate sentence for the juvenile offender.

The research was carried out in South Africa, in the province of KwaZulu-Natal, in a small town known as Port Shepstone, which is an hour's drive from Durban. It gives an in - depth analysis of diversion by explaining the perceptions and opinions of justice personnel on diversion. The thesis further explored the criteria that are used by the probation officers in assessing the juvenile offender for diversion and the nature of the diversion programme selected. Using a qualitative approach I sought to explore different discursive practices, opinions and perspectives within the Child Justice System and particularly within the diversion programme. In an attempt to gain understanding on the above issues, I conducted open - ended interviews with Child Justice System personnel, probation officers and prosecutors.

DECLARATION

I hereby confirm that, unless where otherwise specified in the text, this dissertation is the result of my own original work. It has not previously been accepted as a subject for any degree and it is not being submitted in application for any other degree.

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CHAPTER ONE

INTRODUCTION : HOW THIS RESEARCH BEGAN

My interest in the Child Justice System began when I started working at the Pietermaritzburg Magistrate's Court - in the children's court as a researcher. There was a case on trial concerning a juvenile offender who had been charged with assault; he had been detained in prison for more than three weeks. It was obvious from the way in which he was behaving that he had an immediately noticeable mental or psychological problem. During the trial the probation officer had mentioned that the offender had been severely traumatized by the death of his parents. A host of questions were running through my mind; why had the offender been detained in prison for more than three weeks? Why was he not placed in an institution where he would receive psychological attention? Should he not be placed in a Place of Safety or a children's home up until the court case commenced? Why had he not been assessed by a psychologist?

From this incident my interest in the Child Justice System grew. I was interested in finding out how juvenile offenders are punished – what form of punishment does the Child Justice Bill have in place in order to deal with juvenile offenders? How do the different forms of punishment affect the juvenile offender's behaviour at a later stage? For example, does imprisonment traumatize a juvenile to such an extent that the offender becomes a criminal? Or is imprisonment rehabilitative? I decided to carry out research on the child justice system in my own home town of Port Shepstone. The research participants were not hard to find, as they were located at the Department of Welfare, Welfare Services and Magistrate's Courts. Conducting the research in Port Shepstone was convenient, in many ways. I worked at a Children's Home in Port Shepstone and I was already familiar with the welfare policies and services that were offered. The fact that I worked at a children's home was a great advantage to me, because it enabled me to interact with the resident social worker of the institution. I was able to ask questions regarding welfare policies and practices within the Child Justice System that I did not understand. This contributed to the extension of my knowledge. My involvement with the home enabled me to locate professional social workers, probation officers and prosecutors that are in contact with the home when placing juvenile offenders during and after Diversion Programmes. The probation officers and social workers that I had previously worked with

at the children's home participated in this study as key informants and assisted me in locating other probation officers and prosecutors and referring me to them.

The Three objectives that guided this inquiry are as follows. Firstly, the research was initiated by a wish to explore and investigate which perspectives of deviance underlie diversion programmes as an option for juvenile offenders. In other words, what type of ideology gave birth to diversion programmes? Secondly, I intended to investigate probation officers' views of diversion (how their approach to diversion emerged and what they thought of diversion). The aim here was to explore diversion in depth, to explain it, to find perceptions and opinions of justice personnel on diversion when comparing diversion with incarceration. For example, when a child is charged with a crime, do justice personnel automatically opt for diversion instead of incarceration or is the sentencing based on the type of crime committed?

The third objective was to find out which criteria are used by the probation officers in assessing the juvenile offender for diversion and the nature of the diversion selected. In the different versions of the Child Justice Bills, which culminated in the Child Justice Act 75 of 2008, there are certain criteria that are stipulated that ought to be observed while assessing juveniles for diversion. Early in this research, I set out to examine if there is any consistency between policy and practice. Muntingh (2000) states that there is a lack of consistency in the diversion of cases and that the discretionary powers of prosecutors could result in discrimination in terms of race and social status. Following this observation, I intended to inquire if the probation officers use the minimum standard guidelines which are stipulated in the Child Justice Bill and how they translate them into real practices of assessing juvenile offenders for diversion. This led me to ask, how the juvenile offenders are assessed for diversion? What are the values, ideals and practices that underpin these assessments?

In the following section, I outline the brief history of diversion in South Africa, through highlighting the basis of this inquiry and the critical quest of this research. I also delineate how the various chapters of this dissertation are organised.

1.1. THE BIRTH OF DIVERSION IN SOUTH AFRICA

This study is based on the Child Justice System of South Africa, with a focus on diversion practices in South Africa. Diversion is assumed to be a positive alternative to imprisonment and a better option for rehabilitating the juvenile offender. Prior to the Child Justice Act 75 of 2008 being passed in South Africa, juvenile offenders were prosecuted under the Criminal Procedure Act (CPA)¹, which did not discriminate between adult and child offenders. In the absence of any provision and consideration for children and their context, the CPA proved to be too harsh when prosecuting juvenile offenders. It is within this context the need for reform of the CPA was sought by probation officers, a search for a procedure which would solely deal with child offenders and which would be more suited to child offenders. In 1994, when President Nelson Mandela came into power, his first address to parliament was to deal with the issue of children in prison (Wood 2003: 20). Former President Mandela wanted to create a system that diverted the juvenile offender away from the Criminal Procedure Act. According to Wood, Mandela's vision was that in future the criminal justice would be the last resort when dealing with juvenile offenders. This led to a period of search for a system that was designed to rehabilitate and handle juvenile offenders in a suitable manner, a system that deals with juvenile offenders as children and a system that did not prosecute juvenile offenders as adults. Following this urge for reform, the Child Justice Bill² was drafted. After a protracted process, it was passed as The Child Justice Act in April 2010. Over the years the Child Justice Bill of 2007 has been subjected to a long process of research and amendment in order to perfect it and create an acceptable Bill for the people of the State and juvenile offenders. This has led to its current form as an Act. The foundations of the Act are the principles and values of restorative justice and rehabilitative impulses, which provide legal space for the juvenile offender. The Child Justice Bill of 2002 and Child Justice Bill of 2007 sought to find alternative procedures to handling juveniles that come into conflict with the Justice System, along with mechanisms of rehabilitation and re-integration back into his/her community. In this study, I try to outline a brief history of the Child Justice System, how the Child Justice System came into being and the struggles and challenges that the justice personnel face when dealing with child offenders.

¹ The Criminal Procedure Act (CPA) is an Act that is used by the Criminal Justice System in order to prosecute offenders. This Act was used to prosecute both juvenile and adult offenders.

² This Bill has gone through many changes. In this research, I closely explore the Child Justice Bill of 2002, the Child Justice Bill 70 of 2003 and the Child Justice Bill of 2007.

In November 1993 a conference entitled “Juvenile Justice: Towards Policy and Legislative Change” was held. It was at this conference that consensus was reached between the Child Justice Alliance and the State that the Juvenile Justice Policy and legislation was fragmented and that there was a need to develop a new, comprehensive Juvenile Justice System (Muntingh 2003:10). This need emerged from the fact that children were being imprisoned, which set them up for, and subjected them to, horrific conditions. During incarceration they would be sodomised, raped, physically abused and, in some cases, brutal deaths were reported of juvenile offenders. Prison had other negative influences such as drugs and gangsterism (Wood, 2003: 27). At this conference a Juvenile Justice Drafting Consultancy was set up by the Child Justice Alliance to draft new juvenile justice legislation for South Africa. Because this Drafting Consultancy consisted mainly of non-governmental organisations, and this was not set up by the government, it faced problems due to the fact that the recommendations that were made could not be implemented (Muntingh 2003:16). At this stage the Department of Correctional Services became involved. This Department set out to develop legislation that prevented children from being held in prisons and police cells. In May 1995 an amendment to section 29 of the Correctional Services Act came into force (Muntingh 2003:18). This legislation stated that no children should be held in prisons, police cells or holding cells (Child Justice Act 75 of 2008 chapter 3 section 20). This sudden implementation of the legislation created in the child and youth care systems. According to Wood (2003: 30), an amendment to an existing law which was intended to entirely outlaw the imprisonment of children during the awaiting trial phase led to chaos when it was suddenly promulgated. There were not enough care facilities such as children homes and places of safety to care for all the juvenile offenders who were awaiting trial. Wood (2003:32) observes:

Inadequate consultation between the relevant government departments whereby police officers failed to inform probation officers upon arrest of a juvenile offender as well as a lack of alternative residential facilities for children caused the application of the new law to be fraught with practical problems, so serious were the consequences of this that within a year the government had to amend the law again, this time allowing children charged with certain offences to be detained in prison awaiting trial.

Places of safety that were primarily designed for housing children in need of care and protection were already overcrowded and could not cope with the sudden influx of children who had, in some instances, committed very serious crimes (Muntingh 2003:20).

Such institutional failures became arguably the rallying point for the Child Justice Alliance to insist on the need for legal framework to deal with children who came into contact with the Justice System and for the development of diversion. This crisis created an opportunity to formally look at the transformation of the juvenile justice system in its entirety, as proposed by the Drafting Consultancy. Following this, the Inter-Ministerial Committee (IMC) was set up by the government. Subsequently, the IMC released an interim policy that included what is deemed to be a whole new paradigm in youth care thinking which, if implemented, would mean radical changes to the child and youth care systems (Muntingh 2003: 20). One of the key principles of this new paradigm was that of restorative justice. Restorative justice is a theory of justice that relies on reconciliation rather than on punishment. It begins with the notion that a society that is functioning well operates on a balance of rights and responsibilities (Muntingh 2003:26). When an incident occurs which upsets this balance, methods must be found to restore the balance, so that community members, including the offender and the victim, can come to terms with the incident and can continue to live their lives normally (Muntingh 2003:26). In order for restorative justice to occur the offender must accept responsibility for the fact that his/her behaviour caused damage and harm to the victim and the victim must be prepared to negotiate and accept restitution or compensation for the offender's wrongdoing. As Muntingh (2003:30) put it, "In this way justice becomes a negotiated agreement between those directly involved."

The restorative option defines crime as a violation of people and relationships (Muntingh 2003:28). The aim of justice is to identify responsibilities to meet the needs of the victim and to promote healing. The process of justice involves victims, offenders and communities, in an effort to identify needs and obligations and the exchange of information between involved parties (Muntingh 2003:33). Muntingh states:

"The Inter - Ministerial Committee (IMC) proposed an approach to young people in conflict with the law that included resolution in conflict with the family, and

community involvement in decision making with community based interventions. The transformation was not only about better resources or jails for children but about a new way of thinking and dealing with children – a total paradigm shift was needed. This is how diversion was born.” (Muntingh 2003:38).

Diversion programmes are thus considered to be vital to a successful and comprehensive Juvenile Justice System. These programmes initiated by NICRO³, strive to channel and divert young people away from criminal behaviour and tendencies and into programmes that make them accountable and responsible for their actions and where they could be retained along with provisions of skills training. Diversion is the channelling of children away from the formal court system into rehabilitative and re-integrative programmes (Muntingh 2003:40). A juvenile in conflict with the law is expected to first acknowledge responsibility for the crime before the child can be diverted. Diversion is, in this sense, deemed as giving the child a chance to avoid a criminal record and the stigma and brutalizing effect⁴ of the criminal justice system. At the same time, diversion programmes are presumed to teach children to take responsibility for their actions and to teach the juvenile offender how to prevent re-offending. Diversion programmes and Restorative Justice have similar concepts in place in order to ensure that justice is carried out appropriately and that the juvenile offender is rehabilitated. Restorative Justice emphasizes the importance of the perpetrator in acknowledging the culpability of his/her actions. It encourages the juvenile offender to take responsibility for his/her actions and to be accountable for their actions in order for rehabilitation to be set in motion.

With such thinking about the process, the Child Justice Bill of 2007 proposed increased access to diversion for children (Muntingh 2003: 40). Furthermore, the proposed Child Justice Act of 2010 chapter 6 provided a set of minimum standards relating to the content of diversion options. The minimum standards proposed in the Child Justice Act 75 of 2008 are aimed at promoting the protection of children’s rights in the diversion process.

³ NICRO (National Institute for Crime Prevention and the Reintegration of Offenders). This is an organisation which offers diversion services.

⁴ A criminal record can have devastating effects on a child’s life. The criminal record will follow the child throughout his/her whole life. For example, when applying for a job people might be reluctant to employ him because of his criminal record. The criminal record will influence the way in which people treat him/her.

In South Africa, diversion initiatives have been in place and practised since 1992, while still awaiting the Bill - making process under the guidelines, and yet often diversion initiatives guided the principles of the Bill along the way, until 2010, the year in which the Child Justice Act was passed. For example, the Child Justice Bill of 2002 and 2007 were instrumental in providing guidelines to existing practices and procedures of diversion programmes. The Child Justice Bill of 2002 and 2007 are not formal pieces of legislation. They simply provided guidelines relating to diversion. Conversely, as Wood observed 15 years ago (Wood 1995 quoted in Wood 2003: 12), because they were not pieces of legislation, they were not being followed appropriately by the justice personnel. According to Wood (2003), the initial years of introduction of diversion as a formal practice happened in the absence of a legislative framework and this made its implementation a selective and disjointed process. Nonetheless, as an institutional practice, diversion developed and progressed, in the sense that the number of juvenile offenders being diverted increased. More diversion programmes were implemented in order to efficiently deal with the criminal behaviour displayed by juvenile offenders and, by so doing, resulting in juvenile offenders being rehabilitated. In the early 1990s juvenile offenders and child offenders who came into conflict with the law were tried and prosecuted under the Criminal Procedure Act of 1977. No provision was made by law for child offenders and, therefore, a child offender would be tried as an adult. There were no laws stipulating differential treatment and handling of child offenders and adult offenders. Prosecuting child offenders under the Criminal Procedure Act of 1977 was too harsh for children (Wood 2003:19). This assertion needs to begin by differentiating adult and children's experiences; for example, child offenders are still children even if they have committed a crime and children are still developing and learning their place in society and therefore a child will make mistakes occasionally. A child should be given the opportunity to make mistakes and learn from these mistakes. It is a totally different story for an adult offender. When an adult offender commits a crime in most cases they are fully aware and they know the consequences of their actions. If they are caught they deserve to be punished to the full extent of the law. In this sense, diversion, as Skelton (2005:31) put it, entailed a strategy developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and incarceration if they are arrested and prosecuted.

The proposed South African Child Justice Bill 70 of 2003 quickly embraced the proposed diversion programmes for juvenile offenders as possible alternatives to prison. It sought to provide a

formal and legal framework for diversion. The Child Justice Bill 70 of 2003 stipulates the circumstances under which a child should be considered for diversion. These stipulations serve as guidelines; they assist justice personnel in assessing juvenile offenders for diversion. The Bill encourages the release of children into the care of their parents or guardians and entrenches the constitutional injunction that imprisonment should be a measure of last resort for a child (Child Justice Bill 70 of 2003). A probation officer will assess every child before the child appears at a preliminary inquiry; this preliminary inquiry is held in respect of every child. Decisions to divert the child away from the formal court procedure to a more suitable programme may be taken at the preliminary inquiry stage, if the prosecutor indicates that the matter should be diverted. In order to have an effective Child Justice System, the Bill proposed monitoring mechanisms to ensure the effective operation of this legislation and promotes co-operation between all government departments and organizations.

The Bill is directed at any individual who is under the age of 18 years and who is accused of committing an offence (Child Justice Bill 70 of 2003). The minimum age of criminal capacity is from seven to ten years. This means that children under the age of seven are presumed to lack the cognitive ability, and the mental and emotional development to differentiate between what is right and wrong. They are therefore unfit to be held responsible for their actions. Children between the ages of seven and ten are considered to be able to differentiate between right and wrong because they are considered by the justice system to be cognitively and mentally developed, so can be held responsible for their actions.

The proposed Child Justice Bill 70 of 2003 stipulates that imprisonment should be the last resort for a child. This stipulation is carried through in the Child Justice Act 75 of 2008 chapter 3 section 20 (2) (a) recommends that accused children should be kept out of police cells/prisons and should be released into the care of their parents. A probation officer is responsible for assessing every accused child before the child appears at a preliminary enquiry. A preliminary enquiry is a process that was proposed by the Child Justice Bill. The preliminary inquiry is to be held in respect of every child within 48 hours of the child's arrest. It is presided over by a magistrate (Child Justice Bill 70 of 2003). Decisions to divert the juvenile offender may be taken at the preliminary inquiry stage, if the prosecutor indicates that the juvenile offender should be diverted. During the preliminary stage,

decisions about pre-trial detention or release are made if the child is still in custody. After the preliminary inquiry stage, depending on the seriousness of the criminal act, the child offender is placed in the custody of his/her parent or legal guardian.

The Child Justice Bill 70 of 2003 section 70 (1) (a) proposes an expanded range of diversion options to be used by probation officers at NICRO as possible sanctions for children. These diversion options have been categorized into three levels, depending on the seriousness of the offence (Child Justice Bill 70 of 2003 section 70 (1) (a)). There are three levels of diversion in order to ensure that a wider range of cases are referred for diversion.

Level One: These orders are less intense and are for a period of one to three months. These orders are issued by the magistrate at a preliminary inquiry, for example an oral apology, compulsory school attendance and placement under guidance or supervision (Child Justice Bill 70 of 2003 section 70 (1) (a)).

Level Two: These orders are more intense and are for a maximum of six months, for example Vocational Training and Victim and Offender Mediation (VOM) (Child Justice Bill 70 of 2003 section 70 (1) (a)).

Level Three: Orders only apply to children of 14 years and older. The court believes that upon conviction, the child would be sentenced to detention for a period not exceeding 6 months. Programmes such as Performance of Duty, in this case an offender would be assigned to do community service for a certain number of hours, with no remuneration (Child Justice Bill 70 of 2003 section 70 (1) (a)).

After a lengthy Bill-making process, on 1 April 2010, the Child Justice Act 75 of 2008 was passed by the National Assembly. However, until then, the Child Justice Bill of 2003 guided and informed handling of juvenile offenders and the diversion programme. The Child Justice Act 75 of 2008 provides new procedures and guidelines under which children that come into conflict with the law are dealt with.⁵ According to Skelton (2009: 15), the Child Justice Act 75 of 2008, which has now been effected, stipulates new regulations whose central agendas are the diversion of child offenders away from the Criminal Justice System, where they would have been imprisoned. Skelton (2009: 15)

⁵ Considering the Act only came into effect fairly recently, I would like to register here that most of the literature I have explored dealt with this issue, while following the Bill and processes and practices informed by the Bill. For this reason, I will continue to use the Bill and only note the Act where appropriate and necessary.

optimistically states that “[t]he Child Justice Act 75 of 2008 will go a long way in protecting minors from being jailed. Imprisonment will be used as a measure of last resort and for the shortest period of time”. The Child Justice Act 75 of 2008 emphasizes the protection of the minor by ensuring imprisonment to be considered only as the last option and instead promoting and encouraging diversion. The Child Justice Act 75 of 2008 chapter 10 section 72 (2) has introduced new sentencing options, with the intention of making these options more rehabilitative and safe for the offenders. The Act stipulates that diversion must be considered in each and every criminal case. Prosecution should only occur if the juvenile offender falls within the age parameters of the legislation. These procedures are to be followed for children who, at the time of committing the offence, are under the age of 18. A juvenile offender may only be prosecuted if they deemed to be with criminal capacity⁶. The Child Justice Act 75 of 2008 chapter 8 section 51 section 42 stipulates that diversion must be considered for all children over the age of 10 years. Children below 10 years who commit offences should be referred to a diversion option or programme (Child Justice Act 75 of 2008 chapter 8 section 51 section).

According to Maepa (2007: 48), in all the nine provinces of South Africa diversion programmes have grown to such an extent that the criminal target of 10 000 was surpassed in 2006 – 2007 financial year: 13 785 individual beneficiaries were served and 9 820 youths reached through interactive workshops. A diversion follow-up study conducted in 2007 in the nine provinces of South Africa found that 93.3% of participants did not re-offend within the first twelve months following completion of the diversion option. Maepa (2007: 48) pointed out that a further follow-up study 84% of programme participants did not re-offend within a three - year period. Maepa (2007: 49) states that diversion can be ineffective when dealing with re-offenders, because they have already been diverted before. If this is the case, then will diverting them for a second time assist the cause for rehabilitation? What does this mean for diversion? Is diversion ineffective at times? In response to these questions, Maepa (2007:49) recommends that the criteria that are used to inform the decision for diversion need to be re-addressed, implying that the reason for re-offending is that the juvenile offender is placed in

⁶ Criminal Capacity: The Bill retains the *doli capax* and *doli incapax*, in other words the minimum age of criminal capacity should be 10 years. But juvenile offenders between 10 and 14 years are presumed not to have criminal capacity. Criminal capacity means the juvenile offenders ability to appreciate the difference between right and wrong and to act in accordance with that.

an inappropriate diversion programme, which does not deal with the root causes of juvenile offending (Maepa 2007: 49).

The criteria that are stipulated in the Child Justice Bill 70 of 2007 and the criteria that are used by the probation officer to inform the decision to divert may be divergent. This is the central aspect of my research, namely how the probation officer uses these criteria that are stipulated in the Child Justice Bill of 2002, Child Justice Bill 70 of 2003 and Child Justice Bill of 2007 (which served as source of guidelines for justice personnel before the Child Justice Act 75 of 2008 took effect) and if they use any other criteria based on their personal experiences in order to find additional, relevant information in order to make an informed decision to divert and in which diversion programme the juvenile offender should be placed. Understanding what the probation officers look for when assessing the juvenile offender and when recommending diversion for the offender also requires understanding their narratives, their experiences and discourses. More specifically, the probation officers' subjective understanding of the factors applying to each case and the causes of the child's criminal behaviour and deviance are a crucial element of this process. They constitute discursive practices and subjective and interpretive schemes. It is the task of probation officers to conduct a full assessment of the juvenile offender, the child's background and history and, most importantly, what made or caused the child to commit the offence. Thus, probations officers search for answers to the following questions: What causes the juvenile offender to offend? Is it the situation that the juvenile finds himself in, for example, did the juvenile offender commit the crime because of poverty or does the juvenile have behavioural problems? Arising from such subjectivities, one of the criticisms of diversion is that race, class and gender prejudice by the prosecutor influence which children are diverted (Muntingh 2003:22). Authority or power to divert is vested in a limited number of people (probation officers and prosecutors), whose practices and decisions are influenced by their own prejudices and dominant ideologies (Muntingh 2003:22). This raises question on how race, class and gender prejudices constitute and influence decisions for diversion.

The next critical question concerns when the decision has been made to divert the juvenile offender. How does the probation officer decide which is the most appropriate diversion programme? NICRO has four national diversion programmes. These are (1) Youth Empowerment Scheme (2) Community Service (3) Family Group Conference (4) Journey and After - Care services. The Bill

proposes an expanded range of diversion options to be used as possible sanctions. These have been categorised into three levels, depending on the seriousness of the crime⁷ (The Child Justice Alliance 2006:23). Which crimes fall into the different three levels of diversion? Does the probation officer use these levels in order to place the offender in an appropriate programme, or is the main criterion the cause of criminal behaviour of the juvenile offender? Subjectivities are useful tools in making such decisions. My focus is not which factors matter, but rather how they are subjectively constructed to make such decisions.

The intention of this research is to problematise, explore and examine the ways in which a juvenile offender is selected for diversion and discourses that frame the diversion procedures used by probation officers and prosecutors. I sought to critically engage and explore discourses and practices within the Child Justice System, more specifically criteria used by probation officers in assessing juvenile offenders for diversion and selecting diversion. I paid close attention to the actual process rather than the effectiveness of the programme. To emphasise what was stated above, the focus of this research was the ideological and discursive foundations of the assessment criteria used in this programme. Much of my research attempts to critically explore and examine the ideologies and practices of assessing juvenile offenders for diversion. This research will strive to identify how probation officers interpret and apply the Child Justice Bills' broad guidelines in their assessment of the offender and verdict on selection of diversion options⁸. The probation officer attempts to determine the root cause of the child's deviant behaviour, on the basis of the belief that this assists them in choosing the most appropriate diversion option. In the following section, by way of introduction, I try to sketch the founding principles of diversion and how it is awkwardly linked to retributive justice, which I hope will set the tone for some of my arguments in this dissertation.

1.2. DIVERSION BETWEEN RESTORATIVE AND RETRIBUTIVE JUSTICE

Diversion is expected to be based on and privilege the ideology of restorative justice, as opposed to retribution; yet, at times, both appear to influence practices within the justice system. The philosophy of restorative justice is that even though the victim and the offender are key elements, the

⁷ The three levels of diversion have been discussed in detail on page 6.

⁸ There are four national diversion programmes offered at NICRO (1) Youth Empowerment Scheme (2) Community Service (3) Family Group Conference (4) Journey and After - Care Services

community's role is also recognised, in the sense that crime is defined as causing harm to society, people and relationships. The response is based on the consequences of the offender's criminal behaviour. The juvenile offender's criminal behaviour creates liabilities and obligations for the juvenile offender. The offender is liable⁹ to the victim and the community by being punished (participation in diversion programme and an apology) and obligated to behave in a responsible manner (avoid re-offending) and rehabilitate. The victim's needs are central, as it is the victim who has been harmed, therefore the victim is given the chance to relate what happened and information is provided to the victim by the justice personnel. The principle of restorative justice seeks to achieve a win - win outcome for both the victim and the offender. The main aspect of the process of diversion is reconciliation between victim, offender and the community and secondly the rehabilitation of the offender.

Retributive ideology appears to influence the practice within the Child Justice System (and selection for diversion), at least in some cases. For example, repeat juvenile offenders are often subject to retributive justice; if the juvenile offender is a third - time offender he/she will not be diverted again, because re-offending meant that the offender has not learnt from his/her previous offences (and did not make proper use of the diversion programme). This approach does not problematise the nature of society and how it shapes actions, rather it simplistically emphasises the repetition of the actions. By concentrating on the fact that the juvenile is a third - time offender and sentencing the juvenile to retributive justice (which often means a harsher sentence) is not dealing with the root cause of the criminal behaviour, because once the duration of the sentence is over the juvenile offender is more often than not subject to the same conditions as before. This approach, that simply punishes the criminal behaviour, without dealing with the underlying causes of such actions, apparently unproblematically resides alongside restorative justice.

Another important point worth investigating is to what extent restorative justice intervenes in the home, community and societal circumstances of the juvenile. To what extent do such programmes seek to address the underlying structures that shape the child's life and life chances, for example, by either assisting the parents of the juvenile to find some form of employment so that they can generate

⁹ Liable – the offender is held accountable for his/her actions. The offender is accountable to the victim and the community for his/her criminal actions.

an income or sustained counselling and training, both for parents and children or, if this fails the social worker could find alternative care for the juvenile. Alternative care would mean that the juvenile is placed in a place of safety or children's home, where they will be taken care of. The state and the offender are key elements because 'crime' is defined as a violation of rules, rules that are made and enforced by the state. Therefore the social, economic and moral contexts of behaviour are ignored and punishment is the debt that is paid by the juvenile offender.

I thus contend that, I argue, the ideology that influences diversion gives such practices both positive and negative elements. Positive elements are the restorative ideology, as the process aims at reconciliation and rehabilitation, whereas the response is based on both the cause and the consequence of the offender's behaviour. It is problematic because it does not address the underlying causes it defines as deviant behaviour: the social, political and economic circumstances within which such behaviours are made possible or necessitated and simply reacts to action that it defines as criminal behaviour.

1.3. OUTLINE OF THE DISSERTATION

Chapter One examined the birth of diversion and the ideology surrounding diversion and gave a detailed explanation of diversion. The chapter also examined the statement of the problem that is to be investigated in the study, the reason why I choose the Child Justice System as a topic for this dissertation and, lastly, the objectives of the study. This chapter explores and discusses the concepts of restorative justice and rehabilitation. It seeks to define these two concepts and highlight their importance in the Child Justice System.

Chapter Two explains the theoretical framework of the research. In this chapter, I broadly survey theories, deviance, anti-social behaviour and juvenile delinquency, as well as the probation officers conception of criminal action and suggested solutions to it. Major sociological theories and approaches such as Delinquent Sub - Cultures, Strain Theory, Conservative Theory and Moral Regeneration Approach are closely examined in this chapter. Having canvassed these theories, in this chapter I explain why I chose these theories, how these theories help me to understand diversion and what they say about diversion. I also explore the ways in which these dominant theoretical

formulations continue to shape and inform practices. In the end, I place practices and policies of diversion and their associated discourses within the social constructionist framework.

