

**JUVENILE OFFENDERS:
DIVERSION FOR THOSE IN CUSTODY**

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DECLARATION

I Melané Johanna de Jager declare that :

- (i) The research report in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any other degree or examination at any other university.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a final flourish.

Melané Johanna de Jager.

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CHAPTER 1

JUVENILE OFFENDERS

DIVERSION OPTIONS FOR THOSE IN CUSTODY

1.1 INTRODUCTION

“Children should not be in prison at all save in exceptional circumstances.” These are the words of Justice J.J. Fagan.¹ According to Justice Erasmus, in 2006/2007 there were 2 077 juvenile offenders under the age of 18 years in prison of which 1 165 were awaiting trial.² The latest 2006/2007 report does not give statistics of the types of offences and the number of juvenile offenders who are in custody. However, in the 2003/2004 report the offences were categorised according to awaiting trial juvenile offenders and the nature of the offences committed.³

Table 1
Juvenile Offenders Awaiting Trial in South African Prisons
October 2004

AGE OF CHILD	ECONOMIC OFFENCES	AGGRESSIVE OFFENCES	SEXUAL OFFENCES	NARCOTIC OFFENCES
7 - 13	3	4	1	0
14	40	40	7	2
7 - 16	358	363	124	13
15	101	84	30	4
16	214	235	86	6
17 - 18	1 374	2 171	640	39
17	264	423	130	8
18	1 110	1 748	510	31

From table 1 it is clear that extremely young children are in prison awaiting trial. The table does not define what is meant under economic offences.

¹ Fagan J 'Annual Report of the Office of the Inspecting Judge 2004-2005' (2005) at 12.

² Erasmus N 'Annual Report of the Office of the Inspecting Judge 2006-2007' (2006).

³ Fagan J 'Annual Report of the Inspecting Judge 2003-2004' (2004).

Economic offences can include fraud, theft by shoplifting, theft of or out of motor vehicle, theft and being found in possession of an item suspected to be stolen.⁴ Aggressive offences can include armed robbery, robbery; assault and assault with the intent do grievous bodily harm. Narcotic offences can be dealing in or possession of prohibited substances. It is difficult to establish from the abovementioned information how many juvenile offenders are in custody awaiting trial for minor offences.

For many years the issue of juvenile offenders in custody has been of great concern to human rights activists. Due to their concerns, international bodies such as the United Nations drew up guidelines to promote the protection of children's rights.⁵ The United Nations Standard Minimum Rules on Juvenile Justice, also known as the "Beijing Rules", sets out the rights of the juvenile offender. The ANC Woman's League raised their concerns in 1996 about juvenile offenders in custody especially for minor offences.⁶ In 1996 there were 398 awaiting trial juvenile offenders in custody and an estimated 62% were suspected of minor offences. Woman's League Executive Member M. Malumise stated that: *'The League speaks for millions of South African mothers, in fiercely opposing the imprisonment of children who are accused of minor transgressions.'*⁷

During 1998 former President Nelson Mandela made the following statement regarding juvenile offenders in detention and prisons: *'... the government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation*

⁴ Deyssel, A. *Kids Behind Bars: Talking to Young Inmates*. www.csvr.org.za/papers/papdis9.html.

⁵ N Jacobs-du Preez 'The application of the United Nations Standard Minimum Rules on Juvenile Justice in an African Context' *Second World Conference 2001 on the Investigation of Crime, Modern Criminal Investigation, Organised Crime and Human Rights.* Durban, South-Africa, 3-7 December 2001. www.tsa.ac.za/corp/research/papers/duPreez2001/unrules

⁶ Quoted in a statement issued by African National Congress on 4 September 1996 *'Kids in prison an outrage says Woman's League'* www.anc.org.za/ancdocs/pr/1996/pr0904.html.

⁷ Supra.

*and ensure that the system of criminal justice must be the last resort in the case of juvenile offenders.'*⁸

From the above it is clear that the main issue is juvenile offenders being kept in custody for minor offences. Mrs. Maureen Malumise MP commented as follows on juvenile offenders who are in custody and who have allegedly committed serious offences: *'The detention of children who are alleged to have committed serious offences has the full support of the Women's League...'*⁹ *Juvenile offenders are only to be detained in custody as the last resort'*.¹⁰

This is in accordance with s 28(1)(g) of the Constitution of the Republic of South Africa Act 108 of 1996 and other international instruments, which state that the imprisonment of juvenile offenders will be permissible in certain defined circumstances.¹¹

In an attempt to minimise the imprisonment of juvenile offenders and to steer them away from the criminal justice system, the concept of diversion has been introduced in South Africa.