Chapter Three deals with the methodology and methods appropriate to conduct this research. The chapter gives a detailed explanation of the methodological discussions, the procedures that I followed, how the data was recorded and which methods of data collection I used. The chapter tries to explain why I used qualitative research and the significance of qualitative research.

Chapter Four discusses the background to the Child Justice System, explores the criticisms of diversion by Muntingh (2000), the criteria used by prosecutors and probation officers in the Child Justice System for the assessment for diversion, the duties and responsibilities of the justice personnel and the different forms of sentencing. This chapter reveals the insights, on and analysis of, the different perspectives of diversion and the incarceration of juvenile offenders by justice personnel (probation officers and prosecutors) and NICRO, the organization which is responsible for the implementation of the diversion programs.

Chapter Five analyses and considers my understanding of the criminal justice system through the observations and the information I collected during this research. This chapter argues that, despite the reason why justice personnel have a strong belief in diversion, the assessment of the juvenile offender remains a subjective process, in which the social life of the juvenile is assessed from the perspective of the dominant ideologies and discourses that facilitate such assessments. Chapter Six presents the conclusion of my research by summarising the main findings and seeks to identify possible recommendations for future research and the practice of diversion.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL FRAMEWORKS

In the early 1990s, Levitt (1998) noted that incidents of juvenile violent crimes had grown almost twice as quickly as those of adult offenders (this is a reference to the American experience). Following such claims, according to Levitt (1998:1156-1157), we started to notice the popularisation of the notion of the ‘super-predator’ and this description of the juvenile offender stresses the absence of morality and socialization among the current generation of adolescents as an explanation for the increase in the prevalence of violent crimes. Fatima (2007), in her article published in the Cape Argus, reported that there are more than 3 000 children in South African prisons for violent crimes such as murder and rape, which highlighted juvenile delinquency as a massive growing problem in our society. It is also noted that 70 percent of the crime is committed by repeat offenders. According to former President Thabo Mbeki, the solution to juvenile offending is moral regeneration.¹⁰ As he put it, “moral regeneration is needed in order to change the mindset of the youth, by teaching the youth morals and values” (quoted in Fatima, 2007). This proposition seems to imply that the basis of the crime is the direct consequence of the lack of morals and values among the youth in South Africa. Therefore the solution is to be found in the injection of values and norms of society into the youth. What is striking about this assumption is its simplification of the problem at hand and consequently the solutions. It ignores the sociological and political aspects of deviance and juvenile delinquency.

It is within this context, that I intended to explore in this chapter the prominent theoretical endeavours in explaining crime and delinquency as sociological and psychological experiences. The intention is to explore the ways in which these dominant theoretical formulations continue to shape practices. It should be noted, right from the outset, that deviance as a concept tries to capture diverse phenomena/actions, whose explanation remains as diverse. The theories or perspectives see delinquency as a function of the juveniles’ environment or surroundings. The root cause of juvenile delinquency, or more specifically deviance, are many and diverse. Addressing the causes should therefore be multi-faceted perspectives and processes. However, it is shown in the proceeding

¹⁰ For further discussion on Moral Regeneration see page 12

chapters, being Chapters Four, Five and Six that the whole practice of the Child Justice System operates on the basis of simplification of both the problem and the solution.

Much of the sociological theories of deviance make the assumption that the character and personality of human beings is shaped and moulded by the environment (see Sykes and Matza 1957; Cohen 1956a, 1956b). Early models simply defined delinquency as inherently individual and problematically noted as innate. Early sociologists such as Cohen and Merton broke away from this proposition of criminal behaviour and suggested that the social aspect is an important aspect of delinquent and criminal behaviour. For example, Cohen's insight into the nature of delinquency examines at the process of code - making for behaviours that are to be located within class conflict and value contradiction. Such insights have led us to consider complex relationships of social factors and individuals that shape individuals' behaviours in order to better understand the nature of delinquency than simply dismissing each case of delinquency as innate (Pitts 1990: 33). Modern sociological research discards the old view of the "born criminal" and instead seeks to unpack the complex set of social factors and differences in the of environments of delinquents and non-delinquents (Pitts 1990:34). It is with this in mind that the contexts within which children grow up and are socialised become the centre of attention.

Since I sought to explore discourses and practices of diversion within the Child Justice System, and particularly the selection criteria used for diversion of juvenile offenders, I try to show my engagement with the socio-political factors that are situated in and appropriated to the context of my research – explaining a specific set of practices of the state/society handling the of juvenile offender. The subsections in this chapter will discuss the following: the first section explores theorising juvenile delinquency and anti-social behaviour; the second section explores the theory of delinquency as a sub-culture; the third section engages with one of the most prominent theories in this area – strain theory; the fourth section deals with conservative theory; the fifth section explores the moral regeneration approach by placing it within the South African context; and the final section seeks to assess the use and relevance of social constructionist views on this matter – how socially constructing the juvenile offender and criminal continue to reproduce certain institutional practices.

2.1 JUVENILE DELINQUENCY AND ANTI-SOCIAL BEHAVIOUR: CONCEPTUALISING CHILDREN'S DEVIANT ACTION

According to Farrington (2004:12), the causes of deviance result from a range of influences in the lives of children. Parents, schools, friends or peers, the media and the community have considerably strong influences on children's lives. These influences can serve as positive or negative. Evidence shows that juvenile offenders whose "anti-social" behaviour from an early age distinguishes them from adolescent juvenile offenders whose criminal activities start later in life, end sooner and tend to be less serious while they last (Farrington 2004: 12). Farrington (2004: 12) suggests that "anti-social" behaviour results from poor bonding between parents and their children and from incorrect parenting skills (neglectful parent, sexual and physical abuse, absent parent and parents who show no interest in the child).

Social psychologists emphasize that the environment into which an individual is born and is raised can shape and mould the personality and the characteristics of the individual (Pitts 1990:23). According to Pitts (1990:23), there are a number of environmental factors which work together in causing delinquency, such as the broken home, lack of discipline, bad companionship, lack of organisation of leisure time and economic factors, to name only the most important from the list. These are linked with the incident of delinquency (Pitts 1990:24). The investigation of these factors has caused the shift of emphasis from the concentration of the punishment of the offender to the examination of the social conditions which have produced the juvenile offender's criminal behaviour and what is to be considered as "anti-social personality" (Pitts 1990:26). Undoubtedly it is this formulation that has come to shape the assessment and criteria used for diversion by probation officers and prosecutors that consider extensive lists of socio-economic conditions at home and in the community.¹¹

The end of a child's primary school years and the first years of secondary education is a period when a child is exposed to a variety of different influences which could shape the child in a positive or a negative way, as these influences affect the child's behaviour. Relationships with their parents remain important. A child learns through examples that are set by their parents and teachers or any other significant adults in their lives. When a child reaches pre-adolescent age, friendships with

¹¹ See Chapter Four and Five for extensive examination of diversion criteria and assessment

children of their own age become increasingly important. Children in the pre-adolescent age group are more aware of their peers, of what is happening in their surroundings, their community and the messages that are delivered through the media of the internet, television, magazines, newspapers and cellphones.

To explain the context in which Farrington (2004) explains deviance and juvenile delinquency, it is appropriate to fall back on a report in the Sunday Times in June 2003. The Sunday Times report gives a perfect example of how children interpret messages in the media and how these messages can affect the child in a negative way, resulting in the child offending. This article focused on the effects of the increased access of children to pornographic material in South Africa. In South Africa there is a pandemic in which teenagers and pre-teenage children are influenced by the media such as pornographic movies (Govender cited in Sunday Times 2003:3). These movies are easily accessed by children through the internet, late night television programmes and cellphones. This, at the very least, symbolises the disarray in the ways in which children are socialised, often receiving contradictory messages. Most of the violent behaviours such as gang rape, sexual abuse and molestation of young boys and girls by older children are often associated with programming and socialisation of children.¹² Certainly it is a prime example of the damaging effects of uncontrolled media and contradictory messages that are bombarding children as well as adults. This may result in some children becoming sexual offenders.¹³ In a sense, humans learn behaviour by imitation, by experiment – yet what the media presents to society has continued to be contradictory and conflicting and by whose standard are we to judge deviance or non-deviance?

The above example illustrates the absence of coherent and shared socialisation process, as modern society continues to be defined by fragmentation, which complicates the social process through and by which deviance is determined. In some ways, it is the reason why Farrington (2004: 12) talks about how influential the parents' behaviour is to the child from an early age, because they engage with children within the controlled environment of their home; what the child sees his/her parent doing

¹² One of the counsellors at the Teddy Bear Clinic¹² in Johannesburg reported that young boys who had been sentenced for sexual offence crimes when asked what sex is, this is what they had to say: "Throwing a girl down, tearing off her clothes and holding a girl down by lying on top of her." One of the psychologist interviewed in the above report also indicated there was a common trend among teenagers where they would film themselves gang raping girls and these films would be sold to people.

¹³ Article that was in the Sunday Time in June 2008

may result in the child imitating this behaviour. Farrington's (2004: 12) theory combined with the article in the Sunday Times, expresses how various negative influences cause juveniles to offend. The exposure of a child to certain behaviours and messages is a potential cause for delinquency (Farrington 2004: 12).

The classical explanation of such behaviours, for Sykes and Matza (1957:664), is best captured by Sutherland's theory of differential association. According to them, this theory emphasises criminal or delinquent behaviour as learned, though the process of appropriating "(a) techniques of committing crimes and (b) motives, drives, rationalizations, and attitudes favourable to the violation of law" (Sykes and Matza, 1957:664). They argue that this approach, even though it shows us the content learnt, dismally fails to appraise the process through which these contents are learnt, setting the tone for the theory of a delinquent subculture. In this sense, while delinquent behaviour like most social behaviour is regarded as learned, it should be emphasised that it is learned in the process of social interaction and judged within and by a specific social context. In an era of delinquency and breakdown of morals, whose lesson shall one take, whose actions are appropriate and by whose social order one shall be defined have long been a central preoccupation. This leads to the discussion of how different sub-cultures induct and socialise their members into accepting specific sets of standards, values and normative actions.

2.2 DELINQUENT SUBCULTURES

Sykes and Matza (1957:664) noted that "the world of the delinquent is the world of the law abiding turned upside down and its norms constitute a countervailing force directed against the conforming social order." This relates to Cohen's (1956b: 88) characterisation of subculture as developing "out of class - based status frustration resulting in malice and opposition to those of the dominant culture." The basic characteristic of the "delinquent" subculture is a system of values that represents an inversion of the values held by the dominant society that constructed itself as a "respectable," law - abiding society. These according to Cohen (1956b: 88), are rooted in class differentials,¹⁴ parental aspirations and school standards, given that the position of a family in the social structure determines the problems the child will face later in life. Thus these boys will experience status frustration and strain and adapt into a corner boy, a college boy or a delinquent boy (Hirschi 1969:79).

¹⁴ Class differentials are a way in which to define the differences between social classes in society.

Those considered as “delinquent boys” band together as gangs to establish peer status and consolidate group loyalty. For Cohen (1956b), the importance of friendship is to help deal with a common problem of legitimacy. What distinguishes those who turn to crime are the “social variable of peer influence” and the “psychological variable of reaction formation” (1956b: 88). Cohen (1956b) is implying that the pressures that peer influences cause on the individual create changes of behaviour in the individual, be it at the pre-adolescent stage or the adolescent stage, to conform to the behaviours of their peers, irrespective of whether these behaviours are good or bad. The reactions that they receive from society due to these behaviours cause a counter-reaction in the adolescent; at times, this reaction can be that of engaging in crime. The process of transition from a peer pressure situation to crime is “gradual, tentative groping, advancing, backtracking and sounding out” (Cohen 1956b:88). Cohen sees the development of subcultures as a matter of building, maintaining and reinforcing a code of behaviour which exists by opposition which stands in point by contradicting the dominant values of society particularly the values of the middle class (Cohen 1956b: 89).

As Cohen (1956b:90) points out, delinquency among youths was more prevalent among lower class friends, and the most common form was the juvenile gang. According to Cohen (1956b: 90), all youths want social status, but not everyone can compete for it in the same way. Cohen suggests that people of the same age and background will group together due to the feeling of being rejected and marginalized by dominant society (1956b: 91). Therefore the forming of a gang gives the juveniles a sense of belonging, confidence and self-worth, a feeling of acceptance and a way of achieving status.

Cohen’s conception of subculture and deviance avoids simple explanations and generalizations; instead Cohen examines the function of delinquent values as a solution to the lower-class problems of social status. In Cohen’s sense, juvenile delinquency is constructed as a form of behaviour which is based on competing values and norms. In other words, the juvenile offender’s delinquent behaviour is shaped from a set of deviating values and norms from society or in competition to the dominant society, thus regarded as a “deviant” lifestyle, whereby the juvenile rejects the norms of the latter; the attendant self-definition of the person as having rightful and appropriate norms and values and even at times as embracing the term “deviant” or “delinquent” as a symbol of status and position of a differing world view. Juvenile delinquency is a form of behaviour that is based on the values and

norms of a deviating subculture, in the same way as an order of the dominant society. This position is a source of acceptable law, norms and values all should conform to. As Cohen (1956b:90) put it, “one of the most fascinating problems about human behaviour is why people violate the laws in which they believe.”

Matza and Sykes (1961:714) state that “much delinquency is based on what is essentially an unrecognized extension of defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large”. In other words, the fact that subcultures create their own value systems and norms, which differ from the rest of society, largely as a reaction to socio-economic and political order, makes it easier for them to offend and break the rules of the dominant system. Their values and norms emerge out of justifications for deviation from and/or rejection of the system.

This theory facilitates an understanding of the process through which juvenile delinquency or deviance is produced and reproduced; that societal structures and class differentials produce juveniles who feel rejected or marginalized by dominant society, juveniles who feel as though they do not belong or fit into society, who feel alienated. As a result, these juveniles may see the system and the laws as being unfair and favouring the wealthy and powerful. Due to this they band together with people of their own status and mindset in order to find a sense of belonging and importance. These juveniles end up rejecting society and its laws that are deemed to have been made by the elites and the powerful. They adopt values and belief systems that deviate from the dominant system; they adopt the values of whichever juvenile gang they belong to, the gang which makes them feel important, worthy and belonging to something. Most of the time these values and beliefs are coercive of the juvenile, in – as - much as they are accepted, which in any case facilitate specific forms of actions and behaviours as part of the gang, whether or not these activities are considered legal or illegal by the judicial system. The juvenile will participate because they fear back-lash from the in-group, or losing the sense of belonging, importance, self-worth and kinship.

Such theoretical formulation has framed my understanding of deviance and crime and the institutional practices of the legal system. During my interviews with the probation officers there was

constant reference to subcultures as an explanation of crime and juvenile delinquency. The formation of gangs and how these gangs terrorize communities was a recurring theme.

Cohen's proposition on subcultures explains the formation of such gangs (and groupings), largely emerging out of reaction to, disagreement with, and rejection by, "mainstream" society. As a result these juveniles seek people who share similar values, norms and mindset. This gives the juvenile a sense of belonging, kinship and acceptance. What is relevant about this theoretical formulation to my research is the implication that having two opposing sets of values and norms have on the assessment criteria for diversion. In order to qualify for diversion, for example, the juvenile offender would have to concede and submit to the supremacy of the dominant legal order. Despite admission of responsibility for their actions, delinquents may still feel indignant and that such actions are acceptable "in light of the [their] circumstances" (Matza and Sykes, 1961:715). Therefore, in this context, one of the stipulations for diversion - that of the admission of guilt - may create complication for child offenders whose affiliation to gangs and gang membership is strong. This means these children are less likely to benefit from diversion as alternative justice.

2.3 THE ROLE OF STRAIN THEORY

Another dominant theory in sociology on deviance and crime is Robert Merton's strain theory. Merton's (1957: 333) proposition begins with an underlying assumption on the existence of two social structures that are at play, not only in organising, facilitating and limiting goals and actions, but also in creating contradiction. According to Merton (1957: 333), "the first structure is culturally assigned goals and aspirations; these are things that all individuals want and expect out of life, including both material and non-material things The second defines the acceptable means for achieving the goals and aspirations set by society" (Merton 1957: 673). In the latter, a good example may be obeying laws and societal norms, such as gaining an education and working hard. According to Merton, "for society to maintain a normal active function, there must be a balance between aspirations and the means by which these aspirations are fulfilled" (1957:673-674). Merton is saying that there needs to be some kind of pay-off, or an internal satisfaction that an individual is playing by the rules. Merton (1957) stresses that if the goal is not equally achievable through an accepted mode, then illegitimate means might be used to achieve the same goal.

Youth may feel that their lives, or the course of their lives, is already structured and organised for them. Society or the elite have already determined the course of their lives through the rules, values and the norms that they establish and enforce. A person is already fitted into a 'box'. For example, an individual has to be educated and hard-working if they want to succeed in life, but success might still remain elusive. Many are told that they must get through school and have tertiary education in order to find a good job and even then there are no guarantees. Even more troubling is the situation in which individuals do not have access to and, in the extreme cases, are denied, the means to acquire formal education.

Insufficient opportunities and differential life chances are produce frustration. As Merton (1957:675) stresses, there is a gap between desired goals/aspirations and accepted modes of actions to achieve them. "For most individuals, there is a lack of opportunity, this could result in the individual to achieving the goal by whatever means". According to Merton this results in crime. In this day and age, too much importance is placed on wealth, yet many people fail to think that the means of achieving this success leads to crime" (Merton 1957: 675).

Merton (1957: 678) explains that the individual's economic and social aspirations are very likely to remain unfulfilled, leading to frustration or demotivation. This lack of co-ordination between means and ends leads to limited effectiveness of the social structure in providing regularity and predictability of success. A condition of cultural chaos then supervenes (Merton 1957:678). Merton (1957: 678) regards strain theory more as a lack of effective co-ordination between means and ends. In other words, the means or resources in achieving goals are non-existent. They do not go hand-in-hand with the goal (end), therefore making it harder to achieve the goal, resulting in the frustration or demotivation of the individual.

As Merton put it, strain theory of deviance and crime, first and foremost, presents a structural explanation (1957: 678). It is within this departure point that Cohen (1956a:23) insists that social structures within society themselves are responsible for encouraging citizens to commit crime. For Merton (1957:678), as he worked through the concept of "strain", he suggested it may result from the following sociological conditions:

- **Structural level:** At the societal level, which filters down and affects how the individual perceives their needs. In other words, if social structures have inadequate regulation, this may change the individual's perception to means and opportunities.
- **Individual level:** This refers to the frictions and pains experienced by an individual as he/she looks for ways to satisfy his/her needs.

Merton (1957: 80) states that “if the goals of a society become significant to an individual, actually achieving them may become more important than the means adopted” (Merton 1957:80). Frustration is generally regarded as an aversive internal state due to goal blockage or any irritating event. In this sense, frustration caused by lower status origins would appear to be associated with more serious repetitive offending. This theory is based on exclusion and marginalisation as an explanation of crime and deviance.¹⁵ This emphasises inequality within society as the root causes of criminality. Due to the structuring of members of society in differential and unequal positions in the social structure, not all people have the same opportunity of achieving their goals; therefore, according to Merton, the situation encourages deviancy (Lundman 1984:122). All individuals want success, but not everyone is afforded the opportunity or means to achieve it in the same way. As a result, Merton feels, deviance should be assessed as emerging not from pathological conditions of personalities but from the cultural and structural conditions of the society (Lundman 1984:122). This, in many ways, represents an essentially structural argument that society is responsible for shaping the ways in which individuals think and act.

The limitation of this theory is its inability to explain ways in which sub-cultures – gangs and gang members – are constructed both by the dominant groups and in-group themselves, which perpetuate and re-enforce certain behaviours. Although it addresses issues of inequality and exclusion, strain theory has not engaged with the nature of the power struggle and domination that is inherent in the social contexts explored as well as the subjectivity involved in the ways we define and determine crime and delinquency.

¹⁵ In Chapter Four, I referred to a study done by Louw (1997) that makes a similar observation on Crime and Poverty in the Northern Cape, South Africa, but from a slightly different angle. Instead of aspirations and goals set for us by society, Louw explores apparently the fundamental psychological instinct – the desire to survive. Louw reported that poverty places humans in a desperate situation, because we all have the need and the will to survive. How is survival possible when you lack the resources to survive? Louw then used an example of how teenage girls, because of poverty, perform sexual favours for money or any material possession in order to feed themselves and their families.

2.4 CONSERVATIVE THEORY

John Pitts (1990), a social worker in London, conducted a study on deviance and juvenile offenders. I found his review and assessment of the proposition of conservative discourse of deviance as an explanation for the cause of crime or deviance interesting, because during my field work I learned that the justice personnel whom I interviewed tend to harbour similar supposition. For a large part the theoretical supposition of the justice system personnel (probation officers and prosecutors) is that of the moral regeneration theory (which I discuss in the subsequent section). This strikingly shares much with the conservative discourse; both are based on taught ‘appropriate’ morals and values. Thus, for him, deviance is a direct result of the decline of morals and values in the youth. Pitts (1990:50) suggests that “the conservative theory locates juvenile crime as a manifestation of the deeper problem of moral decline, which is seen to generate not only law-breaking but industrial strife and inflation.” He further notes that, for conservatives, moral degeneracy is characterised as a “consequence of misguided government welfare initiatives of the past and the relaxation of moral standards which they have fostered. These policies have resulted in the disruption and dislocation of the moral order and the spread of what could be called a delinquency syndrome, a conglomeration of behaviour, speech, appearance and attitudes, a frightening ugliness and hostility which pervades human interaction, a flaunting of contempt for other human beings, a delight in crudity, cruelty and violence, a desire to challenge and humiliate but never to please” (Pitts 1990:50).

According to Pitts (1990: 6), “conservative theory of juvenile delinquency is an ideological device with a dual significance”. The ideology and behaviour of the young is a consequence of the previous generation, while it indicates the reprehensible direction in which our society is moving. What Pitts (1990: 6) means by dual significance is that the ideologies and the behaviour that the youth display are due to the teachings and the attitudes that they learnt from their elders. For example, during the apartheid years the attitudes of some people towards the police or government officials were of fear, mistrust and insecurity, due to the ill-treatment and unjust and heavy-handed action they received from these officials. These ideologies and attitudes might have been passed on to the youth. Therefore Pitts (1990: 6) feels that, the source of deviance of the youth is located in their negative attitude to authority. This is because authority is perceived as controlling and favouring the financially stable and wealthy. The attitudes of one generation are transferred to the next. The most relevant point Pitts (1990: 6) mentioned here is an ideological device that the powerful or the dominant creates,

ideologies that determine and influence how social life is experienced, organised and structured. The elite determine the way in which life is experienced and lived. They are the ones who create the laws and enforce the laws, mainly laws which benefit them.

Authority is perceived by the youth as controlling and favouring the wealthy. The negative attitudes centred on morality emerge from the modern ideology of the youth. The youth of today may experience most moral laws as old-fashioned, or as not being in line with modern times. As a result it makes it harder for the youth to incorporate these laws concerning morality into their everyday lives. Thus, they break the rules of the old, not only as a way of understanding and making sense of their world, but also as they fight or revolt against perceived or real domination by the conservative old world. Youth experience the world as having changed the laws and morals which applied to the past society. They consider these morals and values as not correlating to the modern way of life, due to the changing times. This is partly because it takes away their ability to define their reality or world. By having morals and values defined for them the youth regard it as if their independence to define their own morals and values is taken. It is for this reason that young people feel powerless. It is as though they are controlled by the 'old' order dictating their environment and social circumstances. It is from this position that Roger Smith (2007:134) reminds us that young people's experiences should be looked at within "broad structural questions of power, legitimacy and control, which will consider the place of law and the judicial system in constructing young people's behaviour as problematic." The youth deviate from these dominant norms which they are excluded from due to their lower position and status in society.

The moral regeneration approach emerges as part of the conservative view of crime and deviance. This approach is presents an explanation of deviance and crime as societal problems and as a solution to them. Its point of departure is that the basic tenet of moral development in human beings is that human nature is fundamentally good. At least it leans directly toward an awareness of the good, and preference for it, over evil and injustice. This approach maintains that human nature is inherently self-perfecting, if in moral understanding and aspiration more than in practice. In the above sense, then, morality is constructed as growing in human beings in a similar fashion to their physical limbs, basic mental and social practices, representing the possibility of a maturing conscience. The notion of moral development thus conveys a sense of progressive human beings, ever evolving and aspiring

beyond ourselves (Blum, 1988). The moral regeneration approach aims at fighting the root cause of crime, the breakdown of morals, the breakdown of the family unit, poverty and inequality. These are the factors which lead to crime. These very factors are the root causes for deviant behaviour that were mentioned by the probation officers.¹⁶ The Umsobomvu's National Youth Policy outlines that the youth come into conflict with the law due to lack of education, employment and sustainable livelihoods (National Youth Policy December 1997: 26). The moral regeneration approach is relevant and useful to my research, because it suggests possible solutions to the problem of crime and the breakdown of morals within society. These solutions lie in community. Elders should be responsible for example, for the moral development of the youth. Some of the suggestions here are strengthening the family unit and revitalising religion, institutions through which the child is inducted into the morals and values of the group (Giacopassi and Hastings 1987). These recommendations include the introduction of groups to the community which provide parenting classes and advice to parents. They assist and guide these parents with problems they might encounter when raising their children, basically institutions which offer support to the family structure. This approach further tries to combat poverty and inequality by stating the importance of addressing these issues. The moral regeneration approach states that addressing issues such as poverty, and morals might decrease the occurrence of crime in society.

In South Africa, this approach gained credence due to concerns about the increase in juvenile offending and, broadly, the prevalence of violent crimes such as murder, abuse and rape, which are seen as signs of a moral breakdown within the youth. The ANC, as the ruling party, felt that the apartheid history of South Africa left behind a legacy of serious breakdown of the moral infrastructure of society (Mukwevho 2001: 1). Apartheid brutalised all – its perpetrators, victims and beneficiaries. Through the migrant labour system and homelands, apartheid sowed the seed for the breakdown of the institution of the family. The breakdown of the moral fibre, it is argued, manifests in many ways and in all sectors of society, the rich and poor, urban and rural, black and white, young and old. Juvenile offending and crime is a manifestation of this (Mukwevho 2001:1). According to Mukwevho (2001: 1):

- ❖ Moral regeneration leads to the development of ethical leadership and the nurturing such leadership.

¹⁶ Chapter Four gives an extensive explanation of the probation officer's perspective of deviance.

- ❖ Moral regeneration aims at harnessing and supporting the energy and creative spirit of the youth toward moral renewal.
- ❖ Moral regeneration aims at making the education system emphasise moral formation as one of its core functions, both in theory and in practice.
- ❖ Moral regeneration aims at strengthening the family unit.
- ❖ Moral regeneration aims at combating poverty and reducing the inequality gap
- ❖ Moral regeneration aims at combating the root causes of crime and corruption in all their manifestations.
- ❖ Moral regeneration aims at fostering greater religious tolerance and co-operation for moral renewal.
- ❖ Moral regeneration must aim at ensuring that the media also carries positive stories of moral courage and renewal.

(Mukwevho 2001: 1)

The contribution of citizens to the ‘moral renewal crusade’ is necessary and encouraged. Moral regeneration is about developing and sustaining morality in communities. Moral regeneration thus represents the fight against immoral behaviour. It encourages the renewal and instilling of morals in all individuals.

“The phrasing of the core messages is far less concerned with spirituality or religion than the early formulations of the renewal initiative. Religion is described as one of the eight focus areas of the movement, but no longer dominates the moral regeneration agenda. There is also less explicit reference to crime thnt there was in some of the earlier formulations. However there is little explanation on what the constitutional values are: and with fourteen moral themes identified in the Constitution, the danger of lack of clarity continues to loom large” (Mukwevho 2001: 2).

Mukwevho (2001: 2) records that the moral regeneration campaign is reported to be failing due to a lack of dedicated attention.¹⁷ In the absence of motivated staff and funding, new campaigns or models such as the moral regeneration campaign are unlikely to receive any attention. Therefore the moral regeneration campaign stands little chance of being adopted. When the government is questioned on what it is doing about the serious levels of crime, they refer to the moral regeneration campaign, when in actual fact this campaign is not being optimally conducted.

The moral regeneration campaign, which briefly appeared to be the dominant theme in South Africa, is claimed to have a great framework in place, yet it fails to emphasise the morals that must be regenerated in the youth. It fails to encourage the fact that not all traditional or moral values can, or should still, be followed during these times. Examples are, the traditional role of women in society, which prescribes and proscribes a lower status for women and asserts women's dependence on the man, and practices that place women in vulnerable positions.

The moral regeneration approach exhibits a social determinist position. Social determinists take the view that society defines individuals – individuals become products of the kind of society they are born into and their choices and decisions are explicable in terms of societal norms and values. Yet it simply moralises at the expense of the other half of the story - processes of moralisation and power struggle, particularly the relationship between black people and South African society is one of economic and social marginalisation and deep-seated inequalities (Mukwevho 2001: 2). Black people's communities are, for a large part, characterised by bad housing, poor job prospects, pervasive poverty, lack of proper education and, one may add, crime and criminality. These inequalities are produced and maintained through institutions. Due to these socio-economic inequalities a vast number of black people are unable to maintain a decent standard of living and provide for their families in the way they would like to. The moral regeneration approach, that seeks to revive norms and values, attributed the cause of the problem to the degeneration of these norms and values. This simply obscures the material basis of the problem.

¹⁷ Government participation has appeared to have declined and there has been no dedicated effort directed toward the moral regeneration. When asked to report on their moral regeneration activities, most departments simply cited programmes that they were doing anyway.

2.5 SOCIAL CONSTRUCTIONISM

According to Pitts, “the central idea of social constructionism is the actors which interact together form over time typifications or mental representations of each others actions and that these typifications eventually become habitualised into reciprocal roles played by the actors in relation to each other” (Pitts 1990:60). These “reciprocal roles” become routinized. The typified reciprocal interactions are said to be institutionalised. In the process of this institutionalisation, “meaning is embedded into the institutional fabric and structure of society and social reality is therefore said to be socially constructed” (Pitts 1990: 60). For example, the social reality in today’s society is the existence of economic inequality. As a result, people may turn to crime in order to accomplish certain goals (Pitts 1990: 60). For Pitts (1990: 60), “social constructionism theorises about knowledge and social reality by considering how social phenomena develop in particular social contexts”. Within constructionist thought a social construct is a concept or practice which may appear to be natural and obvious to those who accept it, but in reality is an invention or artefact of a particular society. Pitts argue, that “[s]ocial constructs are products of countless human choices, rather than laws resulting from nature” (Pitts 1990: 68).

The idea of social constructionism emphasizes the contingent aspects of the individual social self and social reality (Pitts 1990: 68). The idea of crime or the concept of crime would not have existed if society had not constructed it. Had we been a different kind of society, with different values, interest, needs and beliefs, a different society would have existed. As social constructionism also applies to our beliefs, this means that our beliefs have been shaped by social forces (Pitts 1990: 68), for example, the belief that there is a particular kind of person, the juvenile delinquent, who is deserving of being singled out for special attention due to his/her delinquent behaviour. When we believe in something, we believe it because we think that there are reasons for it to be true, reasons that we think are general enough to be adopted by other people, even those who do not share our perspective.

A major focus of social constructionism is to uncover the ways in which individuals and groups participate in the creation of their social reality. It involves looking at the way in which social phenomena are created, institutionalized and made into tradition by humanbeings. Socially constructed reality is seen as an ongoing dynamic process: reality is reproduced by people acting on their interpretations and their knowledge of it (Pitts 1990: 70). Social constructionism is the

relationship between the individual and society – the social environment we live in, work in and how we live. This social environment influences the lives of the individual. The way in which we perceive the world is generated through our experiences. Social workers and the justice personnel explain crime or deviance as a result of social circumstances such as gangsterism and poverty, which is a belief that the individual is influenced by his/her environment, background and surroundings. Such constructs, then, become institutionalised. This in turn, shapes practices within such institutions. These views and ideas by themselves are located within a particular social structure – knowledge production. These socially constructed ideas concern the origin and impact of crime which informed the solution. The fact that the justice personnel believe that the juvenile offender is influenced by his/her environment, background and surroundings, results in the juvenile offender finding help for the problem. Once the probation officer knows the cause of offending a suitable solution can be found for the problem, thus ensuring the rehabilitation of the offender.

One of my research objectives was to understand the way in which the justice personnel perceive deviance and how of which they generate selection criteria for diversion. In relation to this, I find the social constructionist view on the relationship between the structuring of ideas and constructs and power relation particularly useful. As Burr (1995:26) put it, “[s]ocial constructionism analyses these power relations within which people live their lives and through their experiences.” For Burr (1995:26), this essentially relates to the fundamental sociological problem of “how to understand the relationship between the individual and society has revolved around the issue of the direction of influence, do individuals determine society or does society determine the individual”.

According to Pitts (1990:75), “society becomes the product of all the individual choices and decisions that people have made and what we call society amounts to little more than the sum total of all the individuals living in it”. The environment, background and surroundings of the individual do influence the individual, because this is where the internal world of the individual is formed or shaped. The way in which the individual perceives the world is shaped or influenced by their experiences. For example, if the environment the child grew up in was good, the parents were responsive to the child and spoiled the child occasionally, the child will grow up generally perceiving the world as a good and happy place filled with opportunity. This sort of perception results from the experience the child has had. Lets us consider another scenario. If Child B grew up in a home where

both parents died of AIDS, therefore he or she would have to look after the younger siblings, do all the housework and still find a job in order to support the family financially. Child B could perceive the world as a place of sadness, suffering and hardship. The way in which the individual experiences their environment shapes the way in which an individual perceives the world and this also the individual's behaviour. In this sense, we need to investigate how individuals make sense of their reality and how their reality is organised through discourses concerning their actions. According to Burr (1995:25), the theory of social constructionism directs us to the understanding that individuals' actions are shaped and formed by their interaction with social systems and group norms.

Pitts (1990: 33) defines the relationships between the individual and society as an eco-system - the effect one person has upon another and the effects of the environment upon the individual. In other words, a person's identity lies in their relation to others and is not an entity to be found inside the person. From the words of Pitts one can gather that a person's identity is shaped through a person's interaction with the environment and significant people in the individual's life. Interaction with people helps shape a person's identity because we adopt values or forms of behaviour from other people who are significant to us, such as our parents or peers. The values or behaviours that we adopt or make as our own are values that fit in with our experiences or the way in which we perceive ourselves and the world. Burr (1995:110) suggests that individuals have a particular social practice in which they live and the discourses which frame their thoughts and experiences become an aspect of a single phenomenon. This means that discourses are neither simply a product or side-effect of social structure, nor one of individualism. For Burr (1995:110), discourses "are embedded in that structure and are parts of it and at the same time serve to structure our identity and personal experiences".

The child justice system exists by constructing a notion of a child deviant and criminal as having specific characteristics, aligned with its purpose of enforcing the dominant norms. Diversion as a programme exists by deploying the idea of the "child". It is also worth noting that there are competing norms or power struggles in which individuals or groups reject the dominant norms or associate these norms with the ruling elite. The mainstream discourse is that individuals have become deviants if they do not conform with the dominant norms and values. Therefore, the dominant society constructs them as lacking 'rationality' and 'morality' and their rehabilitation is also framed within this construction.

The social influences that result from gangsterism (as a competing norm and social world) propel an individual within the gang to commit an act (which the dominant class would call a crime, while it remains a heroic act within the confines of the group) (Sykes and Matza 1957). The same individual (and his or her act) is constructed differently by different social groups. According to Pitts, “the nature of the social within this view is an array of variables which distort, mask, exaggerate or otherwise modify the basic capacities and character of the individual” (1990:31).

The normal social context of the person’s everyday life is seen as full of variables which distort and disguise the individual capacities and characteristics and various ways of constructing them (Burr, 1995:104). For example, diversion, which is seen as a way of removing the juvenile from the formal court procedure or process and at the same time providing the right environment for the offender to be rehabilitated, essentially requires subjective understanding of these realities.¹⁸ It is seen as a suitable form of punishment because it is in a ‘safe environment’, away from sexual abuse, harassment, negative influences of older inmates. It places the juvenile in a place where the probation officer has the opportunity to counsel and to assess the juvenile offender problems, to find the root causes of the problem and to assist in the rehabilitation of the offender, so that the offender may integrate back into the community as a fully functioning individual.

Social constructionism leads us in the direction of a particular view of humankind, which diffuses responsibility of action and agency and, at the same time, reduces morality to a discourse. Yet the appeal of social constructionism comes is two-fold: on one hand, it explains the subjective construction of experiences and nature of deviancy (and the prescribed remedies) and, on the other, it allows us to reflect on the subjective and problematic ways of assessing juvenile offenders for diversion.

¹⁸ I discuss this point at some length in Chapter Four.

2.6 CONCLUSION

The theories that were explored in this chapter were the juvenile delinquency and anti-social behaviour theory, delinquent subcultures, strain theory, conservative theory, the moral regeneration campaign and social constructionism. These theories all offer a structural explanation to the causes of deviance and crime. Most of these theories explain crime or deviant behaviour as a consequence of the environment or the social context of the juvenile offender. The underlying proposition of these theoretical endeavours is that delinquency or criminal behaviours are function of the juveniles' environment or surroundings. The causes of deviance result from a range of influences such as the social context, the parents, school peers, the media and the community. Thus the causes of deviance are associated with social influences and are structurally rooted. Members of society have created social structures, for example education and law, which affect people differentially. Usually these structures perpetuate social inequality and benefit people in power and people of a higher social class. These structures and inequalities are maintained through institutions such as education and the law. The struggle against such conditions is what the dominant class calls deviance and crime.

Similarly, the moral regeneration approach, which is dominant and has gained popular acceptance in South Africa, places emphasis on the absence of morals and socialisation amongst juvenile offenders. This does not, however, seem to consider the material and socio-political context. The significant lesson from the above theories, and what this research has appropriated, is the ways in which criminality is produced within structural context of domination, marginalisation and inequality. I have also discussed the theory of social constructionism, which centralises the very discourses of crime and deviance. In this sense, deviancy or the child deviant is a subjectively constructed reality of the individual as well as the group, where the dominant discourses construct certain acts as deviant and criminal and these justify certain forms of intervention.

CHAPTER THREE

METHODOLOGICAL REFLECTIONS

The research was carried out in South Africa in the province of KwaZulu-Natal, in a small town called Port Shepstone, which is an hour's drive from Durban. Broadly, the focus of the research has been on the following issues: how the probation officers interpret the different criteria from the Child Justice Bill 70 of 2003 and subsequently the Child Justice Bill 70 of 2007, in order to select the most appropriate form of diversion, understanding of the Child Justice System, how this justice system works and what the justice personnel look for when deciding on an appropriate sentence for the juvenile offender. In an attempt to gain understanding on the above issues, I conducted open-ended interviews with Child Justice System personnel, probation officers and prosecutors.

Chapter Three outlines the research methodology, more specifically the type of research approach adopted and the methods used in this research. Against the backdrop of specific characteristics of qualitative methodology, I try to demonstrate in the following section the reason why I have chosen this approach and how it was implemented. Section two explores the ways in which I gained access to the field and the pertinent issues around access. The third section provides details on various data collection tools such as interviews, informal conversations and policy documents used for this research. The fourth section briefly outlines the analysis process. Finally, the last two sections look at ethical issues encountered in this research and the limitations of the study.

3.1 CHOOSING APPROPRIATE METHODOLOGY: THE QUALITATIVE APPROACH

I chose the qualitative approach in my attempt to study human actions and discourses from the perspective of the social actors themselves, as constituted within a specific institutional framework. According to Babbie and Mouton (2001:270) the primary goal of qualitative research is to describe,

explore and understand, rather than to explain human behaviour. Choosing the qualitative approach was thus necessary because of its potential to explore different discursive practices, opinions, perspectives and procedures of the probation officers and prosecutors and, by so doing, it assisted me in understanding how the broad criteria for diversion and diversion options are interpreted by the implementers.

Qualitative research was useful in this research in exploring a discursive understanding of the causes of criminal behaviour in juvenile offenders. The interviews with the probation officers and the prosecutors enabled me to understand their discourses of deviance, their understandings, descriptions and views of deviance, which, in turn, shape how the probation officers choose the appropriate diversion programme for the juvenile offender.

The significance, over all, of such an exercise dwells within the understanding of qualitative methodology; that it is better suited to understanding the probation officers' interpretation of their own practices and discourses when assessing and selecting juvenile offenders for diversion. Qualitative methodology distinguishes itself from quantitative methodology in terms of at least four features: It is an inquiry relating to the setting of the research. Significance is given to both the process and outcome of the research. The perspective of the participants is emphasised, and focus is on the aim of the inquiry (Babbie and Mouton 2001:270). Against the backdrop of these features, I try to outline how I engaged with the chosen methodology.

Unlike quantitative methodology, research in qualitative traditions is conducted in a natural setting of actors. Following this tradition, I spent much of my fieldwork in corridors and offices of the justice system and in court-rooms. The data that was collected was obtained from the probation officers and the prosecutors in their places of work, court-rooms and their offices. By obtaining the information this way enabled me to observe and understand what is done by justice personnel on a daily basis. Obtaining the information in the natural setting of the actors enabled me to observe how the probation officers and prosecutors conduct their duties and responsibilities. It gave me the opportunity to observe the court procedures, to observe the different roles of the probation officer, the prosecutor and the magistrate, as described in the Child Justice Bill.

As Babbie and Mouton (2001: 270) stipulate, a qualitative researcher should always remain focused on the process rather than the outcome. The process the researcher pursues throughout the research phase can affect the research either negatively or positively. It is necessary that the direct words of the participants are captured and used, in order to ensure accuracy and avoid any misinterpretations and misunderstandings, which would place the validity of the data at risk.

In qualitative research, it is important that the actors' perspectives are appropriately captured. The aim of qualitative methodology is in-depth descriptions and understanding of actions and events. Prosecutors and probation officers are the criminal justice system personnel whose task is to oversee the process of child offenders' cases and they deal with the offenders on a daily basis. I sought to generate insight into issues surrounding diversion programme and the procedures guiding the process of selecting individual offenders for this programme by obtaining the information directly from the prosecutors and probation officers; this certainly gave me a deeper insight and understanding of the Child Justice System. In this sense, my research is completely framed by what Babbie and Mouton (2001:207) point out as the main concern of a qualitative research - "to understand social action in terms of specific content rather than attempting to generalise to some theoretical population."

In a nutshell, the use of the qualitative methodology in my research was useful because it enabled me to see the social actor's perspective and gave me the opportunity to look at the criminal justice system through the eyes of the probation officers and the prosecutors and enabled me to observe the natural setting of the social actors.

3.2 ACCESS TO THE FIELD

Gaining access to the field is crucial, as it influences the nature and shape the research is going to take and the outcome of the research (Henry 2004: 130). This influence on the nature of the research can be reflected in the information you get from observing the probation officers and the prosecutors and/or by talking to them. In this sense, modalities of gaining access to the field shape the research process and its outcome. In order to gain access, the researcher has to earn and cultivate trust by the research participants and, at the same time, the researcher has to ensure that the participant is comfortable and has to maintain a level of respect at all times.

My experience with gaining access was that it is a process that requires patience, adaptability, flexibility, manners and courtesy. Initially, I had to be granted authorisation by the gatekeepers, in this case the supervisors of the probation officers. It was a very lengthy process, as these supervisors were hard to locate. They were often tardy in answering my request to carry out my research in their departments. I would begin by calling the supervisor, setting up an appointment and explaining who I was, where I was from and what the research was about.

At first, most of the participants were hesitant and were reluctant to participate in the research. The following are two of the prominent questions raised by the prospective participants: Who was going to use the research? Are any names going to be mentioned? The response I gave to these questions was that this research was mainly for me to obtain my masters degree and it would be kept at the university library for other researchers to reference. I found that after responding in this manner to the research participants' questions, they felt more at ease, relaxed and were willing to engage in discussion and offer information. Some probation officers took their own initiative and supplied me with more literature on diversion policies and practices.

I informed them that the ethical code of the university and the ethical conduct of a researcher required me to keep all personal details of the participants confidential. If I did not adhere to these rules I would be in breach of the university's code of conduct. In order to gain access to the field, I found that there had to be continuous engagement and negotiations between the supervisors (or the people in charge) and me. I had to keep in constant contact with the supervisors; I telephoned them on a regular basis to ensure that they did not forget any request for authorisation to conduct research and in order to negotiate suitable times for interviews. I found that, throughout this process, I had to keep on assuring the probation officers and prosecutors that their names would not be mentioned therefore would not get into trouble or face negative consequences for talking to me. I had to constantly affirm this and encourage them to feel free to talk openly and honestly. This continued assurance was needed in trying to maintain trust and access to the field.

One of the most challenging processes to me and this research was negotiating the racial lines¹⁹, which I found to be an issue that the research participants (probation officers and prosecutors) were not willing to openly converse about. I found that when it came to issues that could paint a negative picture of the justice system, such as racial discrimination, neither the probation officers nor the prosecutors wanted to entertain and openly discuss such issues, or were very cautious when answering questions emerging from such topics.

Relevant to this, my position as a young black woman researcher appeared to generate racialised responses. Some of the probation officers, curiously all of them black, alluded to, with discernible caution and reluctance, the existence of racial discrimination within the Child Justice System. Their points focused on concerns where children of colour were not treated in the same manner as white children, or that when dealing with children of colour police officers were failing to follow the correct procedures. They treated black children in a harsher manner, by keeping them in holding cells longer than the stipulated time frame and a probation officer was never informed of a new arrest.²⁰ The research participants would first enquire if their names would be kept confidential, because they feared the consequences of disclosing such information to a researcher or a stranger. They wanted to ensure that I would not be a threat to them in any way. They feared they would lose their jobs and in some cases their reputation would be damaged and they would not be able to work as probation officers again.

Researching across racial lines was not easy, either. I often felt that white probation officers and prosecutors either undermined my work or did not take me and my research seriously. They undermined me in the sense that they would speak down to me, implying that I had difficulty understanding them or the English language. Others would ask to see my student card or some form of certificate as proof that I actually was at the University and studying towards my masters degree. This behaviour led me to believe that possibly they did not think it was possible that a black woman, like me, could actually be studying towards a masters degree. The way in which they spoke to me also

¹⁹ During the research process I found that there was a large number of black juvenile offenders who were not being diverted and they were placed in holding cells. I wanted to inquire why these juvenile offenders were being placed in holding cells instead of being diverted. It can not be that only black juvenile children are offending, there has to be children of other races offending as well. Probation officers and prosecutors were reluctant to talk about this.

²⁰ For detailed discussion on racialised narratives and practices in the Child Justice System see Chapter Four.

makes this observation quite intriguing, constantly asking me if I understood them, which I did not see a need for them to do.

By contrast, my interactions with black female participants were lucid, open and comfortable; they volunteered information, took me seriously and even gave me extra material to work on. I could not help but notice a spirit of “sisterhood”, as the colloquial expression goes. To my surprise, and contrary to their male counterparts, the white female participants, also engaged with me in this favourable manner. This was not the case with all the white female participants but rather mainly the older generation. In any event, uncomfortably, I tend to attribute these observations and encounters as framed by my skin colour, even though it could happen because of my age, gender or perhaps even lack of sufficient reputation to respect my work. As I re-read my work, I started to reflect that, this remains to be a larger process of the South African imaginaries of race and social relations.

Gaining access to a psychologist and the child offenders proved to be particularly difficult. It would have been extremely interesting if I could have interviewed the juvenile offenders because I felt that this would have opened me up to their opinions, perspectives and encounters with the Child Justice System. Interviewing a child offender would have gone against the law because a juvenile offender is a minor and their identities are kept confidential. This serves as protection for the child, because by disclosing the child’s identity it causes complications for the child’s future. All of my efforts to set up interviews with the psychologists working for the Child Justice System were fruitless. All of my requests for interview appointments were declined blamed on the excuse of no time and busy schedules. The psychologist of the Child Justice System would have provided a psychological perspective and understanding of deviant behaviour. The psychologist would have given me insight inon how they analyse deviant behaviour, the causes of deviance and the causes of re-offending.

3.3 METHODS USED FOR DATA COLLECTION

My research participants were mainly individuals working in the justice system. These were the prosecutors and the probation officers and the NICRO probation officers. Data was collected by using both formal and informal interviews, as well as secondary data such as policy documents and the literature. Fifteen formal in-depth interviews were conducted in total. These fifteen interviews were of

a formal nature and setting²¹. Formal interviews were done by using an interview schedule stipulating the series of questions that I intended asking the research participant, as a way of standardising my questions. These formal interviews gave me clarity on issues that were carried out in practice but were not stipulated in the Child Justice Bill 70 of 2007. The formal interviews were recorded using a dictaphone, with prior permission from the research participants. I then transcribed those interviews onto paper.

Informal interviews were conducted either as follow-up questions or new discussions. Informal interviews were important in three ways: first, they allowed me to inquire from the probation officers about issues relating to diversion or the Child Justice System which I did not understand; second, it gave the probation officers the opportunity to add any additional information; third, it allowed me to pose follow-up questions and generate additional insights as part of my inquiry. Most of the in-depth discussions around the Criminal Justice System and general practices within the system accorded me sufficient opportunity to explore with the probation officers what their perceptions of, and practices within, the Child Justice Bill were and what they think works well, changes needed and what should be done away with completely. Occasionally I used the literature, for example, by Skelton (2005), Skelton and Batley (2006) and Muntingh (2003) that point out the differences in policy and practice and the recommendations of what procedures should be incorporated into the new Child Justice Bill 70 of 2007, as points of discussion with the informants as well as informal discussions. These discussions and the informal interviews were captured in the form of field notes and diaries.

As part of the informal interviews, throughout my research I also had two key informants – individuals who were willing to talk to me openly and discuss issues. These key were probation officers that I knew closely before the research project started through my part-time work with children's homes in the city. These informants proved to be very useful and helpful as they referred me to other probation officers and prosecutors whom I could interview. I also had in-depth discussions with the key informants, on policies and regulations of the Child Justice System and the general practices within the system.

²¹ Formal natural/setting refers to the way in which the interviews were conducted. The interview were conducted in the most natural environment of the interviewee, the environment which they feel most comfortable, in. their everyday environment.

The fact that the justice system is very short-staffed made it difficult for me to conduct as many interviews as desired. Most of the interviews were cut short on account of busy schedules or having to rush back to the court room or attend meetings. The second difficulty I faced was that each time I made an appointment and I ended up waiting for hours for the interviewee to arrive; some did not even arrive at all and if I was lucky they would call to cancel or reschedule. Rescheduling appointments presented further problems, since more often such participants declined another appointment on account of workload. After all that effort, I would be forced to search and approach other research participants from other welfare societies. Apart from these challenges, the interviews were successful and informative, the recordings of the interviews were held in a quiet environment, there were no interruptions during the interviews and there were no problems with audibility.

The dimension of the method employed during this inquiry was the use of secondary data, particularly policy documents and relevant literature. Before and during the data collection stage I perused the relevant literature and policy documents in order to guide my inquiry. The sources I found most useful and relevant were by Roper, diversion programmes and Rehabilitation; the Child Justice Bill of 2002; the Child Justice Bill 70 of 2003; the Child Justice Bill 70 of 2007; the Child Justice Act of 2008; Maepa (2007), Magistrates' and Prosecutors' Views of Restorative Justice; Skelton (2005), the Child Justice Bill from a Restorative Justice Perspective; Wood (2003), Diversion in South Africa, a Review of Policy and Practice. I found these very useful, because they clarified my understanding of diversion, deviance and diversion programmes. Apart from the use of this literature in alerting me and informing me on the finer details of the system and its working, they also became invaluable points of reference for the informal discussions that I had with the research participants.

Wood (2003) gave me insight into the different justice personnel, their relevance, duties and responsibilities. Wood (2003) describes and explains the different procedures within the Child Justice System, for example, the assessment phase and the preliminary inquiry stage. Wood provided an in-depth explanation of the court process. This was extremely useful when I made observations in the court room, because I could follow what was happening and I could understand the different role-players and the legal terminology that is used during court procedures. During my observations, I attended court at 08:00 in the morning. I sat with the prosecutor at his table and listened to all that went on. We have recess at 10:00, break for lunch at 13:00 and the day would end at 15:00. In court r

I was not allowed to record the court hearing on a Dictaphone and I could not record the juvenile offender's name. I was permitted to listen and write down the court process. I made these observations for four months. I could make observations in the court room only, as this was the sole place I was allowed access to.

3.4 ANALYSING THE TRANSCRIBED DATA

Data analysis involved organising the collected data and breaking it down into subsections for analysis. I began by re-examining the 15 transcribed formal interviews of the probation officers and field-notes and diaries from the informal discussions I had had with the probation officers and my two key-informants. Gaining insight into how the probation officers think and assess juveniles and their cases helped shape my perspectives of deviance, diversion programmes and the Child Justice System in South Africa. I organised the data by creating themes and mind maps, then separating the collected data according to these themes. The mind maps were my ideas and questions that emerged during the organisation of the data. I felt it necessary to place these ideas and questions on paper so that I would not forget to incorporate them in the data at a later stage and as a reminder for further inquiry - questions that I should ask the research participants during our discussions.

The themes generated were the Definition and Criticisms of Diversion, The relevance of Diversion, Deviance, the Roles of Prosecutors and Probation Officers. By examining the data I managed to categorise the themes. Through this the themes were developed and refined. The themes I speak of in this chapter were for my personal use at the time, so that I could understand the information. Once I had a good understanding of the information I used other headings in my analysis. These themes emerged from the content of the data. These headings were taken from the themes that I conceived as significant. These themes were to assist me in my understanding and organisation of the collected data.

3.5 ETHICAL ISSUES AND CONCERNS

Two major concerns were anonymity and consent. As I noted in section 3.2, the participants wanted reassurance that they would be kept anonymous. Attempts to ensure confidentiality and anonymity included not mentioning any names during the recording of interviews or afterwards. Instead, I deployed codes for each participant's responses. I went as far as letting the participants decide if they wanted to tell me their names or not. If the participant did not want to give me their names I assured them that it was acceptable, as the ultimate decision was theirs to make. I would then address these participants as sir or madam, as I did not know their names or their surnames and I wanted to ensure that I showed the participants respect at all times. There were two probation officers who wanted to know how they would benefit from the research – more specifically would they get paid for the information they provided. I found it difficult to explain how they would benefit from this research. I explained to them that this research was for my Masters degree. When participants wanted to be paid it presented problems, because these people are very busy and they left their duties and responsibilities to make time for the interview. Not rewarding them could be interpreted as exploitation. The information they give is vital for the research. Maybe research participants could be rewarded in other ways for their contribution, other than monetarily. For example, a box of chocolates or a small fruit basket could serve as a token of appreciation. I did not give the participants anything except my thanks for their time and willingness to talk to me. I did not reward the participants, as I was not sure if it was allowed and I did not want to contravene the ethical code.

3.6 LIMITATIONS OF THE STUDY

During this research I experienced a number of limitations. Firstly, my research participants were mostly made up of probation officers; this is because they were most co-operative and willing to make time for interviews. The probation officers in my study were always willing to be interviewed. They would allocate the time to be interviewed and they would be present for the interviews. The prosecutors seemed to be very busy, as they would agree to an interview and an appointment would be made, but they would not appear for the interview. I would attempt to reschedule another interview but the prosecutors would not agree to another interview. This caused problems because I ended up interviewing more probation officers than prosecutors. This may have skewed the data that I collected in favour of the perspectives of probation officers, whose professional training was likely to influence and inform their response. Frustratingly, it was very hard to get an interview with the psychologist. I

was consistently reminded that she had a very tight schedule and every time I made an appointment she would cancel²². At times, some of the interviews were cut short and often abruptly, which left these interviews short of sufficient exploration of issues and the relevant themes. Even more frustrating was the reluctance of probation officers and prosecutors to reschedule interviews because of their work load and busy schedules. Another shortcoming was the prohibition to interview juvenile offenders.