Diversion in the juvenile justice system is a fairly new concept in South Africa and started in 1990 with the introduction of the Youth Empowerment Scheme ('YES' programme). This was followed in 1992 with the life skills diversion programme by the National Institute for Crime Prevention and Reintegration of

⁸ Quoted in South African Law Commission document 'What do you think about ... young people in trouble with the law' (1998) 1-7.

⁹ Quoted in a statement issued by African National Congress on 4 September 1996 *'Kids in prison an outrage says Woman's League'* www.anc.org.za/ancdocs/pr/1996/pr0904.html.

¹⁰ Quoted in a statement issued by African National Congress on 4 September 1996 *'Kids in prison an outrage says Woman's League'* www.anc.org.za/ancdocs/pr/1996/pr0904.html.

¹¹ The United Nations Convention on the Rights of the Child (1989); the 1995 United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the 1990 United Nations Rules for the Prosecution of Juveniles Deprived of their Liberty; the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency and the African Charter on the Rights and Welfare of Children.

Offenders (NICRO).¹² To date there is no legislation that regulates diversion. Currently the discretion to offer diversion to a juvenile offender depends on the prosecutor.¹³ If a prosecutor or the legal representative of a juvenile offender is unaware of the diversion option, the juvenile offender will not be afforded this option.

Diversion attempts to divert the juvenile offender away from the criminal justice system and into reintegrated programmes.¹⁴ This is in keeping with standards set for juvenile justice in Art 3(1) of the United Nations Convention on the Rights of the Child (1989) (herein after referred to as “the Convention”). Article 40(3)(b) states that wherever appropriate and desirable; States are encouraged to take measures to deal with juvenile offenders without resorting to criminal proceedings with the proviso that the human rights of the community and the juvenile offender are safeguarded.¹⁵ Other relevant international instruments are the 1995 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the 1990 United Nations Rules for the Prosecution of Juveniles Deprived of their Liberty, the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency and the African Charter on the Rights and Welfare of Children (1999).

Diversion is aimed at balancing the interests of justice and the rights of the juvenile offender. Various rights of the juvenile offender may be infringed if the juvenile offender agrees to diversion. The right to be presumed innocent until

¹² J Sloth-Nielson and J Callinetti *Child Justice in Africa. A Guide to Good Practice* (2004) ‘Policy Development: Change and Reform within Existing Justice Systems’ at 42 and also J Gallinetti ‘Diversion’ 66 at 66. See also T Maepa(ed) *Diversion: A Central Feature of the New Child Justice System* in *Beyond Retribution Prospects For Restorative Justice in South Africa* (2005) 76 at 76.

¹³ This is based on a directive issued by the National Director of Public Prosecutors (NDPP) (Part 7 of NDPP Policy and Directive on Diversion (herein after referred to as the NDPP Policy)).

¹⁴ C. Bezuidenhout and S Joubert *Child and Youth Misbehavior in South Africa a Holistic View* on 191.

¹⁵ CJ Davel *Introduction to Child Law in South Africa* at 418-419.

the State proves the commission of the offence beyond reasonable doubt is infringed when the juvenile offender agrees to diversion. The privilege against self-incrimination may also be violated as the juvenile offender has the right to have a court of law decide on his or her innocence.¹⁶ It is submitted that the benefits derived from diversion, as discussed below outweigh the possible infringement of the abovementioned rights of the juvenile offender.

1.1.1 BENEFITS OF DIVERSION

The benefit of diversion to the juvenile offender is the **removal of the stigmatisation of being arrested** and also the **decriminalisation of the offence**.¹⁷ The other advantages are:

- not being incarcerated whilst awaiting trial;
- not being exposed to other juvenile offenders who are in custody for more serious offences; and
- the juvenile offender does not acquire a criminal record.¹⁸

1.1.2 AIMS AND PURPOSES OF DIVERSION

In terms of a directive issued by the National Director of Public Prosecutors (herein after referred to as the NDPP) the aims and purposes of diversion are:¹⁹

- to encourage the child to be accountable for the harm caused by his or her acts;

¹⁶ Part 7 of NDPP Policy and Directive on Diversion.