3.7 CONCLUSION

Chapter Three discusses the importance of qualitative research and the relevance of qualitative methodology to this research. The aim of this approach is to gain a proper understanding of the experiences and opinions of the participants and the criminal justice system. Qualitative research enabled me to collect data from the experts in the field of the Child Justice System - experts being the probation officers and the prosecutors. The qualitative methodology provided me with the skill to organise the data by arranging it according to themes. This gave me an in-depth understanding of the collected data, because I could search for similarities, differences and ideas within the data and develop my understanding further. I could re-examine the data and develop it by asking questions and gaining clarity before I moved onto the next chapters. Through the use of qualitative methodology I gained the opportunity to reflect on my data and re-trace the steps and techniques that I used, allowing me to ponder on why I followed certain stages I could then analyse the responses I got from participants. Qualitative research enabled me to constantly reflect on opinions, impressions, relationships and connections during the data collection stage. I could compare certain statements and theories that were made by the different interviewees.

²² The challenges I faced when trying to get an interview with a psychologist are discussed in detail on page 5 of this Chapter, Chapter Three

CHAPTER FOUR

THE CHILD JUSTICE SYSTEM AND ASSESSMENT CRITERIA FOR DIVERSION

This chapter explores the Child Justice System and the official roles assigned to the justice personnel, as well as procedures and the nature of diversion itself. Through this exploration I sought to provide some insight into the working of the justice personnel, their narratives about their roles, perspectives and the values of the Criminal Justice System. This exploration focuses on two of the major staff categories within the Child Justice System-the probation officers and the prosecutors. My analysis also focuses on guidelines that are stipulated in the Child Justice Act 75 of 2008 concerning how to handle juvenile offenders and what the criteria used to determine eligibility for diversion. Here I argue, determination for diversion as practiced in South Africa are essentially subjective processes that are inevitably influenced and framed by dominant discourses difference and asymmetrical relationships of our society.

Chapter Four is divided into eight sections, each with its own subsections exploring particular themes. Section 4.1 explores diversion, the philosophical foundations of diversion and the different kinds of diversion programmes that are used in the Child Justice Act. Section 4.2 examines the discourses and practices of diversion. It tries to explain how the probation officers understand deviance and the emergence of deviance. This chapter tries to unpack how the probation officer understands deviance. Section 4.3 attempts to clarify the amendments that are made in the New Child Justice Act that was recently passed regarding the age of criminal capacity. This section explains how an age assessment is done on the child and who conducts the assessment. The section explores the logic and practices of the Child Justice System by way of examining the practice of incarceration of juveniles as an option, what happens to imprisoned juveniles and what serves as cause for imprisonment. This section looks at the different methods of sentencing.

Section 4.4 examines the different levels of crime, the seriousness of crime and what happens to juvenile offenders who commit serious crimes such as murder and rape. This section gives a detailed

discussion on the stipulations that are made by the Child Justice Act 75 of 2008 on the importance and the necessity of the child offender having legal representation. Sections 4.5 and 4.6 explore the criteria that are stipulated in the Child Justice Act 75 of 2008 that affect the decision to divert and the criteria that are used by probation officers, in addition to the criteria stipulated in the Child Justice Act 75 of 2008. Section 4.7 discusses at the discrepancies and asymmetrical experiences of juvenile offenders within the Child Justice System. It is my opinion that dominant views and practices that continue to asymmetrically position individuals from different racial and class groups (as well as their intersection) in South Africa are also lurking within the child justice system. As a backbone of this analysis, these sections extract from a brief history of the post apartheid South Africa how legacies of the past continue to affect the youth of today. The conclusion for the chapter is section 4.8.

4.1 DIVERSION AND DIVERSION PROGRAMMES OPTIONS: CHOOSING THE BEST FOR CHILDREN?

Skelton (2009:10) stresses that the Child Justice Bill is guided by principles which seek to protect the child, involve the child and attempt to teach the child the “wrongfulness” of their actions in a more rehabilitative manner. Skelton (2009: 13) lists guidelines which are used to ensure this:

- A. Child offenders are not treated as severely as adult offenders for the same crime.
- B. All children will be given the opportunity to participate in any proceedings, particularly the informal proceedings where decisions affecting him/her might be taken.
- C. Every child will be addressed in a manner that is appropriate to their age group and intellectual development; the child should be spoken to in his/her language and be allowed to speak in his/her language of choice through an interpreter.
- D. Parents or appropriate adults should be able to assist children in proceedings and, wherever possible, participate in decisions affecting them.
- E. Children will all be treated equally. No child will be given preference due to family status or circumstances.

(Skelton 2009: 13)

A decade earlier, Sloth-Nelson (2003) and Sloth-Nelson and Muntingh (2001a) made a similar point concerning the fact that the Child Justice Bill had the intention of protecting children’s rights. For Shaw (1997: 40), the Bill granted children’s rights and protection, over and above those afforded

to them as citizens within the Bill of Rights. Section 28 of the Constitution, Shaw (1997: 40) felt, created a ‘mini–charter’ of children’s rights, giving constitutional weight to certain key rights, as contained in the United Nations Convention on the Rights of the Child (1989). It is relevant to note that Shaw (1997: 40) brings to our attention two of the principles and legal frameworks concerning children’s relations with the child justice system – the Constitution (as a local instrument) and United Nations Convention on the Rights of the Child. Section 28(1) (g) of the Constitution states that:

“Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be I) kept separately from detained persons over the age of 18 years; and II) treated in a manner, and kept in conditions, that take account of the child's age”²³

The consecutive Child Justice Bills (and much more recently, the Child Justice Act 75 of 2008) play a central part in the Child Justice System, as they are used as guidelines that state the policies, criteria and procedures that need to be followed by the justice personnel to ensure an effective justice system for the juvenile offender. All of the different Child Justice Bills make a case for diversion programmes as an alternative as well as for a successful juvenile justice system. Diversion programmes strive to channel young people away from the criminal (and punitive) process to strictly rehabilitative programmes and community based interventions. The appeal for these programmes is that they work with restorative justice and are geared towards rehabilitation that involves the community.

The Child Justice Bill provides a balance between the rights of children and the interests of society. One of the critics of this Bill, Fatima (2007), stated that the Bill is “soft” on child offenders. Nonetheless, the Act discriminates between levels of crimes, such as petty and serious crimes, and diversion is set as an option with such consideration. This Bill allows for petty offences to be diverted and for serious offences such as murder and rape to be dealt with in a more serious manner such as

²³ It is interesting to note that the South African Constitution section 28 (1) (g) defines a child as any individual below the age of 18 years. This would have to be contrasted with the consecutive CJ Bills’ definition of a child.

imprisonment. This stipulation is retained in the Child Justice Act. The Child Justice Act 75 of 2008 section 72 (2) (c) allows for a 25-year prison sentence to be imposed on a child who is found guilty, after trials for committing a serious offence such as murder. This does not qualify as “soft” punishment especially for a child offender.

The Bill-making process is strongly influenced by the notion of restorative justice, centred in the concepts of reconciliation, restoration and harmony. Shaw (1997: 47) associates this with an African way of dispensing justice and adjudication, a concept of *ubuntu* as the values underpinning the juvenile justice system. Show described the legal reform sought in the Child Justice Act, which was initiated more than a decade ago, as Africanising international principles by emphasising family and community. Within the Child Justice System, a probation officer that I interviewed mentioned that diversion is deemed a better option for rehabilitating the juvenile offender’s because the juvenile offender is not incarcerated where they can be influenced by the older inmates and they cannot be harmed by the older inmates. Diversion deals with the root cause of the juvenile offenders criminal behaviour and they undergo therapy. Of course, this cannot be compared with incarceration, particularly considering the state of prisons in South Africa. Incarceration can perpetuate the perpetual problem, when adult prisoners constantly exert negative influences on the minors. In prison the child is exposed to all sorts of criminals. As a result the child could be drawn or coerced and socialized into the deeper criminal world. One probation officer expressed her misgivings about the potential dangers of incarcerating of juvenile offenders:

*“Our main concerns were that ..aah.. when a person goes through the criminal justice system they are then taken to prison if they are convicted, and there they are made into even more hardened criminals than what they are”.*²⁴

Another notable risk of incarceration is that the juvenile offender could be exposed to physical and psychological danger such as sexual molestation, physical abuse and rape by other prisoners. As one of the social workers I interviewed noted, “Prison can be very harsh, especially for these poor kids. They can be raped, beaten up. Is this what we want for our children?”²⁵ Diversion, therefore, is

²⁴ Interview done at NICRO, Port Shepstone, on 20 October 2006.

²⁵ Interview done at the Department of Welfare, Port Shepstone, on the 17 May 2007

considered by probation officers as not only being restorative justice that attempts to address the hurts and the needs of both victims and offenders in such a way that both victim and offender, as well as the community of which they are part, are healed, but also as an option that is sought to keep children from harm.

Most of the research participants expressed the view that prison is not a rehabilitative place for children. There is a belief among most of the probation officers that I interviewed that prison or imprisoning a juvenile offender is not the solution to the problem. In fact, in their view, it may be the start of greater problems. A probation officer from Umzumbe stated the following about the incarceration of juveniles:

“Personally (ah) I feel that imprisoning a child is not a solution because we are not dealing with the problem. Dealing with the problem would be finding out why the child committed the crime. And you know prison equals advanced criminals. I mean, a child comes out of prison having learnt a whole lifetime of new ideas on how to do a housebreaking. That’s not the only thing; just imagine the other criminals that are in there, I mean, those grown men. There was this, I think, documentary that was shown on TV about an ex-prisoner who exposed all the activities that go on in prison and he had caught everything on tape. This older male prisoner had asked a warden to bring him a small boy for R50. I couldn’t believe it; this sick warden actually brought him the young boy and the poor thing was raped. I mean, it made my skin crawl. How could someone do such a thing? These are the kinds of risks that children are exposed to in prison; they can’t defend themselves from being raped.”²⁶

This probation officer mentioned the horrific ordeals a juvenile offender would face in prison. There appears to be a general consensus among the probation officers interviewed that incarceration is an undesirable option and, many of the descriptions they gave on the state of South African prisons do not paint a rehabilitative picture of the institutions. The central point raised by probation officer 5 is that the after-effect of incarceration could be in the juvenile offender re-offending. This is evident

²⁶ Interview done with probation officer 2 at Umzumbe on 3 April 2007

from the number of child offenders she has dealt with. These child offenders were incarcerated and she found that many of them re-offended. Probation officer 5 deems the experience of imprisonment as one that is likely to create a hardened and hate-filled repeat offender. This experience affects the juvenile offender in a physical and psychological way (and others would add adults as well).

“It kills me that this is happening. Children are children we need to teach them not kill their.....eh.....spirits and make them worse. Uyazi²⁷, I have dealt with children that have been imprisoned as a result of this..... eh.....ngingathin²⁸;i incarceration, the child becomes worse off than s/he is. Most of these imprisoned youngsters actually re-offend and they keep at it. ...eh.....I believe prison is not the right thing for children. Now that you mention it the number of ingane there is shocking.”

Probation officer 5 is strongly opposed to the incarceration of child offenders. She stated that this is because she has dealt with large numbers of child offenders who have been both diverted and those incarcerated. She said that she has observed that imprisonment does not rehabilitate a child, but instead causes a child to re-offend; this is because, instead of the child being taught something constructive in prison, they are being exposed to other criminals and from this exposure the child offender learns new ways of committing crime.

Probation officer 1 spoke out against prison sentences for first-time offenders and suggested alternatives:

“Before such children would be sent to prison, they would serve something like 2-3 months or even more in prison because their offence is so small it doesn't warrant them getting into any programme that is offered in the prison. So they are just sitting there in those prisons serving time. On the other side, diversion makes people take responsibility of their actions”²⁹

²⁷ See page 133 for the translation and meaning of Zulu words.

²⁸ See page 133 for the translation and meaning of Zulu words.

²⁹ Interview done with probation officer (1) from NICRO, Port Shepstone, on 20 October 2006.

One can discern from the above assertions that these probation officers feel that the experience of prison is traumatic and unnecessary, because it does not serve the aim of restorative justice (which is claimed to be the thrust of the Child Justice System) and a mechanism of rehabilitation. Instead, in their view, it is likely to create and develop the juvenile offender into an adult criminal.

Each time probation officers used the word ‘child’ they were referring to children between the ages of 14 years and 18 years. Probation officers push for a child offender to be diverted because they believe that diversion is the only viable and effective option and it serves the purpose of rehabilitation. Imprisonment, to them, does not serve the purpose of rehabilitation, but instead places the child’s life at risk and exposes the child to dangers such as rape or physical abuse and exposure to learning criminal activity. From the interview extract of probation officer 5 and other interviews, it is clear to see that probation officers still see the child offender as a child, even though they might have committed a crime, and no matter what the seriousness of their crimes, these children still need to be treated as children. They deserve the protection of the Criminal Justice System. As I will argue in the subsequent section, what drives practices and decisions within the Child Justice System, therefore, is the construction of children, as bodies deserving to be taught the moral ethics of society and deserving to be given the chance to rehabilitate and change.

The Child Justice Act 75 of 2008 provides a new set of rules concerning the way in which children are dealt with in the Child Justice System. Skelton (2009: 5) advised, before the Act was passed, that juvenile offenders went through the Child Justice System in terms of the Criminal Procedure Act, which is used for adult offenders and therefore had very few provisions for children (2009: 5). Somewhat differing from the earlier versions of the Child Justice Bill, the Act stresses the importance of the first 48 hours of the child’s arrest. The Child Justice Act 75 of 2008 has introduced the procedure of the preliminary inquiry and made this procedure compulsory for all child offenders. The Act is designed in such a manner that restricts and prevents children going through the Criminal Justice System and so very few children would be referred to trial. In order to achieve this, the Child Justice Act has introduced Juvenile Courts. Juvenile offenders have a separate court room from the adult offenders. The juvenile offender does not come into contact with the adult offender, thus protecting the child offender from bad influences and from psychological trauma. The Act intends to speed up the process of inquiry and referral using these arrangements. The child is thus expected to be

immediately assessed after arrest and is then taken to a preliminary inquiry at which a magistrate presides, in the presence of the prosecutor and probation officer. This is where a decision is made if the child really needs to go through the Criminal Justice System or if they could be diverted to other programme through which they could be held accountable and be taught valuable lessons, but without having to actually come into contact with the Criminal Justice System and by so doing avoid a criminal record (Skelton 2009: 10).

The purpose of the preliminary inquiry is to establish if a juvenile offender can be diverted and, if so, a suitable diversion option for the juvenile offender is selected. Before a child makes an appearance at a preliminary inquiry he or she needs to be assessed by a probation officer. Skelton (2009: 12) states that the assessment which is done by probation officers is to serve a number of purposes:

- A. To determine the age of the child or to give an estimation of the child's age
- B. To establish the prospects of diversion.
- C. To establish if the child is in need of care.
- D. Preliminary inquiry is important so that the magistrate and prosecutor can make a recommendation relating to the release or detention of the child.
- E. If the offender is below 10 years of age the assessment determines how the child could be dealt with.

(Skelton 2009: 12)

As Maepa (2007: 33) points out, diversion programmes are educative, and provide social and interpersonal leadership and life skills. One should ask here, should that be what society must accord children in the first place, before one walks this road? If part of the motivation for diversion is that it is educative and provides essential life skills, one senses the apparent admission that these are absent as a regular provision for all.

Kuhn (2000:38) provides an exhaustive list of the philosophical foundations and aims of diversion programmes:

- ❖ To prevent the child from being kept in prison and/or police cells and to keep the child out of the mainstream criminal justice system.

- ❖ Young people should experience diversion as a turning point in their lives within the context of their developmental and ecological needs, so that a positive attitude to society's legal and authority structures can be developed.
- ❖ Diversion aims to shift from a retributive-oriented approach to a restorative justice approach.
- ❖ To increase appropriate early intervention programmes and decrease prosecution and sentencing.
- ❖ To make offenders responsible and accountable for their actions
- ❖ To provide an opportunity for reparation.
- ❖ To identify underlying problems motivating offending behaviour
- ❖ To prevent first-time or petty offenders from receiving a criminal record and being labelled as criminals, as this may become a self-fulfilling prophecy.
- ❖ To provide educational and rehabilitative programmes to the benefit of all parties concerned.
- ❖ To reduce the case load of the formal justice system.
- ❖ To present development programmes for families in order to empower and enable them to take responsibility for their own lives and behaviour.
- ❖ To gain the support and involvement of the communities to motivate them to take responsibility for their children and to receive them back into community.
- ❖ To ensure that each child in conflict with the law will be assessed and attended to with an appropriate individual developmental plan.
- ❖ To involve the parents in the programmes to enable them to support their children's taking responsibility for their behaviour.

There are five national diversion programmes, each dealing with certain issues and addressing certain dimensions of the considered problem. These are as follows:

- ❖ Youth Empowerment Scheme (YES): The YES programme is an eight week intensive life-skills programme. Life-skills courses are conducted during weekends/ weekdays. During these courses attention is given to: self-image, decision-making, assertive behaviour,

parent-child relationships and consequences of a criminal record. Parents or guardians participate in the first and last sessions. The programme can be used as a pre-trial diversion or as part of a postponed sentence.

- ❖ Community Service: By involving young people in conflict with the law in community service for a specific number of hours ensures that they are diverted away from the criminal justice system and that they take responsibility for their actions. Community service allows young people to serve a certain number of hours in the community, in a placement of which the nature is directly or indirectly related to their crime. NICRO monitors the performance of the client and reports to the prosecutor. The young person has the opportunity to atone for his or her transgressions by repairing in a symbolic way the wrongs committed through the criminal act.
- ❖ Family Group Conference (FGC): The aim of the FGC is to involve young people in conflict with the law in a family conference where, together with their family members, the victim and the other role-players the problem areas related to the young person's life, including difficulties he/she may be experiencing, are discussed and a programme of action decided upon. When the victim and offender meet in a mediation process, the impact of what has happened can be discussed and a negotiated agreement can be reached. The agreement includes how "to put right". The FGC gives the youth the opportunity to restore the balance caused by the crime.
- ❖ Journey: The journey programme is a long-term hard-hitting diversion programme using concepts of rites of passage. Youth are faced with strong challenges, in order to alter their past and work towards a better future. An aspect of the journey is a wilderness experience. The focus is on young people and personal transformation, whereby they are given the opportunity and means to develop a constructive and healthy life-style.
- ❖ After-Care Services: After the completion of the programme, support and guidance are given, either by a NICRO social worker, to assure and enable the youth and the family to reach their set goals. After-care services are rendered for a period of three to nine months, according to the needs of the youth and the family. Youth are encouraged to participate in community upliftment programmes.

(Extracts from the Child Justice Bill 70 of 2007)

The Child Justice Act 75 of 2008 Chapter 8 section 53 has implemented eight new diversion programmes. The new diversion programmes are as follows:

- ❖ Developmental Life Skills Programmes: Diversion programmes in this category include a range of life skills such as personal growth, communication skills, conflict resolution, sexuality, crime awareness and prevention, gender sensitivity, leadership and family life. This diversion programme seeks to give the child a sense of belonging to the community they came from.
- ❖ Peer/Youth Mentorship: This diversion programme makes use of peers, the youth and adult mentors from the offender's community. These mentors are youth leaders, in the sense that they are assigned to a child or a young person and they develop a unique relationship with them. In other words, they become the child offender's big brother or sister as they offer the child guidance and friendship. These mentors have the responsibility of being accountable, because they have to report back to the programme manager on the progress of the child.
- ❖ Wilderness/Adventure Therapy Programmes: This programme offers an outdoor experience to the child offender. Through this experience the child learns leadership skills and is given therapeutic support.
- ❖ Counselling/Therapeutic and Treatment Programmes: Many children who commit crimes have behavioural problems and are in need of intensive counselling. The counselling serves to address the emotional and behavioural problems that the child offender has to face. This diversion programme is primarily for sexual offenders and for children who abuse substances, because it offers treatment.
- ❖ Specialised Family – Based Programmes: This programme is family-based. The child offender is placed back with the family, but the family receives specialised support and education on how to improve family dynamics. These services are referred to as Intensive Family Support Services or Family Preservation services. The family support personnel have the responsibility to report to the court on the progress the child and family is making.
- ❖ Foster Placement: This is also a family-based diversion programme, the only difference is being the child offender is placed with foster parents. This type of foster care is referred to

as Professional Foster Care. This placement is temporary and it is for children with serious behavioural and emotional problems who need to be placed with families, but whose own families are not in a position to deal with. These professional foster parents are individuals who are trained in child care strategies. These professional parents have the ability to deal with the challenges that the child offender may present and they are in a position to supervise some of the court orders.

- ❖ Victim Empowerment Programme (VEP): This programme allows for services to be given to the victim of crime. This programme offers services such as court preparation and officials who provide support to crime victims, especially abused children, in preparing them for court proceedings. This programme is to assist victims of crime. The juvenile offenders have to face the victim of their crime. This results in the juvenile offender reflecting on the consequences of his/her actions.³⁰
- ❖ Say Stop Programme: This is a six-week programme. It is designed for children who confess to their criminal activity. Children who are sent to this programme do not go to court.

(Child Justice Act 75 of 2008 chapter 8 section 53)

The Child Justice Act 75 of 2008 encourages the practice of diversion to involve the participation of the family and the community of the offender in his/her rehabilitation in order to encourage family and community participation. These are the diversion programme that have been implemented. This is to be observed through the diversion programme that have been implemented and are operational. For example: the Developmental Life Skills Programme and the Peer/Youth Mentorship Programme: These programmes involve community participation in the process of rehabilitation of the offender, because they have young women and men from the community acting as brothers and sisters or mentors and friends to the child offender. This is meant to give the child offender a sense of belonging to the community they came from and provide him/her with mentorship and guidance, support and respect. The Family-Based Programmes serve the purpose of teaching the parents of the

³⁰ The Act makes provision for the consideration of the impact of the offences on the victim by means of a victim impact statement, that is delivered by the victim or someone authorized by the victim. This statement serves as a reflection of the physical, psychological, social and financial and/or any other consequence that the victim suffered at the hand of the offender. This process is deemed to facilitate healing and reconciliation between victim and offender.

offenders parenting skills. They seek to improve the relationship between the offender and his/her family and preserve the family. These are expected to revitalize the family as an institution, and what is clear is the presumption that deviance and criminality creeps-in as a result of “dysfunctionality” of families and absence of parental guidance or parenting skills. Family and community thus, in principle, occupy a central space in thinking about diversion. This follows Skelton’s (1995:38) advice, at the early stages of the programme, that diversion should incorporate a variety of strategies from school-based crime prevention programmes through to community-based programmes used as an alternative to custody. The greatest change that I have observed in the Child Justice Act 75 of 2008 is the emphasis placed on counselling and therapy, which was not explicitly stated and stipulated in the different versions of the Child Justice Bill. Diversion programmes such as Counseling/Therapeutic Programmes are concentrated on dealing with the child offender’s emotional and behavioural problems. The behavioural and emotional problems are dealt with one-on-one in the form of therapy.

Despite the varied philosophical roots and practices of diversion, it is believed by probation officers to promote more humanitarian and less stigmatizing responses to child offending than punitive sentences. Skelton and Batley (2006:22) suggest priorities in developing mechanisms to ensure that this occurs in a just and consistent manner. Apart from the apparent positive attributes of diversion, its philosophical basis and progressive takes, both in its discourse and practices, remain to be a mere facelift of the Child Justice System that do not fundamentally address the underlying problems and challenges, what Barberton (2009) identified, “structures of power, control and legitimacy”. Instead, one is confronted with the problem of society’s reproduction of criminals and what Pitts (1990) called ‘ideological device’, sustained by this very apparently progressive practice. I try to redraw this argument in the following section, by focusing on the discourses and actual practice of diversion.

4.2 DISCOURSES AND PRACTICE OF DIVERSION BY PROBATION OFFICERS/PROSECUTORS

The prosecutor and the probation officer need to communicate and work closely with each other in order to ensure the best possible rehabilitative course for the juvenile offender, with the view in mind that the central theme within the Child Justice System is the rehabilitation of the offender. Therefore, in principle, the decision that the prosecutor makes has to be rehabilitative to the juvenile offender;

which in this case is diversion programmes. From the interviews I conducted with the prosecutors it was quite clear that the prosecutors are in favour of diversion the a best option that is rehabilitative for the juvenile offender. One example of such options can be found in what one of the prosecutors I interviewed said:

OK.. Diversion is ..eh.. basically diverting the juvenile offender from the Child Justice System. If the, the child is found guilty he or she is not branded by a criminal record. Eh.. in other words they are not followed by a criminal record so ..eh.. we can say that they are given a fresh start.³¹

Similarly, others have used words like “new chance” and “new lease on life” that diversion offers to the juvenile offender. Here expunging a potential criminal record is described as affording the juvenile offender a “clean slate”, “clean page to start over” or “fresh start” and, more to the point, “their wrong act is scrapped”. When an offender has been diverted he or she is not given a criminal record. This supposedly enables the juvenile to make a “new start”. The Child Justice Bill 70 of 2007 stipulates the expungement of criminal records. Expungement³² of criminal records applies only to limited cases, excluding serious and violent offences. If a juvenile offender has committed a serious crime such as kidnapping, armed robbery or rape, the criminal records of these offenders are expunged after five years in accordance to the clause 81 (4) of the Child Justice Bill 70 of 2007. For petty offences, a far shorter period for the expungement of the record is given. This is deemed important, as the period concerned is the one during which the child is often seeking employment or admission to educational or vocational programmes and having a criminal record at that time is most likely to be prejudicial to the young person’s life.

This realisation grew against the backdrop of the high levels of violent crimes. Diversion gives the majority of children charged with petty offences or non violent offences a chance to make up for their mistakes without being labelled and treated as criminals (Shaw 1997: 60). According to Shaw (1997: 60) the Child Justice Act 75 of 2008 stipulates, and makes it clear to the public that they would be protected from juvenile offenders who have committed serious, violent crimes. According to the Child Justice Act 75 of 2008 section 10 it is the duty of the state to protect its citizens but at the same

³¹ Interview done with Prosecutor 1 at Port Shepstone Court on 21 June 2007

³² Expungement is the withdrawal of criminal records of juvenile offenders, once they have served the sentence given to them by the magistrate for their committed offence.

time not infringing on children's rights. Expungement of records allows the juvenile offenders to make up for their mistakes without being labelled and stigmatised as criminals. One prosecutor draws a contrast between punishment and rehabilitation, diversion and incarceration, which resonates with these sentiments:

*You got to look at the purpose of diversion, I mean what is the sense of punishment, or punishment as you put it if it messes up a person even worse than before. I mean we got to be more concerned with rehabilitation not making a person pay. At the end of the day, yes the person has paid but what effects will his incarceration have had on society will this person change or will he be worse.*³³

From this quote the conclusion that can be drawn is that prosecutors view diversion as being rehabilitative. The main aim of sentencing has to be rehabilitative. It should be noted by society that whatever the argument is, diversion is meted out as a way of teaching and punishing a child offender, at the simultaneously. In this sense, diversion programmes are expected by probation officers and prosecutors to teach and instil new moral codes and practices in the child offender. According to Barberton (2009:40), diversion has the following purposes:

- ❖ Encourage the child to be accountable for the harm caused
- ❖ Meet the particular needs of the individual child
- ❖ Promote the integration of the child into the family and the community
- ❖ Provide an opportunity to those affected by the harm to express their views on its impact on them
- ❖ Encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm
- ❖ Promote reconciliation between the child and the person or persons or community affected by the harm caused
- ❖ Prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system.
- ❖ Prevent the child from having a criminal record.

(Barberton 2009:40)

³³ Interview done with prosecutor 2, Port Shepstone Court, on 10 April 2007.

Enrolment into a diversion programme for the juvenile offender only comes with the admission/acknowledge of guilt. For example, during the assessment phase the probation officer has to interview the child offender and the parents of the child in order to determine the root cause of the problem, or the root cause of the child's deviance, so that the probation officer can recommend an appropriate diversion programme for the child. Primarily, punishment has to have a rehabilitative effect. To some justice personnel incarceration is not rehabilitative for a juvenile offender. The question often raised by the justice system personnel is: yes, it is punishment, but what would the child have learnt from the experience of being incarcerated? Will the child have learnt to deal with their problems or will the child have learnt other ways of committing crime?