¹⁷ J Sloth-Nielson *Juvenile Justice. Regspleging ten opsigte van minderjariges* SACJ (1998) 11 at 98.

¹⁸ CJ Davel at 418.

¹⁹ The United Nations Convention on the Rights of the Child (1989); the 1995 United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the 1990 United Nations Rules for the Prosecution of Juveniles Deprived of their Liberty; the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency and the African Charter on the Rights and Welfare of Children.

- to promote the re-integration of the child into the family and the community;
- to provide an opportunity for reparation;
- to provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such crime;
- to identify underlying problems motivating offending behaviour;
- to provide educational and rehabilitative programmes to the benefit of all parties concerned; and
- to lessen the case-load of the formal justice system.

At present, the procedure is that a juvenile offender, who has admitted to committing an offence, is assessed by a probation officer to establish the suitability of the juvenile offender to be considered for diversion and then released into the custody of a guardian, care-giver or parent. Some of the factors that will be taken into account in assessing the juvenile offender's suitability for diversion are the following:²⁰

- biographical information (name, age address and gender);
- education, schooling and school attendance;
- household structure;
- household income;
- level of parental or guardian supervision;
- relationship with parent or guardian;
- criminal history of the juvenile offender;
- the parent or guardian's of the case and the juvenile offender;
- opinions of any significant persons of the case and also the juvenile offender;
- any previous diversions offered to the juvenile offender and what programmes where offered; and
- any history of substance and or alcohol abuse.

²⁰ Child Law manual for judicial officers at D -17.

The person concerned will have to take responsibility for ensuring the juvenile offender's attendance at all the required programmes and also in certain circumstances as part of the retribution or community service. The juvenile offender and the guardian, care-giver or parent is sent to NICRO with a letter of reference as NICRO offers the diversion programmes. NICRO then assesses the juvenile offender to determine if he or she is a suitable candidate to attend the programmes. If the juvenile offender is found to be suitable, a contract is given to the juvenile offender to return to the prosecutor. The contract normally sets out the programmes that have to be followed, the number of applicable hours of community service and the venue of such service. On receipt of the said contract, the prosecutor, the juvenile offender and his or her guardian, care-giver or parent signs the contract. Once the document is signed, it is returned to NICRO.

Once the juvenile offender has completed the programmes and/or community service, the criminal charges are withdrawn against him or her, thus enabling the juvenile offender to walk out of court, without a criminal record.

NICRO will not accept a juvenile offender into any programme if the juvenile offender does not admit guilt to committing the offence or if he or she had previously attended any programme at NICRO. In these instances, NICRO notifies the prosecutor in writing of the reasons for not accepting the juvenile offender. If the juvenile offender is not accepted as a candidate to the diversion programme, the matter will then go through the normal criminal procedures stipulated under the Criminal Procedure Act 51 of 1977.²¹

Diversion has not been practiced consistently across South Africa. Only 25% of all magistrates' courts offer this option.²² The Child Justice Bill (hereafter

²¹ The procedures stipulated in these paragraphs are not contained in any official documentation but has been the practice followed in court. This has been from the researcher's experience both as Prosecutor and Magistrate in the Juvenile Court in Durban.

²⁰ *What is Restorative Justice?* www.capeway.gov.za/pubs/public_info/WI/47588.

referred to as the Bill) that is still to be promulgated will for the first time give formal legislative enforcement to diversion. The diversion requirements and processes are covered in chapter 6 of the Bill.

1.1.3 OBJECTIVES OF DIVERSION

Diversion in South Africa has two different objectives:

- Diversion for the juvenile offender in conflict with the law; and
- Diversion for the juvenile who is living in the street and not yet in conflict with the law.²³

Juvenile offenders who are in conflict with the law can fall into one of two categories:

- Those who have committed minor offences, and
- Those who have committed serious offences.

Juvenile offenders who have committed minor offences are more likely to be offered diversion options than those juvenile offenders who have committed serious offences.

This dissertation will focus on juvenile offenders who are in custody due to minor offences at the Westville Youth Centre and the Excelsior Place of Safety. Juvenile offenders who are kept in custody for minor offences normally do not have care-givers, guardians or parents in whose custody they can be released.