The response to these questions is clear, not only in the officer's discourse, but much more evidently, in their practice. Probation officers usually aim at getting the child diverted because, they believe, it is a way of removing the child from the "harshness"³⁴ of the criminal justice system; by so doing, young offenders, they argue, are given a "second chance in life", not so much by creating a new foundation and environment, but, rather, a "new opportunity", defined by the absence of a criminal record. The formative understanding is, as it appears, that the child's future should not be destroyed by the crime committed. The possibility of rehabilitation is provided in a "conducive environment". This assertion is captured in the statement made by one of the probation officers:

*Diversion, like many other things, works for people that make it work for themselves. Personally, diversion is rehabilitative punishment. People are given the opportunity to be taught or re-taught the difference between right and wrong, but most importantly the child's future is preserved, the child is not branded a criminal and stuck with a criminal record, instead the child has opportunity to learn from their mistakes. Its like the child is given a clean page to start over.*³⁵

Diversion is thus characterised as "rehabilitative punishment", but with a qualification that it only works for those children who want it to work for them. In a casual conversation I had with another

³⁴ This description is used to capture the inhospitable and non-rehabilitative conditions of the correctional services of the country and it stands in contrast to the perceived "conducive environment" available in diversion programmes.

³⁵ Interview with probation officer 1 at NICRO, Port Shepstone, on 20 October 2006.

probation officer, she employed a narrative of the variation and uniqueness of every child (and each case), to explain the variation in the success and effectiveness of diversion. She spoke about the uniqueness of every child and the cases that they deal with in the system. She pointed out another telling point: diversion works; it is rehabilitative, but it does not work for every child. The reason for this is that some children understand the wrongfulness and the seriousness of their crimes and they absorb what the programme teaches them and through this they are willing to learn and change. In contrast, she continued, some children do not understand the seriousness of their crimes and “may view diversion as getting off lightly.” The truism that every child is different somehow provides a simplistic justification for success and failure of cases referred to diversion programmes. This does not try to explain and analyse factors compounding each case, or the socio-economic context in which each child is located. The fact that all children are unique and special therefore claims that some children easily learn from their mistakes, whereas other children learn in other ways or possibly are in need of a somewhat harsher sentence in order for them to fully understand the wrongfulness of their actions. The “duality” of the same story of diversion and wronged experiences are simplistically characterised by agency rather than structures of society.

Both probation officers and prosecutors seem to have a very positive outlook on diversion and its rehabilitative properties and purpose. Despite the similarity in the narratives of diversion from justice system personnel, not all narratives are the same. There are somewhat contrasting views as well. Here are examples of two contrasting views extracted from two interviews:

View No.1:

Q: How do you feel about diversion?

PO (9): It can be both good and bad. It can be good if you are dealing with a child who is truly remorseful and wants to learn and change. I feel it is bad when dealing with a child that has no remorse at all. Because what are we saying through this diversion to this child – it is ok to carry on doing what you’re doing and we will put you in a nice little group where you get meals and attention. By doing this aren’t we encouraging criminal actions?

Q: Are you saying that diversion is soft punishment or not punishment at all; therefore it is the law makers of diversion that are encouraging criminal activity?

PO (9): Yes, that's what I think

Q: Would you feel the same way if heaven forbid one day your child so happened to break the law?

PO (9): I might

Q: How do you feel children should be punished?

PO (9): I think that we should invent more effective of dealing or punishing our children. The children are our future; what kind of future will we have if we treat or handle these children with gloves?³⁶

View No. 2:

Personally diversion means protecting the child from the harshness of the justice system. Removing the child from that, finding alternative ways of punishing the child, a more rehabilitative way of punishment....ah...such as what NICRO does.³⁷

While View No. 1 the unproductive and unjust nature of the apparent restorative justice, the second claims positive element to it. It is worth noting that the first view tries to qualify the selection criteria and insists upon “remorse” as an essential condition and dismisses diversion for its lack of effective punishment of offenders for their crime. View No. 2 underlines the importance of diversion as a rehabilitative programme. How do such varied discourses, as captured in these contrasting interpretations of the system and its legislation, shape the children’s encounter with the justice system? How do these produce differential practices and treatments, depending on which probation officers wait for each case? The one emphasises the agency of children – remorse, their willingness to change etc., as central conditions and uses these as deciding factors whether to refer the child for

³⁶ Interview with probation officer 9 on the 15 May 2007

³⁷ Interview done with probation officer 2 on the 3 April 2007

diversion or not. The other, in some ways, adopts the view that failure of the system and society to provide the children with consideration and sufficient guidance is at the heart of this problem. The response is to consider diversion at all possible moments.

Throughout the interviews, the latter seemed to be the dominant view among the probation officers. They tend to be protective of the children and have a hopeful outlook concerning child offenders. Perhaps is the result of their professional training as social workers. A social worker's role, as defined by the profession, is to protect human rights, to help people help themselves, to protect children by removing them from or changing bad circumstances these children may find themselves in (these circumstances are often noted as neglect, abuse, violence and crime) in order for the child to have a bright future and better possibilities. This is evident in the above quotes from the NICRO probation officer and View No. 2 stated by a probation officer from the Department of Social Welfare. The social construction of "the child", presumed to have limited agency, seems to influence many of the probation officers I interviewed; hence, even if a child commits a crime they are still regarded as children and they still need to be protected and taught what they have done wrong.

Many of the probation officers I interviewed argue that a juvenile offender is never born a criminal or born with behavioural problems; instead it is circumstances that the juvenile offender finds him/herself in that are likely to produce and reproduce the "bad" behaviour – what is deemed a criminal act. Some of the probation officers consider the juvenile offenders criminal behaviour as "a cry for help". Probation officers are trained to look for the underlying problems in a child offender. They are trained to look for factors such as environmental factors or psychological problems that may lead or cause a child to offend. Committing a crime might be the child's way of dealing with the problem, it may be the only way a child has to voice his or problems or frustrations and be heard. For example, a child might be molested at home and they do not know who to talk to or how to deal with the problem. The child might end up voicing their frustration and depression through their behaviour. This frustration and depression may cause a child to have behavioural problems – he or she may become a problem child. Through such behaviour a parent or a teacher may pick up on the change and send the child to a social worker or a counsellor. It might then be discovered that the child is behaving in this manner because they are being molested and not because they are naughty. The behaviour was because the child could not handle and cope with what was happening to them and the behaviour

became an outlet for that frustration. A child committing crime or being deviant may be an outlet for the problems that the child has encountered. It could be that the child may not know how to cope with the problems. The criminal behaviour could be viewed as the child asking for help. One can consider this probation officer interview extract for such a discourse:

I think it's a holistic kind of way of looking at things, because we look at why do children steal I mean our programme affords children that opportunity. You have to dig deep in that child's background....em.....because we have some from poor families or if we have some well of children that do steal, you know...em....so, we, we, want to know why they are stealing, you know and so we found a lot of things, but maybe it's a poor background or maybe it's a rich background that the child is looking for attention, they are feeling like they are being ignored at home. Maybe their parents work and they travel a lot and the child is left with the nanny or there are just some other things, there are underlying reasons for the child committing crime. You know, so for us it's more like the child is crying out for help, that I need help, you know. So.....em....so that one I think that's the way we fit in by diverting those children....em....moving them away from the Criminal Justice System at the same time ensuring that they do take responsibility for their action.³⁸

The fact that probation officers believe that a child is never born a criminal, or the fact that they abandon the ideology of the “born criminal”, expresses their perspective of deviance. This belief highlights the fact that some of the probation officers view deviance as emerging from external factors or problems that encourage a child to deviate from the norm. It is notable that most of the probation officers who participated in this research believe that children offend due to circumstances they find themselves in. The following quotations capture this point:

You get children that offend because of certain circumstances that are beyond their control for instance street children. They have no where to go and thus you find that they may steal food because they need to survive or better yet snatch a handbag because they want money to sustain themselves.³⁹

³⁸ Interview with probation officer 1 at NICRO on 20 October 2006

³⁹ Interview done with probation officer 3 at Oshabeni on 17 May 2007

What drove him..eh...you know lenth⁴⁰ poverty can lead a child to commit crime, because of frustration and the child wishes for something he/she doesn't have. Most kids that come here are poor they do lenth because they want things, does this make ingane⁴¹ bad noma⁴² is it amacircumstances⁴³? ⁴⁴

When you ask the parents you find that the parents are working and these children get all they need. You find that they stole clothing from the HUB because they want what their friends have or they want to look better than their friends. Even worse, you find out that the child is in a gang they use all these substances you can think of glue, pills, cough mixture, alcohol, just to get high. Then they do all these horrible things.⁴⁵

Probation officer 4 explains the fact that when a child offends a probation officer needs to look beyond the offence and assess the circumstances under which such acts took place. What is highlighted here is that the probation officers seek to find out what drove the child to commit the offence. The probation officers explore and assess the external factors, the circumstances of the child and the context that drove the child to commit the offence. The external factors and circumstances of the child are of utmost importance. The most dominant themes that keep emerging from interviews I had with probation officers, captured in these three interview extracts, are poverty, lack of sufficient supervision, a disenfranchised family setting and peer-pressure. In the first and second extract a child offends because of poverty, they steal money or food in order to sustain themselves. In the third extract, on one hand the absence of parental guidance was noted and, on the other, a child offends due to wanting things that their peers. Lastly a child may offend because of substance abuse and negative influences. These probation officers are saying that the reasons that may encourage a child to offend could be beyond the child's control. These probation officers are saying that once you get a picture of the underlying problem you begin to understand that a child offending does not mean that a child is

⁴⁰ See page 133 for the translation and meaning of Zulu words.

⁴¹ See page 133 for the translation and meaning of Zulu words.

⁴² See page 133 for the translation and meaning of Zulu words.

⁴³ See page 133 for the translation and meaning of Zulu words.

⁴⁴ Interview with probation officer 4 at the Department of Welfare in Port Shepstone on 4 April 2007.

⁴⁵ Interview done with probation officer 5 at Umzumbe on 20 May 2007.

“bad”. Instead it means that they do not know how to deal with the problem; they do not know how to cope with or handle the frustration of being in that situation. The themes that emerge from these extracts are how the probation officers understand deviance and crime, which, in turn, shape their assessment of cases for diversion. I intend to explore these themes below. The following sections describe the discourses of diversion.

4.2.1 POVERTY AND FAMILY CIRCUMSTANCES

Probation officers reported that the child may come from an impoverished family, where the parents cannot afford to take proper care of the child; in other words, the parents cannot afford to give the children three meals a day and/or provide guidance. As a result the child may be placed in a desperate situation or the child may lack a sense of direction, often leading to crime and deviance. Probation officer 6 stated that most of the children commit crime due to poverty. According to him, the need to survive is primal and, as a result, children will steal food to satisfy their hunger. Probation officers 6 and 4 noted that poverty gives a child a feeling of helplessness. The fact that the child has nothing results in the child experiencing frustration and they will therefore end up committing an offence. For probation officer 6, “most of the time it is poverty. Poverty equals frustration. These are the children that really need diversion.”⁴⁶ Such discourse, on the surface, appears to imply that children coming from difficult socio-economic backgrounds earn sympathy and are thereby potentially diverted (of course, with consideration and assessment of what is regarded as the “seriousness” of the crime).

Such discourses are also sustained by social science research. A study conducted by Louw (1997: 52) in the Northern Cape in July 1997 on contextualising crime and poverty shows how crime affects the poor in significantly different ways. Louw (1997:52) feels that violent crimes such as murder, assault, rape and child abuse are all characterised by alcohol and poverty. For the majority of people living in the Northern Cape, unemployment and poverty are seen as the fundamental causes of crime. In a National Victimization Survey in South Africa, factors such as unemployment, poverty and illiteracy are noted as root causes of crime. Lack of recreation and entertainment for the youth are also believed to be causes of crime, as these youngsters use alcohol excessively to relieve boredom. This is also said to be a key factor contributing to criminal behaviour. Unemployment in the Northern Cape is

⁴⁶ Interview with Probation Officer 6 in Hibberdene on 15 May 2007

below the national average of 19 percent⁴⁷. As a long-term sustainability concern, the province has the second lowest economic growth rate in the country. Poverty and unemployment are associated with the perpetuation of all crimes, as these are often deemed the contexts within which crime occurs. Louw (1997: 52) explains that the high rates of juvenile crime in the Northern Cape are associated with the socio-economic context. In such context, crimes involving juvenile offenders and children as perpetrators are exceptionally high and the involvement of juveniles in crimes such as rape, murder, sexual offences and assault are also relatively high. As Louw (1997; 52) records, these rates are at 12.5 percent, which is well above the national percentage of 5.5 percent. Most of the violence takes place within the context of the family or the community, violence among friends, family members, women and children (Louw 1997: 52). I made reference to Louw's (1997: 52) study not only because it explains the effects poverty and substance abuse can have on juvenile offenders, but it also assesses the potential such works have to inform and reinforce the justice system personnel's discourse.

According to Louw (1997: 53), the life of black people in South African society is one of economic inequalities. These economic inequalities exist between black and white people and, one may add, considering recent developments, within black communities. The majority of the black people's communities, Louw (1997: 53) argues, are represented by bad housing, poor job prospects and inequality in education. These inequalities are maintained through institutions such as education and the law. Due to these economic inequalities, a vast number of black people are unable to maintain a decent standard of living and provide for their families in the way they would like to (Louw 1997: 53). Louw (1997: 53) describes the situation of poverty that most South African people find themselves in. These are the conditions of poverty that the probation officers are referring to when they say that poverty may lead a child to commit a crime. The crime is committed because a child may have no other alternative and circumstances are beyond his/her control. Crime may be the only way a child can find food for themselves and their families.

Pitts (1990:24) states that, "there are a number of environmental factors which work together in causing delinquency, such as the broken home, lack of discipline, bad companionship, lack of organisation of leisure time, economic factors, to name only the most important items. These are linked with the incident of delinquency". The claims of Pitts and Louw and others on factors related

⁴⁷ This set of data goes back to 1997, when Louw's research was done.

to incidents of delinquency have led to a shift in emphasis from concentration on the punishment of the offender to the examination of the social conditions which have produced the juvenile offenders' "criminal behaviour" and "antisocial personality". Robert Merton (cited in Lundman 1984: 123), insisted that society is to blame for crime, because it sets rules and encourages individuals to pursue goals, which may not always be obtainable because of society not always providing the individual with the means to obtain them legally. According to Lundman (1984: 123), the individual is faced with two choices to commit crime or not. In today's society material success and wealth is highly desired and what is characterized as middle-class aspiration. As a result, people strive towards achieving this aspiration. Most individuals who are unable to achieve this or acquire the wealth and goals through legitimate means, in Merton's sense, would possibly resort to acquiring those goals through illegitimate means. Merton stresses that if the goals are not equally achievable through an accepted mode, then illegitimate means might be used to achieve the same goal this results in crime (cited in Lundman 1984:123).

Social Science research presents these theoretical explanations, which can inform and reinforce the daily narratives of the justice system's personnel. The probation officers spoke of child offenders committing crime because of external factors or circumstances beyond their control, poverty being one of these circumstances. These common sense explanations, appears to agree with Merton's explanation, that society sets these goals that are not equally achievable to all through legitimate means. Some people may thus resort to illegitimate means to achieve these goals (Merton cited in Lundman (1984:123). Merton points out that not all people have the resources to sustain themselves or the resources to acquire certain things in life. Because not all people have an equal footing in life or find themselves in a position to help themselves, people may turn to crime. There is a striking similarity between the probation officers' understanding of deviance and the social science research and theoretical works, which reinforce one another.

4.2.2 PEER PRESSURE

Peer pressure is identified by probation officers as a potential contributor to juvenile delinquency and crime. Peer pressure, within sociology, is treated as an important factor shaping individuals' actions and behaviours. It contributes to crime in the sense that some juveniles commit serious or petty crimes just for the sake of fitting in with their peers or to be identified as part of a certain peer group (as is often the case with gangs). Probation officer 5 indicated that most of the children that she assessed in the Umzumbe area committed crimes because they wanted to fit in with their peers and be part of a gang. These children, she insisted, did not come from poverty stricken homes and, in most cases, their parents worked and provided for their children, but could only afford the essentials and not accessories or luxuries. As a result, in order to fit in with the rest of the crowd these children would steal clothing or other goods from shops so that they could be like their friends – their peers. Probation officers 5 stated:

When you ask the parents you find that the parents are working and these children get all they need. You find that they stole clothing from the HUB⁴⁸ because they want what their friends have or they want to look better than their friends. Even worse, you find out that the child is in a gang they use all these substances you can think of glue, pills, cough mixture, alcohol, just to get high. Then they do all these horrible things.⁴⁹

This narrative represents the desire of juvenile offenders' for a sense of belonging and an urge to be accepted by their peers. In order to achieve this they have to dress in a stylish way, have certain "cool" gadgets and act in a certain way. At the same time, the above narrative alludes to absence of the means to acquire all of these possessions that give them status. Subsequently, the need these children have for status and approval from their friends is identified as a factor contributing to juvenile crime. Such explanations, in-as-much as they are informed by what can be identified as expert knowledge and experiences, operate with simplified but necessary generalizations. The impulse to fit in is noted as a source of frustration, because they do not have the means to acquire the assets that award a person that kind of status or approval. As probation officer 5 explains, it is this frustration that encourages a child to commit an offence. This generalisation allows capturing the

⁴⁸ A clothing chain store across South Africa.

⁴⁹ Interview with probation officer 5 at Umzumbe.

reality that these children face, without entering into the complexity and complicated nuances an everyday experiences.

Theoretical works explaining this situation are abundant and perhaps feed into and provide the conceptual tool to this expert knowledge. For example, in sociology, frustration is generally regarded as an aversive internal state due to goal blockage or any irritating event. As Cohen (cited in Hirschi 1969: 78) put it, frustration due to lower status origins would appear to be associated with more serious repetitive offending. Cohen (cited in Hirschi 1969:79) found that delinquency among youths was more prevalent among lower class friends, and that the most common form was the juvenile gang. Cohen is saying that all youths want social status, but not everyone can compete for it in the same way. Cohen (cited in Hirschi, 1969:79) argues that subcultures emerged out of class-based status frustration, resulting in malice and opposition to those of the dominant culture. The causes were rooted in class differentials, parental aspirations and school standards, given that the position of a family in the social structure determines the problem the child will later face in life. They will thus experience status frustration and strain and adapt into either a corner boy a college boy or a delinquent boy (Cohen cited in Hirschi 1969:79). Delinquent boys band together for no real purpose except to establish peer status and consolidate group loyalty. For Hirschi (1969:88), the importance of friendship is to help deal with a common problem of legitimacy.

4.3 THE CHILD OFFENDER AND THE AGE OF CRIMINAL CAPACITY

When a child is accused of committing a crime, the first question that arises is the child's age and whether or not the child has criminal capacity. Criminal capacity means the child's ability to be held legally responsible for his/her actions (Child Justice Bill 70 of 2007). According to the South African Child Justice System, a child who has not yet turned seven years lacks criminal capacity and cannot be held criminally responsible for any criminal act. A child who is seven years or older, but below fourteen years of age is expected by law to lack criminal capacity. This presumption can be contradicted by evidence that the child does have criminal capacity. It is up to the state to prove that such a child had criminal capacity at the time of the crime, the condition for rebuttal of presumption is that the child must have known the difference between right and wrong and that he or she must have known that the action was against the law. Furthermore, it must be shown that the child was able to

act in accordance with the knowledge of right and wrong at the time and in the circumstances of the offence. As the child approaches fourteen years of age, the presumption that the child lacks criminal capacity steadily weakens. Children must appreciate the consequences of their actions. Therefore, in some cases, a child between seven and fourteen years old will be held criminally responsible for his/her actions. At 14 years or above children are presumed to have criminal capacity (Child Justice Bill 70 of 2007).

I questioned one of my key informants as to what happens if the child's age is unknown and if, upon arrest, the police and the probation officers have difficulty in the determination of the exact age of the child (usually this happens in the absence of documentary or other proof). I was referred to Section 337 of the Criminal Procedure Act 51 of 1977, which covers such cases in criminal proceedings. Where the age of the child is a relevant fact, of which there is insufficient evidence, the judicial officer (magistrate) may estimate the child's age. The juvenile offender may also be referred to a medical practitioner for examination. For a more accurate assessment the juvenile offender is referred to a radiologist who will conduct an X-ray of the child's wrist. This is because certain bones in the wrist, the distal metacarpal epiphyses, are separate in young children, but fused together by the age of 18 years. Due to the expensive nature of this procedure, a radiologist is not used in every case, but only in serious cases (Maepa 2007: 60).

Maepa (2007: 62) states that the current law is based on the concept of *doli incapax* and rests on two legal rules. Children below the age of seven years are irrefutably presumed to lack criminal capacity and children who have attained the age of seven years but not yet turned fourteen years, are presumed to lack criminal capacity, but this presumption can be rebutted if the state can prove that the child is able to appreciate the difference between right and wrong and can act in accordance with that knowledge. This requirement has been found not to be an effective protection for children (Maepa 2007:77). Thus the minimum age of criminal capacity should be raised from seven to ten years of age (this has been done in the Child Justice Act 75 of 2008). The presumption of the lack of criminal capacity of a child who has attained the age of ten years but has not yet reached the age of fourteen, should remain in place, with increased protection for this age group of children. The state should be required to provide proof beyond a reasonable doubt that the child understood the difference between right and wrong at the time of the commission of the alleged offence. Evidence has to be called for

the intellectual, emotional, psychological and social development of the child in the form of a report from a qualified person in child development or child psychologist and this is to be undertaken at state expense, where necessary (Maepa 2007:85).

4.4 THERE IS A DEGREE TO CRIME: ASSESSING SERIOUSNESS OF THE CRIME AND OTHER SENTENCES AS AN OPTION

Despite some variation, there is general negative sentiment shared by justice personnel towards incarceration of juvenile offenders. At least in some of the cases the probation officers' and the prosecutors' sentiments are only relevant on the basis of some assessment of the degree of the crime. This section examines the nature of such assessment by probation officers and prosecutors of the degree of the crime, opinions and views of the justice personnel on incarceration. Before starting this discussion, it is important to highlight the Child Justice Bill's provision on this matter. The Child Justice Bill of 2000 gives a range of sentencing options, of which diversion is one option for child offenders. There are different forms of sentencing that are used in the Child Justice System that are handed down on juvenile offenders:

- ❖ Community based sentences: This type of sentencing requires the child to do community service in different organizations.
- ❖ Three years imprisonment, wholly suspended for a period of five years: If a child commits a crime within these five years the charge is reopened and the child is sent to prison and gets a criminal record.
- ❖ Correctional Supervision: The child is released under house arrest, which is supervised by correctional officials. The child's activities are limited, he has to be home at a specific time and inform the officials of his movements. If the child fails to adhere to the stipulated conditions they are detained for a period of seven days⁵⁰.

While considering the above options, justice personnel have to rate the crime committed. What they consider serious crimes are rape, murder and armed robbery. These offences usually lead to incarceration. Probation officer 1 captured elements of this assessment of the degree of crime in the following sentences:

⁵⁰ This is taken from the Child Justice Bill of 2000. This is also retained in the Child Justice Act 75 of 2008 – see Child Justice Act 75 of 2008 section 72(4)

In the whole justice System I think (eh) our main aim is to divert the child from the Criminal Justice System and to afford them a second chance (em) as I said that when children are incarcerated they become even more hardened and some times, I wanted to say before that, sometimes children create offences like stealing chocolates from Shoprite. (aah) stealing toys from Shoprite or other shops. You know and you wouldn't, before such children would be then sent to prison they would serve something like two to three months or even months in prison and then the question is so what did the child gain by being in prison, because of the, the their offence is so small so that it doesn't warrant them getting into any programme that is offered in the prisons so that they are just sitting there, in those prisons, serving those three months, or whatever sentence they are serving (em) where diversion is on the other side, we've got programmes that make people take responsibility for their actions (em) it also, I think it's a holistic kind of way of looking at things, because we look at why do children steal I mean our programme affords children that opportunity. You have to dig deep in that.⁵¹

The Child Justice Act 75 of 2008 section 72 (4) considers offences such as murder, rape or armed robbery as serious crimes. Juvenile offenders who have committed such crimes are excluded from diversion. This categorically opens the offenders to what the probation officers and prosecutors consider as alternative sentences, and in some cases harsher sentences, for example incarceration. Apart from the seriousness of the crime, in some of the cases, it is repeat offenders⁵² who are considered for sentences other than diversion.⁵³ Often such repeat offences are regarded as lacking the willingness to change and learn from past mistakes. At times such individuals are treated as those for whom diversion did not work or who did not let it work for them and are viewed with little sympathy. On the basis of such an interpretation of events, juvenile offenders would likely be sentenced to incarceration.

⁵¹ Interview with probation officer 1 from NICRO on 20 October 2006.

⁵² Repeat offenders are juvenile offenders who have been convicted of a crime and gone through the justice system more than one once.

⁵³ This is discussed in Section 4.4.1 in great length.

Under the Child Justice Bill 70 of 2007 there were no policies stipulating the category of offender who is eligible for imprisonment. The New Child Justice System, however, states that imprisonment will only be used as a measure of last resort and in very serious cases such as murder. According to Sloth-Nielsen and Muntingh (2001b:400), during October 1998 to September 1999 a total of 66 cases of children aged fourteen years were sentenced to terms of imprisonment. This is compared to a total of 4 564 child offenders aged from 15 years to 17 years. During 1999, 2000 and 2001, an average of 427 sentenced children were admitted to South African prisons per month (Sloth-Nielsen and Muntingh 2001b: 403). When averages are calculated for each year they are 390.8 for 1999, 438.5 for 2000 and 451.6 for 2001. This reflects an increase of nearly 16% in the monthly average number of sentenced children admitted to prison from 1999 to 2001 (Sloth-Nielsen and Muntingh 2001b: 403). Most children serving sentences are sentenced to less than five years in prison. According to Correctional Services statistics on 11 September 1999 there were 1 375 children serving prison sentences, and of these, 239 or 17% were serving terms of longer than five years. More recent statistics show that 46% of children admitted during 2006 had been sentenced to 12 months or less. The majority of people under the age of 18 years serve prison sentences of less than five years, but the number of children being sentenced to longer sentences is increasing (Sloth-Nielsen and Muntingh 2001b:408). Over the years the statistics for imprisoned children has increased. On 18 May 2008, UNICEF released statistics stating that in South Africa 100 000 children are arrested each year (Skelton 2008: 20). According to Skelton, in June 2006 the four provinces which struggled most with the issue of children in prison awaiting trial are Gauteng, KwaZulu-Natal, Eastern Cape and Western Cape. KwaZulu-Natal continues to struggle with this problem, with Durban showing an alarming upward trend. The situation is not improving. Skelton (2008) states that in Westville Prison alone there are 700 children prisoners (Skelton 2008:20).

The new Child Justice System gives the police other options instead of arresting children, putting them in police vans and taking them to the police station. The avoidance of this ordeal saves the child unnecessary trauma. Instead the police can actually take the child home to their parents or guardians and release them on a written warning to appear in court. This places the responsibility of the child on the parent, who has to ensure that the child is in court on the appointed day. This obviates the need for the child to be held in police custody.

Barberton (2009: 20) states that the new Child Justice System has introduced the idea of Child Justice Courts, which deal with all matters pertaining to a child in conflict with the law. This is one of the most important and most needed changes the new Child Justice Act has introduced. Child offenders will go through a speedier process, because the designated magistrate, prosecutor and probation officers will only be dealing with cases pertaining to child offenders. This will enable them to concentrate on that single case and reach a verdict more quickly. The fact that child offenders will no longer appear in courts which are designated for adult offenders limits the interaction of child offenders and adult offenders, thus reducing the bad influences that these adult offenders might have on the children, More importantly, it will reduce the traumatic experience for the child. Barberton (2009:20) explains that the Child Justice Courts will be staffed with magistrates, prosecutors and probation officers who are trained in child justice. This will ensure that offending children are dealt with and managed in a way that is suited to their offence and that the sentencing received by these children will be rehabilitative. Barberton (2009: 30) points out that this system does not involve more resources, but rather the allocation of staff and premises, which is easier on the state's finances.

Since probation officers often have a very negative outlook on incarceration, they appear to prefer diversion over incarceration. One central assumption that influences such a sympathetic outlook is the nature of prison, as understood by the probation officers, in particular, and justice personnel, in general. This discussion is followed by specific criteria used by probation officers to make the decision to divert; this section will detail why probation officers feel this way and, what causes probation officers to harbour such opinion. As I emphasised the probation officers' ideology is influenced by their training and their experiences during their work in the Child Justice System.

4.5 CRITERIA USED BY PROBATION OFFICERS TO INFLUENCE THE DECISION TO DIVERT

Probation officers are qualified social workers, in this case working in the child justice system. They are equipped to handle situations and problems arising when dealing with the juvenile offender. Most importantly, they assess the nature, cause and gravity of the crime committed by the child, such as the crime the juvenile offender is charged with, or any other behavioural problems that the child may present. In other words, the probation officer leads the child through the system until the child is sentenced and assesses the child by gathering all the relevant information concerning the child and

circumstances surrounding the crime committed by the child. The probation officer wants to determine why the child committed the crime, the child's family background or history, the child's residential address and the child's identity, in an attempt to learn all the information on the child and the cause of the child offending. The probation officers follow the guidelines and procedures that are stipulated in section 4b of the Probation Services Amendment Act, since probation officers work on crime prevention, treatment of offenders, care and treatment of victims of crime and problem-solving with families and communities to serve the purpose of restorative justice. Section 4b of the Probation Services Amendment Act⁵⁴ stipulates the procedures that the probation officer needs to follow when dealing with a juvenile offender. Their tasks in relation to the Child Justice System are providing the assessment of the juvenile offender, making recommendations to courts on the matters of release or detention and the sustainability for diversion and writing pre-sentence reports. They also supervise children in the community and are involved in the running or monitoring of the programmes for children.

According to Section 4b of the Probation Services Amendment Act, the process for the handling of juvenile offenders involves the following:

- ❖ The child should be assessed by a probation officer in terms of section 4b of the Probation Services Amendment Act.⁵⁵
- ❖ After assessment the probation officer will recommend to the public prosecutor whether a case can be diverted and whether or not the child can be released in the care of his/her parents/guardian, or if the court should determine bail.
- ❖ The public prosecutor can use Part 7 of the Public Prosecutor's Policy Document⁵⁶ as a guideline on whether a case should be diverted or not.
- ❖ If satisfied that the child meets the criteria laid down in Part 7 of the Prosecutor Policy, the case can be diverted to the NICRO diversion programme.
- ❖ The prosecutor will inform the court of his/her decision to divert the case and the court will postpone the case for eight weeks for the child to complete the diversion programmes.⁵⁷

⁵⁴ Section 4b of the Probation Services Amendment Act.

⁵⁵ The criteria for assessment by probation officers that are stipulated in Section 4b of the Probation Officers Amendment Act is explained on page 28 of this chapter

⁵⁶ Part 7 of the public prosecutors policy document stipulates the procedures and criteria a prosecutor needs to follow when dealing with a juvenile offender and the criteria that should guide his/her decision to divert.

- ❖ After the postponement the young offender and his parents go to the nearest NICRO office for assessment and determination of a suitable diversion programme.
- ❖ After the NICRO assessment the child will be informed of the date of commencement of his/her programme and what the programme is that he/she will attend that makes them accountable and responsible for their actions and, where possible, repairs the damage caused by their crimes.⁵⁸

(Section 4b of the Probation Officers Amendment Act 35 of 2002)

Assessment is done by the probation officer in terms of section 4b of the Probation Services Amendment Act 35 of 2002. NICRO staff also do an assessment to determine the best programmes and types of intervention for the specific child brought to the Justice System. The NICRO probation officers are the people who administer the diversion programmes. Once the child offender has been diverted, the NICRO probation officers are responsible for the diversion programmes. They ensure that the juvenile offender attends every class in the diversion programme and they are responsible for the rehabilitation of the offender, as well as the after-care programmes⁵⁹.

From the discussions with my key informants I found that, in practice, probation officers do not conduct a thorough assessment due to an influx of cases and the shortage of probation officers. Therefore the required detail in the assessment reports is at present not being provided due to the time constraints of probation officers. Issues of incompetence by probation officers have also been raised by prosecutors. The incomplete assessment report by probation officers makes it harder for prosecutors to sentence child offenders. This is because the assessment reports assists the prosecutor in making his/her decision on how to sentence a child offender. The prosecutor needs a complete and detailed assessment report regarding the child offender's background, mental and psychological well-being and whether if the child is a re-offender or not. An incomplete assessment report could result in

⁵⁷ The prosecutor has the final say about the sentence. The probation officer only recommends what he or she thinks could be a suitable sentence for the juvenile offender. If the prosecutor feels that diversion is not the appropriate sentence then the offender is not diverted.

⁵⁸ NICRO assess the juvenile offender before the juvenile offender is placed in a diversion programme. This is done so that the juvenile will be placed in an appropriate programme.

⁵⁹ After-care programmes are offered at NICRO. These are carried out once the diversion programme is completed. It is done to ensure that the child offender has learnt from the programme and these probation officers attend to problems the child offender might have thereafter. For example, if the child offender has difficulty settling back into the community.

the child offender being incorrectly sentenced. The seriousness and the implications caused by this are discussed in depth in Chapter 5. If the juvenile offender is not being assessed properly how can the probation officer make an appropriate sentencing recommendation? I was told that there are tendencies among the probation officers doing an improper job because they are under pressure to get through a large number of cases per day. One of my key informants stated:

To be honest, Nopsi, due to time and the shortage of manpower we (probation officers) do not have the luxury of spending a lot of time on one case, therefore it is hard to get all of the facts on one case.⁶⁰

They are pressed for time and are also seriously under-staffed. Due to this the probation officer, at times, omits to ensure all of the relevant information relating to the different cases is collected. It is then difficult to make a well-informed decision.

Here I present the two lists of criteria for making an assessment and a decision for diversion, with the intention of comparing and discussing them to point out the gap between policy and practise. The first set of criteria are prescribed in Section 4b of the Probation Officers Amendment Act 35 of 2002 and are also stipulated in the Child Justice Act 75 of 2008 (which symbolises the principle and intents of the Act). I shall then discuss the reported list of criteria used by probation officers (that in a way reflects the actual process and ideological positions of the practitioners). These are the stipulated guidelines in section 4b of the Probation Officers Amendment Act and in the Child Justice Act 75 of 2008 section 30 (1) (a). These guidelines help the probation officers to make a decision about diversion. The following criteria can be seen as important in influencing a decision to commit a juvenile offender to a diversion programme:

- ❖ First-time offender
- ❖ The offender must voluntarily admit guilt for the crime
- ❖ The offender must take responsibility for his/her actions
- ❖ The offender must have a fixed address
- ❖ The offender must have his/her parent or guardian present during the interviews and court procedure
- ❖ The nature of the offence that the child is charged with

⁶⁰ Interview with key informant (1) in June 2007

- ❖ The offender should be below the age of 18 years

4.5.1 FIRST-TIME OFFENDER

According to the Child Justice Act 75 of 2008, section 40 (1) (a), the probation officer and prosecutor are expected to assess the juvenile offender's criminal history, by asking questions such as: Does the juvenile offender have any previous offences? Are any of these offences still pending or are any suspended? What was the juvenile offender previously charged with information on these in principle allows the probation officer to make an accurate assessment, which will be the basis on which the prosecutor makes his or her case. For example, if a case concerns a first-time juvenile offender who is charged with a petty offence, the prosecutor will be expected to be lenient when seeking sentencing. If it is a repeat offender the prosecutor will not be as lenient, on the preposition that the juvenile offender has not learnt from previous mistakes. Prosecutors are not lenient on repeat offenders because repeat offending is an indication that the child offender has not learnt from the previous offence and it indicates that they do not have respect for the law. To the child offender diversion is soft punishment and they re-offend because they think they will get off lightly the second time around. As one of the prosecutors put it:

It is up to the offender if he makes it or breaks it. I don't believe in diverting re-offenders.⁶¹

For this prosecutor the concern in diverting repeat offenders is that they have proven in the first place that diversion has not worked for them or that they have not taken the whole experience of diversion seriously (they did not learn from their mistakes and they did not take the opportunity that they were given to rehabilitate). This prosecutor mentioned that the reason for repeat offending may lie with the probation officers who are administering the diversion programmes, who may not have done their work properly.

As mentioned previously, there is a sentiment among the prosecutors that probation officers are very incompetent in carrying out their responsibilities. They often complained that probation officers do not complete the assessment forms correctly. As a result the child offender might be given the wrong type of sentencing. The type of sentence, or the diversion programme that the child offender is

⁶¹ Interview with prosecutor 3 at Port Shepstone Magistrate Court on 11 April 2007.

placed in, might not be suitable for the child, the prosecutors pointed out, as a result of incomprehensive and incomplete assessment. This, in turn, is perceived as a reason for making the programme less effective in accurately dealing with the cause of the offence, in some of the cases. Prosecutors raised this question:

How can we expect the diversion programme to be effective and to rehabilitate the offender if the person responsible for doing these programmes lacks the ability and capability?⁶²

The prosecutors I interviewed insisted upon the need for the training of these probation officers and a thorough assessment before they are given the role of rehabilitating the juvenile offender. It would certainly be expected that these would be central criteria for appointment, as this is a very important job and since it affects the future of the juvenile offender and the juvenile's relationship with the justice system. It could be a case of a blame game for individuals, rather than a thorough consideration of the overall system and other factors. In any sense, the prosecutors are being too harsh for blaming the probation officers for the failure of the diversion programmes. This does not entertain other potential factors that may cause re-offending and not just the failure of the diversion programme. Instead of concentrating on process and structural issues, the focus now has been reduced to individuals, which is not reflective and reflexive. This is not to undermine the importance of proper training, rather to emphasise the multiple factors involved in such behaviours.

There is a perception among the prosecutors that once a juvenile offender has gone through a diversion programme they should never come into conflict with the justice system again, for they have gone through a programme which is painted as the best alternative. For them, therefore, the choice after this lies with the juvenile, to abide by the law or re-offend. Another prosecutor had this to say about diverting re-offenders:

(Eh) this is so because diversion is a fresh start a second chance for the child to change and learn from his/her actions. It is up to this offender if he makes it or breaks it. (em) a offender has to learn from his/her actions. By offending again it tells me a lot it is either the probation officers didn't do their job properly or the child hasn't learnt from the first offence he/she took it lightly it wasn't scary

⁶² Interview done with prosecutor 3 at Port Shepstone Magistrate Court on 11 April 2007.

*or serious enough the first time round. If a child offends again [he or she was not] truly remorseful in the first place (eh) children push boundaries the push and push to see how far you will be pushed and I mean (eh) we have to make a stop to it at some point, we have to be harsh, otherwise we will have two year-olds committing murder.*⁶³

From these interview extracts by the prosecutors, one can sense the professional biases; the prosecutors have a background in law, where conviction and acquittal is central, while the probation officers are trained in child care and psychology. Prosecutors may therefore have a harsher outlook when it comes to re-offending. For them, as these interview extracts demonstrate, if an offender breaks the law they need to be punished for their actions in order to learn. Re-offending implies that diversion did not mean anything and therefore harsher punishment needs to be meted out to the offender. Harsher punishment is deemed to serve as a wake-up call for juvenile offender to change the course of their actions.

The discursive construction of the child as an offender and criminal offences as individualised actions allow for the simplification of an easy answer. The above prosecutor's analysis of the situation at hand represents exactly this - reaction or response to the juvenile offender who is being charged with a crime based on the offender's past. Does the offender have a criminal record? The ways in which first-time offenders are dealt with is different, in the sense that the prosecutor is more lenient and understanding. The prosecutor might feel that there are mitigating circumstances: this is a child and children do misbehave and it is only his first offence.

Repeat offenders are usually sentenced to a reform school or School of Industry for Correctional Supervision. This is according to the sentencing options in terms of the South African Criminal Procedure Act of 1977. reform school is that the court orders a person under the age of 21 years to be sent to an institution where they will receive vocational training and guidance. It is often thought that this option is useful because it avoids sending young people to prison. The Correctional Services Act section 276 of the Criminal Procedure Act provides for an offender to be placed under correctional supervision, which is a form of house arrest, combined with a set period of community service and

⁶³ Interview with prosecutor at Port Shepstone magistrate's court on 21 June 2007.

attendance at an especially designed course. This can be served while still being in the community, or the court can decide to send the offender to prison if this is presumed not to be effective and the offender is proved to be disobedient and/or not attending the course he or she was sentenced to. Correctional Supervision is an effective method for avoiding imprisonment if there are no other options available.

According to Khun (2000: 50), in practice, there seems to be a lack of infrastructure within the Child Justice System. More specifically, there is a shortage of reform schools and places of safety in the country.⁶⁴ In the KwaZulu-Natal region there are only two reform schools, one for boys and one for girls. In the current system, children may be sentenced to reform schools, which are compulsory residential facilities offering academic and technical education. In 1996, the government requested an investigation into the availability of such facilities. There were nine reform schools in South Africa, seven for boys and two for girls (Khun 2000: 50). Currently there are only four facilities receiving sentenced children. The fact that these facilities are not evenly spread throughout the country is also causing numerous children who have already been sentenced to reform schools to wait in prison (Muntingh 2000).

Key informant 2 informed me that the crisis concerning the shortage of reform schools began receiving attention in 2007, when the Child Justice Bill 70 of 2007 moved away from the terminology of reform school and instead allowed for children to be sentenced to a residential facility. The definition of this is broad enough to include facilities within the Departments of Education and Social Development. The Department of Education can now consider utilising reform schools for the accommodation of sentenced children and also those currently existing and planned secure care facilities can be utilised for sentenced children. There are only eight places of safety, not counting the smaller places of safety that do not accommodate juvenile offenders. This limits the availability of institutions where offenders can be sent to as an alternative form of sentencing. This lack of infrastructure causes an influx of children being detained in prisons for a long period of time until there is available space in the reform school. The prosecutor and the probation officers may be

⁶⁴ I discuss element of this in Chapter Five.

persuaded to divert due to the lack of infrastructure, even though diversion is not the best option for that particular offender.⁶⁵

4.5.2 THE OFFENDER MUST VOLUNTARILY ADMIT GUILT FOR THE CRIME

By admitting guilt for a crime, it is assumed, by law, that an offender is taking responsibility for the crime, for the wrongdoing of his/ her actions. After this voluntary admission of guilt the offender can be diverted. Through admission of guilt, the juvenile offenders are deemed as (or expected to be) showing remorse for their actions and thus receive the lesser penalty of enrolling into the diversion programme, as part of taking responsibility for their criminal actions. This follows admission of guilt, to be followed by an apology to the victim, for the trauma he or she caused the victim. The emphasis is placed on “remorse” and “apology” as prerequisites to be considered for diversion. One of the probation officers stressed “remorse” and its association with the potential for rehabilitation: “A child has to first admit guilt for a crime they have to say, ‘Yes I did that. I’m guilty...’ The child has to show remorse⁶⁶ for his actions, how else rehabilitation can take place if they don’t regret their actions.”⁶⁷

This can be problematic, in the sense that an offender might admit guilt in the hope that they will be diverted and therefore they will not have to face other forms of sentencing. This admission of guilt may be based on fear or they may have been persuaded to admit guilt by their probation officers and legal representative, telling them that diversion would be a better option for them, and that in order to be diverted they would have to plead guilty. The juvenile offender might fear incarceration due to the experience they might have had from being placed in a holding cell while awaiting trial. They might fear being placed with other offenders or they might have heard rumours about what happens to prisoners in jail, such as physical abuse, rape and molestation by other prisoners. Therefore, the offender may feel that diversion would be a better option because when a child is diverted they are placed in a place of safety or in the care of a parent or guardian while attending the diversion programme. Another cause of fear is the court experience. Being in front of a prosecutor and a

⁶⁵ Interview with key informant 2 in June 2007.

⁶⁶ Remorse by the juvenile offender is shown through an apology to the victim and through an admission of guilt by the offender.

⁶⁷ Interview with probation officer at Umzumbe

magistrate is very intimidating, if not traumatic, for the juvenile offender and this perhaps leads to a guilty plea in order to be removed from that situation.

Mbambo (2000: 12) refers to diversion as ‘being a violation of human rights’. This is because before an offender is considered for diversion they have to admit guilt for the crime in front of the prosecutor in order to become eligible for diversion. Mbambo (2000: 12) argues that this is a violation of human rights and our constitution because every individual is innocent until proven guilty. Furthermore, Mbambo (2000) argues, a child can admit guilt because the offender might have been persuaded to by the justice personnel; or the offender may have been led to believe that through an admission of guilt they would get a lighter sentence such as diversion.

One of the probation officers noted that juvenile offenders who come from impoverished backgrounds, which is true for many, may be persuaded to plead guilty, because during diversion the offender is given refreshments and meals at intervals (which might be construed as a reward and/or possible scenario to follow an admission of guilt). This observation is difficult to dismiss considering that for many of the juvenile offenders such treatment is absent at home and perhaps the juvenile offender even views this as a luxury that they do not have, due to poverty. Probation officer 4 described this situation:

Diversion can be both good and bad. It can be good if you are dealing with a child who is truly remorseful and wants to learn and change. I feel it is bad when dealing with a child that has no remorse at all. Because what are we saying through diversion to this child? Its OK carry on doing what you are doing and we will put you in a nice little group where you get meals and attention. By doing this aren't we encouraging criminal actions?⁶⁸

Probation officer 4 appears to be cautious that diversion might encourage criminal behaviour and may result in the offender pleading guilty, since there is a tendency for offenders to see diversion as a soft option of sentencing. Here the probation officer's sentiment is that diversion results in the offender being treated with kind gloves; it is not a way of sentencing and teaching the offender. According to this probation officer, diversion is deemed a soft option, for the offender's freedom is not

⁶⁸ Interview with probation officer 4 from Hibberdene on 15 May 2007.

taken away completely, the diversion programme is only attended for a couple of hours a day, there is no real punishment. This probation officer (4) is implying that diversion is not a sufficient punishment for a child that does not demonstrate 'remorse'; even worse, there is nothing much about diversion that causes the offender to feel that they have done wrong and need to be held accountable for their actions. For this probation officer, showing remorse is a sign of the juvenile's readiness to be reformed.

The justice system personnel are of the view that any child admitting guilt or making a confession should be supported by an adult or counsel. The concept of an independent observer to witness the confession made by the juvenile offender is viewed as central to this process. One of the key informants⁶⁹ informed me that in some of the cases this process is not properly observed, for example, in cases where the child's parents or legal guardian are not available. For such cases, there are not even accredited persons available at each station to support the juvenile offender, if he or she decides to plead guilty. Such supervision is evidently necessary to ensure that the juvenile offender is not coerced into pleading guilty and that the juvenile fully understands what he or she is about to do and what the consequences of pleading guilty are.

4.5.3 THE OFFENDER MUST HAVE A FIXED ADDRESS

A fixed address as a criterion is considered essential by the prosecutor in order for diversion to be considered. If the juvenile offender is to be released or has been released into the care of a parent or guardian, the address provides a guarantee that the parent or guardian is taking responsibility for the child and they can be contacted when necessary since their place of residence is known. In theory, this enables the probation officer to conduct interviews with a juvenile offender's family and community and make proper assessments. The investigating officer is able to carry out further investigations and ask questions if the need arises to find or contact the juvenile or parents/guardians. According to the Child Justice Act 75 of 2008 the fixed address also permits access and communication between the probation officers, police officers and the parent or guardian of the juvenile offender. The parent or guardian, who takes full responsibility for the juvenile offender, is expected to ensure that the child does not abscond, or cause harm to members of society and that the juvenile offender does not

⁶⁹ Interview with key informant 2 in June 2007

commit another offence. The parent or guardian has to ensure that the juvenile offender attends all court hearings on the set court dates.

In practise, there is a common trend for police in Port Shepstone to detain children in a holding cell for lengthy periods of time, without a preliminary inquiry and without informing the probation officer of the juvenile offender's arrest, which further delays the assessment. These children are detained because they do not have a fixed address and they cannot provide an appropriate adult's contact details. One of the probation officers recorded this concern:

Most children that live on the streets and that live in the rural areas are black. Do you know how banks struggle when it comes to black people? Because most of these black areas don't have street addresses or phones have you ever seen white people living in squatter camps without any street address and phones. It's easier to contact white people.⁷⁰

What is noticeable in the above claim is the racialised nature of this problem.⁷¹ It should be noted how class and race intersect in South Africa, where you find that the majority of black households live in squalid conditions, often turning some unknown and inhabitable spaces into a home. Another relevant issue to take into account is, considering the existing realities of our country, where there is an increasing number of child-headed households because of the HIV/AIDS epidemic, it could be that these children do not have parents or guardians. They may be orphaned. If no adult can be found, these children are detained for long periods in holding cells. Investigations need to be carried out by the police in order to determine the true nature of the child's situation in order to avoid the child being detained unnecessarily.

In spite of denying juveniles their rights, such practices are unnecessary and do not account for the nature of crime allegedly committed and the risk of being physically abused, raped and molested or even being recruited into a gang while in prison. It also causes an influx of juvenile offenders into the jail. In South Africa, there are currently more than 3000 juvenile offenders in prison (Fatima, 2007: 2), who, apart from the above-noted concerns, also incur unnecessary costs. The resources used to

⁷⁰ Interview with probation officer from Eziqoleni

⁷¹ For detail discussion on racialised practices within the child justice system see section 4.6. I have used this quote in this section again, for it is relevant to how racialisation of discourses and practices seep through institutions.

keep petty offenders in prison could have been better spent on employing people who would invest time and energy in locating the parents or guardians of these children, assuming they do have them. They would assist the police officers in locating the family members of the juvenile offenders. Such an initiative would be useful in the rural areas, where the police struggle to find parents or guardians from family members. At the same time, it will ensure that the child justice system is accessible and more equitable and fair to the rural communities (and one should never forget its potential for employment creation).

4.5.4 THE OFFENDER MUST HAVE HIS/HER PARENT OR GUARDIAN PRESENT DURING THE INTERVIEWS AND COURT PROCEDURE

Section 37 of the Criminal Procedure Act of 1977 provides that a child arrested on criminal charges may be assisted by his/her parents or guardian during the pre-trial stage of the criminal process and the court case (The South African Criminal Procedure Act of 1977 section 37). The parent or guardian may sit near the young person on trial and is allowed to help the child in asking questions. Although the presence of a familiar adult is comforting for the child in court, this in no way replaces the need for legal representation for the juvenile offender.

There is confusion amongst justice personnel as to who qualifies as a parent or guardian of the juvenile offender. This is because several sections in the Criminal Procedure Act 51 of 1977 mention 'parent or guardian' without defining these relationships. While the term 'parent' is clearly defined, the term 'guardian' is not as clearly defined. The term 'guardian' could be regarded as any appropriate adult who knows the child and can supply the assessing probation officer or prosecutor with relevant information concerning the child. In practice, many magistrates interpret this to include any older relative (over the age of 18 years) or other responsible adult such as a teacher, social worker or family friend, who indicates that he or she is prepared to take responsibility for the child with regard to the criminal case. There is nothing in the Correctional Services Amendment Act 17 of 1994 to preclude this wider source. The Correctional Services Amendment Act 17 of 1994 added the words 'or any other suitable person' to the terms parent and guardian. This addition allows a wider range of people to assist when children have been arrested.

4.5.5 THE NATURE OF THE OFFENCE THAT THE CHILD IS CHARGED WITH

Schedule 2 of the Criminal Procedure Act of 1977 lists the following as serious offences: murder, rape, armed robbery, armed robbery and theft of a motor vehicle, assault with the intent to do grievous bodily harm, assault of a sexual nature, kidnapping, illicit conveyance or supply of drugs and any conspiracy or incitement to commit any of these offences. One of the probation officers indicated what crimes they deal with:

I think it is important to note that we work with young children who have minor offences so (eh) offences like murder (aaa) all those really yukky offences we don't do. We do things like, maybe assault, Grievous Bodily Harm GBH, theft, house-breaking. But I mean all of those as long as there isn't any (aah) violence in them, you know bad really bad violence, I can't think of the English term now. So those are the kinds of juveniles that we work with.⁷²

According to schedule 2 of the Criminal Procedure Act of 1977 children over 14 years and under 18 years charged with these offences can be held in prison awaiting trial. These juvenile offenders are detained so that the trial can take its course and for the safety of the community, to decrease the risk of abscondment and the risk of the juvenile offender harming people in the community and, lastly to decrease the possible risk of the offender committing another offence. The criminal records of these offenders are expunged after a period of five years⁷². Offenders who have committed serious crimes are not diverted because their offences do not fall under the divertible offences; serious sentencing is required for these juveniles.

⁷² Interview with Probation Officer from NICRO Port Shepstone 20th of October 2006

⁷³ The conditions of expungement of records and reasons for expungement are discussed in detail on page 48 and 49 of Chapter Four.

4.6 PROBATION OFFICER'S CRITERIA THAT ARE USED IN PRACTICE IN ADDITION TO THE GUIDELINES STIPULATED IN THE CHILD JUSTICE BILL 70 OF 2007

During the interviews I discovered that probation officers use criteria in addition to the guidelines stipulated in section 4b of the Probation Officers Amendment Act 35 of 2002 and The Child Justice Bill 70 of 2007. I learnt that this is done on the understanding that the probation officers need and want to glean as much information as possible on the child, so that they get an accurate and complete picture of the child. By doing this they can find the 'true' cause of offending. The presumption here is that thorough investigation by the probation officer requires going beyond the superficial look into the child offender's behaviour, through which the probation officer might learn other issues involved, such as a psychological illness or family problems that the juvenile offender is experiencing. Through discovering factors that are affecting the juvenile offender, the probation officer can deal with the child offender appropriately. The child's personal identity particulars and the child's family background and behaviour of the child are used as additional considerations by the probation officers while assessing the juvenile for diversion.

4.6.1 THE CHILD'S PERSONAL IDENTITY

According to section 4b of the Probation Officers Amendment Act 35 of 2002, the probation officer has to know the child's name, surname, identity number, the child's physical and postal address and know if there are any documents proving the child's age. The child's personal particulars are of the utmost importance, so that the probation officer will know who he or she is dealing with. The child's correct names must be recorded, because some people use their nicknames. There is also the possibility that an individual is assigned different names in Zulu and English. The individual might be known by their Zulu name in the community and in another area by their English name. This can cause confusion. According to the law the individual's correct names need to be documented. The probation officer also needs any documentation such as birth certificates or reports from surgeon (if the probation officers and the prosecutors are not certain of the child's age) that can prove the child's age (see 4.4.7; the offender should be up to the age of 18 years). The child's correct name and particulars will allow the probation officer to conduct a background search on the offender, to determine if the offender was involved in any previous crimes.

4.6.2 THE CHILD'S FAMILY BACKGROUND AND BEHAVIOUR OF THE CHILD

One of my key informants informed me that during the assessment the probation officer is required to gather all of the information relating to the juvenile offender from the parents or guardian, teachers and people who know the juvenile well. This is done so that the probation officer can understand where the child comes from, the child's environment, the behaviour of the child; is the child well-behaved? Is he or she a problem child? How does the child perform in school? Does the child display any anti-social behaviour? Does the child have any psychological or mental problems? The probation officer is also interested in the juvenile offenders home and family circumstances. For example, what kind of family structure shapes the child's circumstances? Are both parents present? Is the family unit complete and stable? Are the child's basic needs taken care of? Is the parent or guardian able to provide for the child adequately? Are there any problems existing within the family that could contribute to the child displaying such behaviour? Has any member of the family ever been in conflict with the law or involved in criminal activity? The probation officer wants to discover why the juvenile committed the offence.⁷³ These questions all contribute to the probation officer finding the underlying cause of such a criminal act; they give him/her a more holistic picture of the child offender's situation and environment. This is what Wood (2003:22) had to say about the assessment phase which is done by the probation officer:

Probation officers have a major role in the assessment phase, their role is to gather information regarding the child, locate the child's family; interview both parents and the child. Prepare a report stating the results recommending appropriate punishment for the juvenile offender. This report is then submitted to the prosecutor (Wood 2003; 22).

The child's background is seen as a central criterion which is considered as telling as it has a significant impact on the child's behaviour. The fact that probation officers are interested in the juvenile offender's background shows that they want to know the possible causes of the criminal behaviour. This criminal behaviour is treated as being located in a specific sociological context, as learned behaviour, shaped by circumstances, home or otherwise. For example, I learnt that probation officers inquire about parents, stability of the family, peer groups, socioeconomic standard of the

⁷³ Interview done with key informant 3 in August 2009.

family and the neighbourhood or community where the crimes are committed. Probation officer 3 stated:

*For me the child's background stands out because I want to know where the child comes from; does this have anything to do with the child having committed the crime? The offence is also a big deal because you can't divert serious offences. It has to be a petty offence. I also look at the grade the child is in, behaviour is important.*⁷⁴

4.7 RACISM AND DISCRIMINATION IN THE CHILD JUSTICE SYSTEM

During the time I spent in the court observing the juveniles being tried and while observing the different roles of the probation officers and the prosecutors, I noticed that there were only black children and a few children from the Indian and Coloured community. There were no white children. I then became curious why this was the case. Following this observation, I made an effort to inquire about it. Some of the probation officers were very informative and others felt uncomfortable discussing this issue. They possibly felt that, as sensitive as the issue is, this information should be kept confidential. Probation officer 1 indicated to me that there were a large number of black children and hardly any from other race groups. In the town of Port Shepstone, the majority of the residents are black people and the white population is the minority. Perhaps these population dynamics have contributed to this skewed and racialised proportion of contact and conflict with the child justice system, which leads us to simplified answer to the question.

One cannot ignore the fact that such processes are racially skewed - without even pondering why it is that a disproportionate number of black children appear to be offenders. One of my key informants claims that whenever she visits the prison cells in order to make a report, do an interview or prepare a juvenile offender for the preliminary inquiry, these juvenile offenders are always black or coloured children and most of the time they come from an impoverished family or background. She asserted that that one never finds a white juvenile offender or a white juvenile offender from a wealthy family in prison. If her statement is true, only having black or coloured children in the Child Justice System

⁷⁴ Interview with Probation Officer 3 in Port Shepstone on 21 March 2007.

is a cause for concern and an issue that requires close assessment.⁷⁵ In this preliminary observation, deviancy appeared to be very much racialised and it cannot be because white communities do not have juvenile delinquents. The absence (or almost no presence) of white children in the child justice system led me to think that perhaps this is a sign of racialised processes of criminalization.

Following my curiosity, I inquired about such possibilities in the child justice system, where much of my discussion with probation officers generated and considered two factors that were reported by the probation officers on racial discrimination. Probation officers pointed out that there is a common trend among policemen of disregarding regulations when dealing with black children. It has been reported that police officers do not inform the probation officers of recent arrests and parents of the child are not immediately informed but often they are informed a couple of days later. In the different version of the Child Justice Bill, which is also retained in the Child Justice Act 75 of 2008 chapter 10 stipulates that when a child has been arrested on suspicion that he or she is guilty of committing a crime a probation officer has to be notified within 24 hours of the child's arrest, so that a preliminary inquiry can be held within 48 hours of the child's arrest. The preliminary inquiry stage is very important, because it is where decisions are made about pre-trial detention or release of the child and decisions to divert the child, if the prosecutor indicates that the matter may be diverted. The procedure was also mentioned by probation officer 5 in the interviews:

*The real procedure that has to obey is that when a child has been arrested for an offence a probation officer needs to be notified within 24 hours of arrest so that a preliminary inquiry can be held in 48 hours. This isn't done.*⁷⁶

If the police officers fail to report the arrest of the juvenile offenders to a probation officer within 24 hours the black child ends up in prison for periods of two weeks or even a month. According to the Child Justice Act 75 of 2008 section 72, this is not allowed.⁷⁷

One of my key informants indicated that she had also questioned the police on why they were doing this to the black children. The answer she received was that the police claimed these children are not from KwaZulu-Natal, but from the Eastern Cape; as a result, they have no valid residential

⁷⁵ Interview done with key informant 3 in August 2009.

⁷⁶ Interview done with probation officer(5) of Department of Welfare on 4 April 2007

⁷⁷ See section 4.7 of Chapter Four entitled incarceration as an option

address or phone number where their parents, family members or guardians can be contacted. They cannot release children who are suspected of committing a crime on their own, they have to be released into the custody of a parent or guardian. If these children are released and they are not in the care of a parent or guardian, the assumption is that they are likely to commit another crime or will not come back to face the consequences of their actions, namely a legal process or trial. As plausible as these concerns are, they do not justify the police officers' actions. They should be reported to a social worker or probation officer. The child should be released into the custody of a social worker and/or placed in a children's home or a place of safety until a court date is set.

It is not only that black children were incarcerated in large numbers in police cells, but also not many of them were being diverted. I questioned many of the probation officers on why this appeared to be the case. Quite a few of them responded by saying that this was because parents of these children were hard to locate and as a result these children could not be released. According to the law, juvenile offenders had to be released into someone's care - a parent or guardian. Why does it appear to be only black children under such difficult conditions? Probation officer 3 said:

... The one day we were discussing the number of black children in jail. It is so scary, I always imagine my son being treated like that just being punished for the fact that he is black. Black males are always being arrested or put into a van just for being black.⁷⁸

This probation officer 3 also highlighted the unfairness within the system and the discrimination that is perpetuated by some of the prosecutors and police officers.

Partly, this is a result of the ways in which children of different races are subjectively constructed, thereby framing how they are, or should be, treated. White children, for example, seem to be treated differently; they are being diverted at the preliminary inquiry stage, while black children are being incarcerated for lengthy periods of time, before even appearing for the preliminary inquiry. It could also be the fact that parents of white children have more access to material and institutional resources and networks, they are easily contactable, have permanent addresses and can afford to pay a lawyer.

⁷⁸ Interview with probation officer 3 in Port Shepstone on 21 March 2007.

Muntingh (2000), in 2000, noted a similar problem in his evaluation of a community service programme and victim offender programme at NICRO in Cape Town. According to Muntingh (2000), there is a lack of consistency in the diversion of cases. The discretionary powers of the prosecutors and probation officers could result in discrimination in terms of race and social status. The authority or power to divert is vested in a limited number of people (probation officers and prosecutors), without checks and balances to ensure that race, class and gender prejudices do not influence which children are diverted and which are not.

Muntingh's (2000) evaluation showed that there were racial biases in decisions by probation officers and prosecutors to divert cases at the preliminary inquiry stage without the need for trial – white children were being diverted at the preliminary inquiry stage. As a result, Muntingh (2000) criticized the diversion process, as practised, for its lack of consistency in the ways decisions for diversion are carried out and diversion of cases are dealt with; he also noted that the discretionary powers of the prosecutors would result in discrimination in terms of race and social status. Muntingh's (2000) findings indicate that in the case of the Community Service Programme nearly 60% of the participants were white, 34% Coloured and only 6% African or Asian; similarly, in the Victim Offender Programme the majority of white participants (81.3%) had been diverted to the program at the preliminary enquiry stage, while only (63%) of African and Coloured participants had entered this programme from the preliminary enquiry stage (2000). This, according to Muntingh (2000), is because their criminal behaviour is excused as having resulted from some sort of drug addiction. The criminal behaviour of white children is never considered to be the white child's fault, but is a consequence of drug use; therefore, they do not deserve to go through the process of the legal system – they are saved from that sort of trauma (Muntingh 2000). For a child of colour (black or coloured), their criminal behaviour is not excused by drug addiction; this means that they have to go through the ordeal of the legal system. This is in spite of the fact that juvenile drug addiction and problems is prevalent in black and coloured communities and some crimes that are committed by these juveniles are because of substance abuse. So, why are they are not diverted at the preliminary stage like the white juveniles? Secondly, it cannot be that all white juvenile offenders are drug addicts or that they were under the influence of drugs at the time of committing the criminal act.

One of the probation officers described the racialised nature of the institutional practice:

It is a race thing. You can't (eh), don't make me laugh; tell me that only black children offend. You know racism. (eh) please don't say my name. [Race] will never die. It is alive and kicking in our society. Let me tell you (eh) the white kids get off quick they are always said to be addicted to drugs. (eh) You see the unfairness, they are always let off quicker they will never, I mean never and I repeat never get dirty in jail. But the black kid is dirty enough to stay there.⁷⁹

Another probation officer (3) alluded to the fact that racist practices are rampant within the Child Justice System:

You know (em) I won't lie there is a lot of racism within the justice system. You find that children of colour - black children I mean are being harshly punished and the white children are being treated like lambs. Why this is I ask myself? It just kills my faith and hope for black people ever getting justice or being treated like humans in this country.⁸⁰

A probation officer from Umzumbe termed all that is happening to black children as a “race thing.” Another probation officer emphasised this point:

...I mean never and I repeat never get dirty in jail. But the black kid is dirty enough to stay there. Even the police you find (I'm shocked) that it's the black who do this rubbish.⁸¹

This is because there are other procedures that can be followed if there is no way of tracing the parent or guardian of the juvenile offender. This probation officer felt that when it is a white child in trouble with the law, all is done to ensure that the child is not placed in prison and all efforts are made to trace the parent or guardian of the juvenile offender. The white child will be arrested on suspicion of committing a crime and then his/her parents will be contacted as soon as possible, allowing the child's release into the custody of their parents. The question that keeps coming to mind is, is this truly incompetence on the part of the police or is it racial discrimination? On one hand there are reports that indicate the police officers have failed to follow procedures when it concerns black

⁷⁹ Interview with probation officer 5 from the Department of Welfare, Port Shepstone, on 4th April 2007.

⁸⁰ Interview with probation officer 3 in Port Shepstone on 21 March 2007.

⁸¹ Interview at the Department of Welfare with probation officer 5 on 4th April 2007.

children and, on the other hand, the fact that there are no white children in prison can be due to the fact that white people have access to material and institutional resources. If the correct procedure is not followed when a white child is arrested the parents will report the officer concerned because they are aware of their rights. A black parent (more specifically black people from the rural areas) might not be aware of their rights and they will not question the police or report infringements of their rights by police officers due to the fear and mistrust of police officers that black people have. This could be put in historical context: most black people fear police officers and they do not trust them, as a legacy of apartheid and the role the police played in that era. During apartheid black people feared the police, because of the ill treatment they endured at the hands of the police. To this day, there is a tendency among black people to avoid and mistrust the police.

It is impossible that the other probation officers have not noticed the ever-increasing number of black children that are incarcerated with no preliminary inquiry after 24 hours, or that probation officers have not noticed the racial discrimination within the Child Justice System. This is how probation officer 6 interpreted the large number of black children being incarcerated:

*Most children that live on the streets and that live in the rural areas are black. Do you know how banks struggle when it comes to black people because most of these black areas don't have street addresses or phones have you ever seen white people living in squatter camps without any street addresses and phones. It's easier to contact white people.*⁸²

Here, who is talking about this issue also matters. Another probation officer, when asked why there were only black children in prison, got very irritable and offended. She expressed herself in this fashion: "I'm just so sick to death with this whole racism thing and people asking why black children are in holding cells."⁸³ This raises questions on whether this probation officer, and many like her, are sensitive to the plight of black children coming into contact with the child justice system. Some probation officers appear to be in denial of the existence of racial discrimination, not because they have not noticed it, but because they are afraid to talk about it, in fear of recrimination from their supervisors and losing their jobs and getting a bad reputation.

⁸² Interview with probation officer 6 at Eziqoleni on 17 April 2007.

⁸³ Interview with probation officer 7 from Hibberdene on 15 May 2007.

According to Maepa (2007), there appears to be a pattern in the whole experience when one looks at how the process unfolds broadly within post-apartheid South African society, where black communities have got the bad end of the bargain. Maepa (2007) shows that in apartheid South Africa policing structures were built on earlier colonial forms of control and were designed to assert state authority over black South Africans, rather than to operate a system of service delivery. Maepa (2007) reasons that these colonial forms of policing were connected with other forms of local authority such as district commissioners, magistrates, chiefs and headmen, in order to ensure compliance among the blacks. The collection of intelligence was, and remained, the key role of the local police and this signifies how skewed the policing function was toward control and illustrates the extent to which informer networks represented the penetration of the security instruments of the state. In short, black communities were not policed but spied upon (Maepa 2007). Visible policing presence was, and still, is a cause for concern rather than a source of security. This form of control persisted. In the early 1980's the presence of uniformed police is regarded as a threat by black people. Post-1994 attempts to transform policing in these territories have met with only limited success (Maepa 2007).

Despite the changes in post-apartheid South Africa, such policing practices among black communities are still the order of the day. There are a number of anecdotes in Port Shepstone where young black men are treated with suspicion, within the community as well as by the police, signalling that criminality is racialised. Somehow, these common sense assumptions have found expression and are institutionalized, thereby shaping institutional practices. As in the past, the police remain largely isolated from the black community. They are meant to serve, but they rely on a culture of using people as informers rather than seeking to build trust among black citizens (Maepa 2007).

It is vital to recall what Pitts (1990: 6) identified as the conservative theory of delinquent youth, with its “ideological device” and “dual significance” (1990:6). On the one hand, the bad behaviour of the young is a consequence of the mistakes made by the previous generation and, on the other hand, it indicates the reprehensible direction in which our society is moving. The source of the violence displayed by the youth can be located in negative attitudes to authority and morality. This is because authority is perceived as controlling and favouring the financially stable and the wealthy. The bad attitudes of one generation are transferred to the next (Pitts 1990: 7). Pitts (1990: 7) stated that

‘authority is perceived as controlling and favouring the financially stable’. The law of the state sided with the financially stable and wealthy. This is because the wealthy have the financial resources and the power to sway the law their way, whereas people who lack these resources do not have the same ability. This could be the reason why there are so many black people or people of colour in prisons and why they are not diverted as often.

4.8 CONCLUSION

The Child Justice System has an excellent policy in place, a policy that is embedded in the philosophy of restorative justice, a theory that has its central aspects based on the reconciliation of all parties that have been affected by the criminal act, the victim, the community and the offender. Most importantly, it is concerned with rehabilitating the offender. By recognizing the role of the community and by involving the community in the rehabilitation of the offender through diversion, the way is paved for an easier integration of the offender back into the community and, by so doing, minimizing the possibility of stigma and labelling of the juvenile offender.

More attention should be paid to the lack of infrastructure in the Child Justice System. The lack of secure care facilities means that children of 14 years and over are kept in holding cells while awaiting trial. This causes great problems because, through the lack of infrastructure, more juvenile offenders are being incarcerated. Throughout the interviews that were conducted with the prosecutors and probation officers it is obvious from their opinions how traumatic incarceration can be and it not serving the purpose of rehabilitation. Therefore more reform schools and places of safety are needed that can accommodate more sentenced juvenile offenders. This will decrease the number of juvenile offenders who are in prison.

Even though there seems to be a good partnership between the prosecutors and the probation officers, there are of problems of incompetency on the probation officers’ part, which might be due to staff shortages. As a result of this, if something goes wrong with the process of justice the probation officer is immediately blamed by the prosecutor, because they play the biggest and the most important role in the system. They have the greatest responsibility in regard to the rehabilitation of the juvenile offender, because the probation officer makes the recommendation to the prosecutor for the

sentencing of the child offender. If the probation officer does not do his/her job thoroughly they could end up jeopardising the child offender's whole future and mind-set.

When reflecting on the changes that the Child Justice Act 75 of 2008 has incorporated into the Criminal Justice System, it is clear that the Child Justice Act seeks to address the problems that were encountered within the Criminal Justice System and further attempts to improve the Justice System in South Africa. Skelton (2009: 13) refers to the New Child Justice Act as an Act which seeks to ensure a child's sense of dignity and self-worth. "This Act also provides mechanisms that ensure that a child respects the rights of others. The ultimate goal of this system is that it allows child offenders to participate in reducing the possibility of re-offending."

The Child Justice Act 75 of 2008 intends to overhaul the way in which children are dealt with. From the literature it was evident that even though the child has committed a crime the way in which the child is dealt with by the Child Justice System could impact in a positive or negative way on the child, the child's behaviour and the future. The Child Justice Act 75 of 2008 seeks to put in place procedures and regulations which protect the child from the traumatic experiences of the Criminal Justice System but, at the same time, not trivializing the criminal acts of the child and making it a 'soft punishment'.

The Child Justice Act 75 of 2008 differentiates between adult offenders and child offenders, by way of ensuring that the system treats them differently. It sustains the argument that a child is a different being and in different stage of development and cannot be tried as an adult the child does not have the same cognitive and physical maturity or development as an adult. "An adult" is constructed as fully aware of his/her mistakes, whereas a child still needs to be guided through life. This is a system which is dedicated to the principles of restorative justice and seeks to prevent and reduce the chances of re-offending in child offenders.

CHAPTER FIVE

THE CHILD JUSTICE SYSTEM: INSTITUTIONAL FRAMEWORK AND PRACTICES

Chapter Four dealt with the Child Justice System, the discourses in the Child Justice Bill 70 of 2007 that provided the foundation of the need for diversion and the duties and responsibilities of the different judicial officers working with the Child Justice System. This chapter, building on the previous discussions and analysis, seeks to provide an insight and analysis on discourses of diversion and how it is currently being practised in South Africa. In 2006 Skelton and Batley (2006:10) revealed that at present the opportunity to be diverted into a programme is limited. The present study indicates that fewer than 5% of juvenile cases are channelled to a children's court inquiry. The diversions that are handled by NICRO annually represent a small percentage of the potential number of juvenile cases which would be suitable for diversion. This is often attributed to drawbacks in the institutional and legislative frameworks. In Chapter Five I look into the implications and challenges that the judicial officials have to encounter on a daily basis and the ways in which they approach them. This chapter also evaluates the institutional capacity and practices of the Child Justice System, by ways of suggesting some transformative processes needed to address such problems. The chapter is divided into three sections, with each section exploring elements of the procedural and institutional practices of the system: at the assessment stage, at court level and the diversion process. The first and second sections deal with the practice of diversion and the implementation of policy, where probation officers play a central role. The third section discusses the ways in which prosecutors appropriate and interpret the policy.

5.1 THE INCONSISTENT PRACTICES OF DIVERSION

The early years of diversion practice in South Africa, according to Skelton and Tshela (2008:32) and Muntingh (2001), lacked a legislative framework. This predictably resulted in the inconsistent practice of diversion. It was inconsistent in that there was no legislative framework guiding and interpreting the diversion process. Not all juvenile offenders were being diverted, even those that could be diverted. Muntingh (2001) showed a number of inconsistencies, where juvenile offenders who were meant to be diverted were not and ended up being incarcerated for long periods. This

resulted from judicial officials failing to follow the correct procedure. Muntingh (2003: 13) reported that in South Africa there were over 2000 children under the age of 18 years in prison awaiting trial, some of whom had been there for over a year. Muntingh (2003: 13) noted that between 1994 and 2000, 12 children had died while in state custody, either awaiting trial or serving sentences. Some of these juvenile offenders committed suicide, or were killed by cellmates. After 1996 the number of children awaiting trial began to increase. By April that year the total had reached 2716 (Muntingh 2003: 13). Muntingh (2003: 13) states that the solution to the increasing number of children being incarcerated is the development of a sustainable model for monitoring and intervention.

Skelton's (1995) research in March 1995 assessed the early years of diversion programmes. She identified the lack of effective intersectional management of children, the lack of appropriate placement, the misuse of facilities and the lack of proper assessment as some of the core problems of the practice of diversion. The Interim National Protocol for the Management of Children Awaiting Trial introduced the following, which the diversion programmes of the early 1990s lacked and needed to have:

- Effective intersectional management of children who are charged with offences and who may need to be placed in a residential facility to await trial.
- Appropriate placement of each child based on an individual assessment.
- The correct use of different residential facilities and the courts.
- Managers of facilities are assisted to keep the manageable number of child offenders in facilities.
- That communities are made safer through appropriate placement of children, effective management of facilities and minimization of abscondment, that the situation of children in custody is effectively monitored and that appropriate procedures are established to facilitate the implementation of the proposed new legislation once it has been passed by parliament.

The 2000s saw an introduction of guidelines by way of appropriating the Child Justice Bill's stipulations. Yet Skelton's (2005: 20) survey of the practice of diversion in 2005 showed that the progress in real terms had been marginal. Skelton (2005) noted that of all provinces the ones that have struggled the most with the issue of children in prison awaiting trial are Gauteng, KwaZulu-Natal, Eastern Cape and the Western Cape. The Eastern Cape and KwaZulu-Natal continue to produce an

increasing number of children in prison, with Durban reported as having an alarming upward trend of the greatest number of children in prison. Skelton (2005: 22) suggests that the reason that Durban showed such an alarming increase is that it is one of the fastest growing cities in the country, with very high levels of poverty, which contributed to a high number of children going to the streets to see what they can find. This is reflected in the high intake of cases awaiting trial, which Skelton claims appears to be growing on a monthly basis.

Despite the guidelines which are now in place to avoid such occurrences, the number of juvenile offenders placed in prisons is on the rise. The interviews I conducted with probation officers and prosecutors and the literature consulted suggest that this is due to the fact that diversion is not regulated in detailed guidelines; guidelines appropriately used and applied by police and prosecutors. Similar to what Skelton (2005: 20) noted, the practices of diversion still operate with loosely assorted guidelines, which resulted in both practitioners and researchers insisting on the need for a set of closely directing guidelines that stipulate the procedure that should be followed by police officers prior to charging the juvenile offender, to ensure that diversion decisions are taken and that cases involving juveniles are correctly channelled to a suitable option, program, children's court or criminal court. According to Skelton (2005: 30) the referral of cases⁸⁴ is usually done by police officers and prosecutors. Their account of the problem points a finger at the failure of the police to properly handle the case after arresting the juvenile offender. Police officers are often accused of failing to promptly inform a probation officer and the parents of the child. During the interviews some probation officers reported on the incompetence of the police. It was reported that police officers fail to follow procedure. Guidelines that state that a probation officer has to be informed within 24 hours of the juvenile offenders arrest are not sufficiently enforced through legislation. This meant the police have little to answer to, and they are rarely held accountable. In principle, a referral should take place as soon as possible after the arrest of the offender. A probation officer from the Department of Welfare had this to say:

Are you familiar with procedure? When a kid has been charged first step is social worker should be called when this is done the child is assessed and the parents are called. Aaa... Child may not stay in prison for longer than 48 hours.

⁸⁴ A referral is the channelling of cases away from the formal justice system such as a diversion option, a children's court inquiry or a criminal court.

You go there all you see is black little faces – kuyangikhalisa⁸⁵. Those policemen really need to be cautioned they need to do their job properly. You know ngababuza why they don't contact the parents as they are supposed to, they excuse their behaviour in the most pathetic (ehh ha, ha) manner they say the parents don't care they were told. You ask ingane they tell you a different story.⁸⁶

Fatima (2007:15) advises that diversion could be regulated in detailed guidelines to be used by the police, probation officers and prosecutors. These guidelines could have the status of directives, standing orders or could be gazetted as regulations to the proposed legislation. The Criminal Justice System requires the practice of diversion, but it does not state how the practice of diversion should be carried out. The Child Justice Act 75 of 2008 section 43 (2) has introduced the compulsory process of a preliminary inquiry. This preliminary inquiry is expected to protect the child from the harshness of being held in police custody for a long period of time unnecessarily and to protect them from adult offenders in prison and afford them the option of a speedier process. Procedurally, the children are supposed to be released to the custody of their parents or legal guardian and are assessed by a probation officer immediately, in order to make a decision on how their case would be dealt with.

The police have to transport the child offenders to and from the police stations to probation officers and from there to their parents or legal guardians, pending on the turnout of the preliminary inquiry to a place of safety. Barberton (2009: 40) warns that the police will have to be more efficient in their duties in order to contribute to an effective and productive diversion process. The Child Justice Act 75 of 2008 provides a more efficient process for taking the children through the Criminal Justice System. This saves time and money because it is easier than the Old Child Justice System, as child offenders are not being sent to jail and the state does not incur the costs of incarceration (Barberton 2009: 42). Barberton (2009: 42) advises that with the New System more children will be diverted and therefore more staff will have to be employed for this, but it will still be much cheaper than incarceration.

⁸⁵ See page 133 for the translation and meaning of Zulu word.

⁸⁶ Interview at the Department of Welfare on 4 April 2007.

Before the Child Justice Act 75 of 2008 was passed, R8 million was spent on diversion. Barberton (2009: 42) estimates that in the future R40 million to R50 million will be spent on diversion. By comparison, to incarcerate child offenders only will cost the state R250 million. There is no doubt that such a line of arguments are likely to convince the state, by plainly putting the cost and benefit in monetary terms, providing the incentive for more rigorous and effective procedures. For many the emphasis is placed on revising and strengthening the legislative framework, which has now culminated in the Child Justice Act 75 of 2008.

5.2 PROBATION OFFICERS AS IMPLEMENTERS OF THE POLICY

According to Gxubane (2008: 32), probation officers are like generic social workers. They have been, and they continue to be, implementers, rather than generators, of social policies. Yet probation officers have an important role to play in the Criminal Justice System, as they are the central role-players. This discussion emphasizes the major challenges that are associated with probation practice in the current Child Justice System. As discussed in Chapter Four in greater detail, the role of the probation officer is to assess the juvenile offender in accordance with the Child Justice Bill 70 of 2007 section 30 (1) (b), which includes establishing whether or not the child is in need of care, for the purpose of referring the child to a children's court inquiry in terms of section 51/64, estimating the age of the child if the age is uncertain, gathering information relating to a previous conviction, any previous diversion, or any pending charge in respect of the child, formulating recommendations regarding the release or detention and placement of the child, assessing the age of the child and initiating appropriate measures (see Chapter 1 in the Child Justice Bill 70 of 2007 section 30 (1) (a)).

The function of the assessment phase is to guide therapeutic interventions that will help the child offender not to come into conflict with the Criminal Justice System again (Gxubane 2008: 38). The challenge arises when probation officers are not effectively trained in providing rehabilitative services and some of the social workers are not even aware of the various services and programmes a child offender may be referred to.⁸⁷ It is likely, due to such lack of training and sufficient professional knowledge, that probation officers may fail the best interests of the child by recommending and

⁸⁷ I have noted in the previous chapter how some of the prosecutors I interviewed felt that many of the probation officers lack sufficient professional training. Though it is difficult to take this at face value, careful consideration of such potential is needed.

placing the child in the wrong diversion programme, thereby putting the programme in a precarious condition to serve its intention of rehabilitating the child. Thus the absence of sufficient staff with professional training is deemed by probation officers and prosecutors to be an impediment to proper investigation and assessment of the cases. Probation officers are required to pursue a thorough investigation into the complex array of the juvenile offender's life and find all the relevant information regarding the background and the psychological, social and environmental aspects of the child offender. This makes probation officers central role-players in the Child Justice System. They are responsible for guiding the court to alternative sentencing options through pre-sentence investigation.

Yet, on many occasions, key informant 3 mentioned during an informal conversation that there are some practical challenges that probation officers encounter with regard to the sentencing of child offenders. According to them, most probation officers are not adequately trained. As a result of this there is very poor quality of work, for example incomplete assessment forms, and a lack of thorough investigation of the juvenile offender. This made me consider the staffing and training needs assessment of the Justice System. I managed to locate a study conducted by Graser and de Smidt (2007: 20) that surveyed the probation officers in the Western Cape in 2008, and investigated the training needs of probation officers. Graser and de Smidt (2007: 22) revealed that probation officers lack self-esteem and adequate training and identified the inadequately delivered probation service, particularly the pre-sentence reports. The latter are directly linked to social workers' lack of adequate training in probation work (Graser and de Smidt 2007: 20). The pre-sentence report that is compiled by probation officers has to be properly completed and researched, with emphasis on "objectivity". It has to be motivated in order to assist the presiding officers in decision-making. This assessment report is the first in order and central to pre-sentence investigation. There are particular shortcomings with the reports that did not include the necessary information. As a result the presiding officers do not find these reports useful. During my study I had similar experiences. For example, prosecutor 5 indicated that probation officers were failing to provide them with the necessary and important information relating to the juvenile offender. The information that the probation officers fail to include in their reports is vital to help make the decision to divert the juvenile offender.

In South Africa, as long as social workers are registered with the South African Council of Social Services Professions, they can be employed as probation officers. Graser and de Smidt (2007: 23) are of the opinion that this is the start of all the problems in the Child Justice System. Since a probation officer deals with criminal law and the Criminal Justice System, it would be essential that the probation officer obtain further training in certain aspects of criminal law, such as criminology, the objectives of punishment, the treatment of offenders, the structure and functioning and the psychology of the child offender and the Criminal Justice System. Due to this lack of specialized training, child offenders end up in the wrong diversion programme, thus forfeiting the benefit of rehabilitation, which may also lead to the child re-offending, for the child has not received the necessary help during the first encounter with the Justice System. Gxubane (2008: 40) advises that probation work is a specialized field of service that requires specialized knowledge, skills and qualities in the person who performs it. According to Graser and de Smidt (2007: 25), presiding officers do not have training in the social sciences. Sentencing is a human process that requires knowledge of human dynamics. In order for judges and magistrates to pass rational and effective sentences, a person with social science training is required to assist the court. According to prosecutor 5, it is essential that all of the required information is in the pre-sentence report and that it is researched properly, for this guides the presiding officers in making an informed decision when it comes to sentencing. It assists the sentencing process.

According to key informant 1 another shortcoming, often identified by probation officers and prosecutors, is the shortage of skilled social workers, which is a nation-wide problem. During the interview process some probation officers reported that the number of cases brought to them exceeds the number of available probation officers. Thus an individual case does not receive the necessary individual attention and some other cases are not finalized properly. The Child Justice Bill of 2007, section 72 (1) (a), makes provision for someone other than a social worker or a probation officer to prepare pre-sentence reports. This was an attempt to address the delay in the finalization of cases involving young offenders due to the shortage of probation officers.

According to Graser and de Smidt (2007: 38), there is a great need to find alternative ways of dealing with the shortage of probation officers, as it often leads to unconstitutional delays in the sentencing of convicted juvenile offenders. Gxubane (2008: 50) argues, in opposition to the above view, that such duties should rather be performed by probation officers or persons with post-graduate

training in probation work or correctional practice, as offered by the Department of Social Welfare. According to the Child Justice Act 75 of 2008, chapter 5 section 40, a sentence report therefore needs to be realistic and to take into account the interests of all the parties affected by the criminal act that was committed by the child offender.

Graser and de Smidt (2007: 59) pointed out that it is not only the probation officers that do not have sufficient training and skill, but also presiding officers.⁸⁸ Sentencing, it is felt, is a human process that requires knowledge of human dynamics. Probation officers who participated in this research hold similar views:

*Government needs to employ assistant probation officers or employ graduates with psychology in order to assist the probation officers. This may help deal with the staff shortages and in turn it will allow us more time to spend on a case.*⁸⁹

*Basically we need help in terms of getting more people or auxiliary social workers to assist. This is a concern and a great problem.*⁹⁰

In order for judges and magistrates to pass a rational and effective sentencing, a person who is versed in understanding of the social and human dynamics is required to assist the court (Graser and de Smidt 2007: 59). In any event, what the above argument does is somehow reveals the subjective nature of the sentencing process.

The discourse of training and skill is central to the process of sentencing and diverting. Knowledge/appropriate information is essential to guide the process of diverting and developing a pre-sentence report which is meant to assist the presiding officers in making an informed decision when it comes to sentencing. Alongside the shortage of skilled and properly trained staff, the justice system, according to prosecutors suffers from a shortage of care facilities. Some of the prosecutors from the Port Shepstone Magistrate Court reported a shortage of care facilities or a lack of places of safety for children. This places constraints on the justice personnel when sentencing juvenile

⁸⁸ Presiding Officers refer to Judges and Magistrates.

⁸⁹ Interview with probation officer 4.

⁹⁰ Interview with probation officer 5.

offenders. This results in juvenile offenders being imprisoned because there is a shortage of facilities for alternative sentencing. One of the prosecutors concurred with this:

We are also very short-staffed, we need more staff. (eh). Government needs to consider building more care facilities for juvenile offenders. There is a huge shortage, we need more places of safety for boys and girls because of this shortage we end up placing these juveniles in prison so that we have the assurance that they will not escape from prison.⁹¹

Along with these concerns, I also learnt from probation officers that there are not sufficient residential care facilities, which are institutions where child offenders are placed for having committed serious crimes. According to probation officer 1, most of these facilities are in Johannesburg and Cape Town and, worryingly, there is not one in townships and small towns. This clearly demonstrates the urban bias in distribution and appropriation of these institutions. In spite of the questions raised on the conditions for rehabilitation such institutions offer, their shortage as alternative facilities to ordinary prisons and their location in urban/metro areas are raised as major concerns. This leads to placement of the offender in an institution that is far away from home, away from the parents/guardians and the victim. This creates a situation in which it is extremely difficult for the child offender to mend broken relationships with the people he or she supposedly hurt the most, thus creating a hurdle to the process and purpose of rehabilitation.

Government needs to improve on the infrastructure and build more care facilities for juvenile offenders. Scholars such as Batley and Maepa (2005:16) pointed out that applying harsher punishment to offenders has had little success in preventing crime. This is because imprisonment has long-lasting and devastating effects on juvenile offenders in particular and the community in general. When juvenile offenders are released back into the community, on completion of their prison term, they have been negatively affected by their institutional experience (Graser and de Smidt 2007:38), which makes adjustment in the post-prison period very difficult.

⁹¹ Interview with prosecutor from Port Shepstone Magistrate Court on 4 April 2007.

5.3 DIVERSION AT THE DISCRETION OF PROSECUTORS

Wood (2003: 60) observes that due to the fact that diversion has been practised in the absence of a regulatory policy child who committed offences experienced very cautious and highly discretionary administration of diversion. Prosecutors are the key decision-makers in the referral process. Under South African law, diversion and the withdrawal of charges have depended on the decision of the prosecutor (Skelton 2005: 40). The prosecutor is the key decision maker concerning the channelling of cases. This raises questions or whether or not the prosecutors are appropriately qualified to make such decisions on the assessment of juvenile offenders. In the early 2000s, Sloth-Nielsen (2003) stated that the diversion programme nationwide was operating in a vacuum, through the sole discretion of a prosecutor, for it was often carried out on an *ad hoc* basis, with much reliance on the positive working relationships between prosecutors, probation officers and diversion service delivery organizations (Sloth-Nielsen 2003: 18). Almost a decade later, this has hardly changed. Referring back to the duties and the responsibilities of the prosecutor, the prosecutor has the responsibility to decide whether the charges against the child should be withdrawn or if a parliamentary inquiry should be arranged. The Child Justice Bill 70 of 2007, section 40 (2) (6), states that the prosecutor is the central figure at the preliminary inquiry in deciding whether or not a child should be diverted and if this should occur conditionally⁹² or unconditionally⁹³. Wood (2003:50) pointed out that South African criminal law allows the Director of Public Prosecution to withdraw the charges against any accused person, conditionally or unconditionally. Prosecutors have the authority to withdraw criminal charges on condition that the child completes a specified activity, this activity being a diversion programme or community service. In practice it is very uncommon for prosecutors to divert a juvenile offender unconditionally.

Muntingh (2001), Skelton (2005: 40) and Wood (2003:50) have raised concerns on the chief referral mechanisms used by prosecutors on the withdrawal of charges and diversion. The major concern is that the power to divert is vested in a limited number of professionals who are granted wide discretionary authority. This can result in race, class and gender prejudices influencing which

⁹² Conditionally: this means that the case of the child offender can be withdrawn by the prosecutor only if the accused abides by certain conditions that are stipulated by the magistrate.

⁹³ Unconditionally: this means that the prosecutor has the authority to withdraw a case against the accused with no conditions that he or she has to abide by.

children are afforded access to diversion.⁹⁴ Skelton (2005:40) therefore recommends a just practice of diversion and the establishment of a suitable legal framework to govern the referral procedures and access to diversion.

Graser and de Smidt (2007: 38) stated that people with a social science qualification are needed to make such individualized assessments concerning the sentencing of the juvenile offender. The argument in this regard is that prosecutors do not have the right supplementary specialized training for this. The fact that prosecutors bear such a heavy case load as reported by the prosecutors from the Port Shepstone Magistrate's Court, means that they do not have the time to be involved with the individual cases of juvenile offenders regarding the offenders' psychological and social contexts in order to fully understand the root cause of the child's offending. Graser and de Smidt (2007:40) stress that the lack of specialized training of judicial officials strips diversion of its most valuable advantages, namely keeping children away from formal court procedures and enhancing the chances of early release from detention.

This raises great concern over the fact that such authority is vested in the prosecutor and yet they do not have specialized training to guide and assist them in carrying out such important and life-altering decisions as the sentencing of the juvenile offender. In addition, this discretionary power has an implication on how the justice personnel engage with one another. This has contributed to the tension between the probation officers and prosecutors. This tension is captured in the following narratives of the probation officers:

*I sometimes find it difficult to work with certain prosecutors, for instance a probation officer recommends diversion and a prosecutor will argue that decision and it is the best decision for the child. Some prosecutors don't believe in the diversion or mostly as probation officers we do not understand on what basis their decisions for diversion are made.*⁹⁵

You will find that before a juvenile offender is diverted, when the prosecutor reads the assessment report we will have lots of arguments over it because we

⁹⁴ A problem which I have raised in Chapter Four, section six.

⁹⁵ Interview with probation officer 5.

look at the child offender differently. The prosecutor's knowledge comes from the legal background, whereas probation officers are trained to look at the environment and all circumstances affecting the child offender. There are a lot of factors that influences a juvenile offender⁹⁶.

Perhaps this is because each comes from a different paradigm in thinking about the best way of dealing with juvenile offenders, yet it warrants a close scrutiny on the working of these procedures of diversion and the power vested in prosecutors.

5.4 CONCLUSION

In South Africa, diversion has been characterized by urban bias and racial, economic and gender discrimination. Both the actual practices and the Child Justice Bill have not been able to implement laws that maintain and uphold the constitutional rights of children, to ensure that children have equal access and opportunities for diversion. Government needs to acknowledge the pitfalls within the Child Justice System, such as the shortage of qualified probation officers and the shortage of care facilities. This will enable justice personnel to carry out their duties effectively and according to the law. As Skelton and Batley (2006: 30) put it, "South Africa's efforts for a new child justice system will have to be supported by broad-reaching improvement in the social and economic lives of all its citizens if real change in the lives of children is to be seen."

By way of conclusion, even though the child has committed a crime, the way in which the child is dealt with in the Child Justice System could impact in a positive or negative way on the child, the child's behaviour and future. What is noticeable from interviews and the reported practices is that diversion has been marked by inequalities such as urban bias, racism and discrimination, based on gender and age. From the interviewed probation officers it is clear that they want all children, especially the black children from the poor, rural communities, to have equal access to diversion, but in spite of numerous complaints to their supervisors and Departmental Officials the situation remains the same. The probation officers from NICRO, upon being interviewed for a second time, suggested valuable solutions to these problems. The solutions made by the probation officers were the provision of diversion services and programmes in rural areas and the need for effective referral which takes

⁹⁶ Interview with Probation Officer 3.

into account the best interests of the child and the removal of constraints to diversion such as the requirement that children need to have a fixed home address before they can be eligible for diversion. The latter criterion has proved to be unfair, because most black people do not have fixed home addresses. This results in the continuous increase in numbers of black children in prison.⁹⁷

Many of the solutions suggested addressing the problems within the Child Justice System. Technical solutions are sought, because the problems have been defined as technical. Maepa (2007: 30) recommends the need for rigorous regulations and detailed guidelines for diversion, which should bind police officers, prosecutors and other officials involved. Maepa also stresses the need for special technical training and multi-disciplinary teams. Despite convincing presentations of the problems and solutions, such technically formulated solutions continue to obscure non-transformed discursive practices that continue to frame the system and its institutional practices.

When reflecting on the change that the Child Justice Act 75 of 2008 has incorporated into the Criminal Justice System, it is clear that it seeks to address the problems that were encountered within the Criminal Justice System and attempts to improve the system in South Africa. Skelton (2009: 13) refers to the New Child Justice Act as an Act which seeks to ensure a child's sense of dignity and self-worth. According to him, "This Act also provides mechanisms that ensure that a child respects the rights of others. The ultimate goal of this system is that it allows child offenders to participate in reducing the possibility of re-offending" (Skelton 2009:13). The Child Justice Act 75 of 2008 seeks to overhaul the way in which children are dealt with. The Act wants to put in place procedures and regulations which protect the child from the traumatic experiences of the Criminal Justice System but, at the same time, not minimise the criminal acts of the child and make it a 'soft punishment.

⁹⁷ Interview with probation officer at NICRO on 20 October 2006. For detailed discussion refer to Chapter Four, section six.

CHAPTER SIX

CONCLUSION

In this dissertation, I have attempted to address the following: Firstly, broadly, I sought to generate an insight into the processes of the Child Justice System by outlining and discussing the practices and different stages of the Child Justice Bill making process. Secondly, I aimed to explore the various elements of the diversion programme and, more specifically, asked: what are the criteria used by prosecutors and probation officers for diverting a juvenile offender within the justice system? How is a juvenile offender placed in the appropriate diversion programme? What are the different diversion programmes within the justice system? Thirdly, I interrogated the discursive processes that have shaped the diversion programme, by way of closely examining the processes and criteria used for diverting juvenile offenders. In this chapter, I summarise the legislative frameworks and institutional practices of the Child Justice System and highlight the main arguments of the dissertation.

After a lengthy Bill- making process, the Child Justice Act was passed on 1 April 2010. The Child Justice Act 75 of 2008 is acclaimed as an excellent policy for prosecuting and dealing with child offenders. It made significant strides following the different versions of the Child Justice Bill. The Child Justice Act 75 of 2008 has instituted legislation designed to protect the child and, one can say, it is a ‘child friendly Act’. This is not to say that it is a soft way of prosecuting the child; instead it seeks to protect, rehabilitate and punish the child offender. For a large part, it seeks to restore the dignity and rights of the child offender. In other words, the Child Justice Act 75 of 2008 makes special provision for young offenders, with specified characteristics and conditions, for example showing remorse for their criminal conduct, to take them out of, or prevent them from entering, a continuous cycle of crime and violence. The Child Justice Act 75 of 2008 through diverting child offenders away from the mainstream Criminal Justice and implementation of child justice courts, treats children and deals with them separately from adult offenders. The aim of the legislation, thus, is to ensure that children’s matters are managed in a manner which respects and upholds the rights of the child, even though they have broken the law. It promotes the sensitivity of justice personnel towards the needs of the child offender and to assists the offender’s rehabilitation so that he or she may become a productive member of society. Here, the idea of the “child” as a construct is central to this provision.

I argued in this dissertation that the Child Justice Act 75 of 2008 is hedged on two constructs: the concept of restorative justice and the idea of the “child” as a construct. The main concept of restorative justice is that the juvenile offenders acknowledge responsibility for their criminal conduct. Acknowledging responsibility for their crimes may prevent the recurrence of crime. In order for this process to occur, the Child Justice Act 75 of 2008 encourages the involvement of all parties concerned, the victim, the family and the community. Chapter Four and Five, give a detailed explanation of how the Act encourages participation from the family and the community and the diversion programmes that are used by the community. The family and the community of the child offenders serve as a support system for the offender during the rehabilitation process. The involvement of the victim is encouraged, so that the offenders can apologise for their behaviour. This creates reconciliation between the victims and the offenders.

The idea of the “child” as a construct is also central to provisions made in the Child Justice Act 75 of 2008, section 30 (2) (a). The “child” has to be constructed as a separate being from an adult, with particular needs, forms of protection and rights. Before the Child Justice Act 75 of 2008 was passed, the child offender was tried under the Criminal Procedure Act of 1977, which is an Act that is meant for adult offenders. The conditions of the Criminal Procedure Act of 1977 proved to be harsh for child offenders, because one cannot prosecute “a child” under the same laws as an adult. The Child Justice Act 75 of 2008, section 80 acknowledges the fact that the legal personnel are dealing with children and therefore the way in which a child is handled has to differ from the way an adult is handled. This undoubtedly relies upon the idea of the “child”, who has to be constructed as having limited agency, being in need of protection, as having inferior capacity and knowing as well as knowledge about morality and the law. A child, thus, cannot be punished in the same manner as an adult, a practice which taps into the idea of “children” as individuals who have not fully developed cognitively, emotionally, psychologically and physically. A child is captured as still learning in life; therefore, they have to be given the opportunity to learn from their mistakes and require a different format for retribution for “offending” society. In contrast, an adult is constructed as fully fledged, cognitively developed and emotionally mature to differentiate between “right” and “wrong”. The following extracts from interviews with the Post Shepstone Magistrate’s Court capture these sentiments and the spirit of the law, as interpreted by the Child Justice System personnel:

*A child is a child no matter what the crime they committed. The basis for dealing with a child in the justice system should be concentrated on the rehabilitation of the child.*⁹⁸

By putting the child offender through the justice system...are we teaching the child or are we scaring the child? What is the motive or the principle? What are they learning from being incarcerated? One has to think long term is it an advantage to the child will it benefit the child?

When a child offender has been charged with an offence the child has to be assessed by a probation officer. A preliminary inquiry is held within 48 hours of the child's arrest. At the preliminary inquiry a decision regarding the child is made and then the child is transported by the police to their parents/legal guardian. The parents/legal guardian are given a warning stating the charge the child is facing, with and the date the child has to attend court or a diversion program, in cases where they were diverted during the preliminary inquiry. The parents/legal guardians are held responsible for the child offender and they have to ensure that the child attends court on the specified dates.

The Child Justice Act 75 of 2008 has introduced Juvenile Courts. Juvenile offenders have separate court rooms from adult offenders. These are termed Juvenile Courts, in accordance with the Child Justice Act 75 of 2008 Chapter 9 section 63. The juvenile offender does not come into contact with the adult offender, thus protecting the child from bad influences and from psychological trauma. The introduction of this new policy emerged as part of an initiative to decrease the number of child offenders being detained in prison for long periods of time.

The Child Justice Bill 70 of 2007 section 70 (1) (a) discriminates between levels of crimes, such as petty and serious crimes, and diversion is set as an option for consideration. For example, the Child Justice Bill allows for petty offences to be diverted. Serious offences such as murder and rape are dealt with in a more serious manner such as imprisonment. Imprisonment and Residential Care Facilities are used as a measure of last resort, after considering all possible options. Much concern has been raised around the issue of Residential Care Facilities. First, the question of rehabilitation has

⁹⁸ Interview with key informant 1 in August 2009.

been raised, more specifically whether or not these institutions serve the purpose of rehabilitation of the offender. Second, there is a shortage of these facilities. Third, their bias towards the urban/metro is palpable, leaving many on the margin, in a difficult situation. For those who are sent there, it meant staying far away from home and family and precluded the possibility of mending bridges with the victim.

The study, through interviews with probation officers and prosecutors, revealed that most of the justice personnel, the probation officers and the prosecutors find diversion to be the best way of punishing and rehabilitating the juvenile offender. The reasons they gave for being in favour of diversion are that the juvenile offender is given the chance to re-learn and re-evaluate what are acceptable values and actions within society. Often, the idea of the difference between “right” and “wrong” is used to capture this view. Diversion for them represents a “second chance” for a “normal life”, “an opportunity” to (re)learn accepted societal values and conducts. There is a discourse that affirms diversion programmes as spaces where juvenile offenders are taught societal values and norms afresh. After diversion, the expectation is that the juvenile offenders, after such an opportunity, are given a “second chance” to become fully functioning individuals in society. The Justice System personnel maintained that diversion offers the juvenile offenders “a second lease on life”, by not ruining their lives, which means not branding them for life as criminals, through the public record of the Justice System.

Alongside this, I learnt from the probation officers that the personnel within the Child Justice System consider that the space diversion provides for a collective solution, by allowing the participation of the victim and the offender and the families involved. The opportunities afforded for talking, apologising and forgiving are regarded as crucial. Diversion (and its whole aspect), which begins with the notion of rehabilitation and restorative justice, insists on ensuring that the child is aware of where and how they went wrong and how to compensate for that mistake. The juvenile offender has to show regret, has to admit guilt and has to apologise before rehabilitation can occur. Here, this process of admission of guilt and apology operates within the idea of ‘remorse’, which occupies a central place, often constructed by Justice Personnel as something demonstrable, which is nonetheless, subjectively understood rendering it subject to contestation. In any sense, this remains a problematic process. The fact that the juvenile offender has to admit guilt and apologise for his/her

actions before they are diverted is problematic, in the sense that the magistrate or the prosecutor cannot be sure that the juvenile offender is 'genuinely remorseful' for his/her actions. The juvenile offender may be persuaded by fear of incarceration to admit guilt and apologise for a crime. This admission of guilt and the apology given by the offender may not be given by the offender with an apologetic heart. In some cases this may not serve the intention or the purpose of healing.

Probation officers have very negative attitudes towards incarceration, as it poses a number of dangers for the child. The child could be raped, molested, physically abused or even killed in prison by adult inmates. The juvenile offender is also likely to be exposed to criminal behaviour, in the process becoming a hardened criminal. Incarceration does not prove to be rehabilitative. I see prison as just being harsh punishment, as depriving the offender of freedom and privacy. Incarceration does not provide therapy or counselling for the offender in order for him/her to change and rehabilitate. By being locked up in a prison cell, the offender is not learning or engaging in something constructive. The Child Justice Act 75 of 2008 section 72 (2) (a) has sought to move away from this by turning imprisonment into a measure of last resort. Imprisonment is reserved for serious and severe cases such as murder and rape. It calculates the degree of crime.

Apart from its central elements of restorative and rehabilitative principles, diversion is underpinned by the principle that society has to provide the best for children to cater for the needs and rights of children, and that the diversion of minor offences involving children has long-term benefits, not only for the child but also for the whole of society. This is not without preconditions. Criteria are put in place. The nature of the crime is considered, and second, the Act allows for the consideration of the child's background, personal and family circumstances, while ensuring that the individual needs and circumstances of a child in trouble with the law are assessed. These criteria operate within the subjectivities of constructs and conditions considered as criteria. On the whole, however, what is sought is a balance between the rights and responsibilities of the child offender, the victim and the community.

During my research I learnt from the probation officer (this is before the Child Justice Act 75 of 2008 was passed) that when a juvenile offender was arrested and charged with a crime, the parents and a probation officer have to be informed of the child's arrest. This was not always done in practice.

A situation could arise where juvenile offenders could be detained in prison for more than a week or even more than a month and their parents or a probation officer would not be informed. Probation officers reported that this usually and particularly happened to black children, as they seemed to be the ones arrested more often than children of other races. Here, we have different kinds of ‘child’ appropriated in practice, a racialised and class-based one. The incarceration of black children is justified by the fact that the police officers are unable to trace the parents or guardians of these children; they do not have a proper address, due to the fact that many of these children are runaways or street kids and/or their parents are in the Eastern Cape. In cases like this, in principle, children are supposed to be sent to a Place of Safety or Children’s Home, where responsible adults will be responsible for them. This is not observed for black juvenile offenders, in many cases; instead they are simply detained in prison. Probation officers that were interviewed constantly reported on the failure of police to report on a new arrest, which contributed to this problem. These probation officers reported that numerous complaints had been made to the police and the Department of Justice.

This suggests to me that racialised practices exist within the Child Justice System. In-so-far as detention in prison appears to be a disproportionate experience of black children, this cannot be explained unless one accounts for racialised practices and socioeconomic inequality that exists in South Africa. Following this observation, one might be tempted to presume that black children are major offenders (which, in my view, is the very act of racialising the process of criminalization in itself). Contrary to such potential presumption, however, I found that white children are treated better than black children; the white child is diverted at an earlier stage – at the preliminary stage. This is evidently a consequence of unequal access to material and institutional resources. Analysis of this, thus, has to focus on the structure of family, economic standing of the parents and the ability to access lawyers and institutions and resources. These hardly exist for black children. Unless there are specific provisions to address these concerns, we are likely to continue to see unequal and discriminatory treatment in the Child Justice System.

It was interesting to learn that children who have committed different crimes are dealt with differently. Crime is discursively categorised, ranging from the least serious to the most serious crime. Juvenile offenders who have committed serious offences are dealt with in a more severe manner. For example, a juvenile offender who commits murder is incarcerated and a juvenile who is charged with

theft is diverted. In Chapter One I pointed out that the Child Justice Bill 70 of 2007, section 70 (1) (a), had differentiated between the levels of crime. Therefore a child is dealt with by the Child Justice System according to the seriousness of the crime. Before a child is even considered for diversion the probation officer is responsible for making a thorough assessment of the juvenile offender. During this process the probation officer assesses the child as a complete individual and the child's behaviour, characteristics and personality traits are taken into consideration. The probation officer consults the child's parents or guardian about the child's behaviour. If a child presents psychological problems a psychologist is brought in to psychologically assess the juvenile offender.

There is much to be admired about the new Child Justice Act 75 of 2008. The Act tries to involve the parents, the victim and the community of the juvenile offender in the offender's rehabilitation. In order for the juvenile offender to be diverted they have to admit guilt for the crime and they have to apologise to the victim. The Act makes it a policy to pay attention to the needs of the victim. The victim has to be kept updated on how the trial is progressing. If the victim is required to testify in court, the victim is assisted by the prosecutor. The victim has to receive therapy or counselling in order to deal with this traumatic event. The parents of the offender and the community from which the offender comes is also involved in the rehabilitation of the offender. Involving the family and the community assists in mending broken relationships within the family and within the community, thus making it easier for the offender to return to his/her family and community once the sentence is completed. It enables the child offender the opportunity to move on from their mistakes and make a fresh start and the same opportunity of making a new start is afforded to the victim.

6.1 CHALLENGES FACED BY THE CHILD JUSTICE SYSTEM AND RECOMMENDATIONS

The study noted challenges that the Criminal Justice System has to deal with on a daily basis. The justice personnel are very short staffed. As a result the probation officers and the prosecutors are not spending sufficient time to go through each case thoroughly. Instead, they only use time to get what they consider vital information in order to make a decision of whether to divert or not. Due to staff shortage, juveniles who come into conflict with the law end up being detained in prison for longer, periods due to the lack of manpower for searching for the parents of these juveniles. More staff needs to be employed in order to assist and conduct the assessment of juvenile offenders. This needs to be

done so that the probation officers have adequate time to make a proper assessment and recommendation for sentencing the juvenile offender.

We have also learnt that there is a shortage of follow-up services after diversion programmes. Only individuals who request further counselling after diversion are provided with this service. Follow-up services are extremely important, as they continue to guide the juvenile offender on the right path. If juvenile offenders have concerns or need consultation or guidance, they have a place to go and talk about the problems that they are facing. They have the opportunity to go to a responsible adult who has intimate knowledge of the justice system. Employing more staff for follow-up services and having the availability of these services will be much cheaper than having a juvenile offender reoffend and be sent back to prison or go through the whole Criminal Justice process again.

There is a lack of sufficient infrastructure. The criminal justice system has a very good policy in place, but they lack the infrastructure to carry out the programmes framed by the policy. For example, there is a shortage of Schools of Industry, where children who have committed serious offences can be detained. There also is a lack of Places of Safety and Children's Homes, where children can be placed when they have no available parents or guardians. The government should consider building more of these institutions and, at the same time, instead of detaining these children in prison with hardened criminals, this is in line with the agenda of providing more alternative places for sentencing for juvenile offenders, as these could ensure their safety and wellbeing.

The policy framework aims to make punishment more rehabilitative and restorative. It wants to ensure that after everything the child's future is still intact and that they emerge as better individuals, knowing and learning from their mistakes. The aim of this policy is to rehabilitate and heal the hurts of society; it wants to improve the face and the ideology of punishment. Attempts should be made to improve the infrastructure and the number of staff members. Professional counsellors are also needed in the system, so that they can assist with the assessment of the juveniles.

This dissertation, treats diversion and the assessment criteria for diversion used by the Child Justice System as being essentially informed by ideologies and discourses that find their roots within a structural context of the post-apartheid South African society. Overall, this has proved to be a

commendable and progressive policy framework, yet putting it into practice has been rather complicated and contestable. In this sense, the Child Justice Act 75 of 2008 is regarded to be a humane way of dealing with children and it seeks to protect the child from unnecessary psychological, physical and emotional trauma. It seeks to prepare the juvenile offender for an orderly society by teaching the juvenile offender how to be a law-abiding citizen. As a final note of thought, I come to wonder, however, if adults are thus not deserving of similar treatment and care.

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Appendix

GLOSSARY

1. Uyazi is a word derived from the Zulu language which means “You Know”
2. Ngingathini is a word derived from the Zulu language which means “What can I say”
3. Ingane is a word derived from the Zulu language which means “A child”
4. Lentho is a word derived from the Zulu language which means “This”
5. Noma is a word derived from the Zulu language which means “Or”
6. Amacircumsatnces means a circumstances
7. Kuyangikhalisa is a word derived from the Zulu language meaning “It makes me want to cry”