Where a juvenile offender is in the disadvantaged position of not having a guardian, care-giver or parent to take responsibility for him or her, he or she does not qualify for diversion. The unfortunate result is that the juvenile offender is not given the opportunity to be steered away from the criminal

²³ J Callinetti *Child Justice in Africa A guide to Good Practice* 'Diversion' 66 at 68.

justice system. This leads to an unfair situation as the juvenile offender will be convicted even after admitting guilt and accordingly will acquire a criminal record.

The other option to convicting such a juvenile offender would be to withdraw the case against him or her. This option, however, will not be in the interests of justice or in the interest of the community. If minor offences are withdrawn due to the fact that the juvenile offender has no care-giver, guardian or parent, wrong messages will be sent out to the community and like-minded juvenile offenders.

In light of the aims and purposes of diversion, it is likely that juvenile offenders without care-givers, guardians or parents will benefit even more from attending or undergoing the programmes that are currently being offered to juvenile offenders who are diverted from the criminal justice system, as they do not have adult supervision or proper role models to guide them.²⁴

1.2 AIMS OF THIS STUDY

This study aims to investigate the diversion programmes presently offered at the Westville Youth Centre and the Excelsior Place of Safety for the juvenile offender who is in custody. The study also seeks to identify the benefits of diversion to the juvenile offender. Recommendations will be made for diversion to be made available to all juvenile offenders who are in custody in the Republic of South Africa.

This study will investigate the role of the social worker and the probation officer in the diversion process.

Finally recommendations will be made to improve the existing diversion system and the provisions regarding diversion in the proposed Juvenile Justice Bill for juvenile offenders in custody.

²⁴ See Chapter 2 at 11-12.

1.3 KEY QUESTIONS TO BE ANSWERED IN THIS STUDY

The following issues will be discussed in this study:

- Does diversion benefit juvenile offenders?
- What are the shortcomings in the current diversion system?
- What are the differences and/or similarities between programmes offered at NICRO and those offered by the Westville Youth Centre and the Excelsior Place of Safety?
- What happens to the juvenile offender who undergoes diversion while in custody after the diversion programme has been completed?
- What are the roles of the social worker and the probation officer in the diversion process?
- What if any are the shortcomings of the Child Justice Bill?

1.4 LAYOUT OF THE DISSERTATION

Chapter 1 discusses the concept of diversion and the problems relating to diversion options for juvenile offenders who are in custody.

In Chapter 2 the provisions relating to diversion in the proposed Child Justice Bill will be discussed as well as other relevant legislation.

In Chapter 3 the information received from the social workers at the Westville Youth Centre and the Excelsior Place of Safety will be discussed and analysed and the role of the social worker and the probation officer in the diversion process will be investigated.

Chapter 4, the concluding chapter, will include evaluations of the current position regarding diversion, comparisons with international instruments and comparisons will be made with the proposed Child Justice Bill. Further proposals will be made regarding the current position and the Bill.

1.5 METHODOLOGY

The methods of approach in this research are as follows:

Scheduled interviews will be held with the social workers who are involved with the diversion programmes at the Westville Youth Centre and at the Excelsior Place of Safety. The social workers concerned will be those who offer diversion programmes.

Library and internet research will be conducted for secondary sources of information.

The provisions of the proposed Bill, relating to diversion, will be studied to determine the proposed diversion options and the diversion options available at present for juvenile offenders in custody.

The researcher's interest in this subject emanated from her personal experience in presiding over cases where children were in conflict with the law. There are diversion programmes for juvenile offenders in custody but this study is limited to two institutions in KwaZulu-Natal. The two institutions are the Youth Centre at Westville prison and the Excelsior Place of Safety in Pinetown. These two institutions deal with the disadvantaged juvenile offender in the sense that he or she does not have a parent, care-giver or guardian.

The Westville Youth Centre and the Excelsior Place of Safety are detention centres for juvenile offenders for the following areas Durban, Pinetown which includes Bothas Hill, Dassenhoek, St Windowlenes and Kwandengezi, Kwa Mashu, Chatswoth, Inanda and the Excelsior Place of Safety also accept juvenile offenders from Verulam and as far as Umbumbulu.²⁵

²⁵ Interview with Mrs. R. Veerasamy, Principal social worker of Excelsior place of safety and Westville Youth Centre, at Pinetown on 17 October 2006.

The fact that there are only two institutions in Kwa Zulu Natal offering diversion programmes gave rise to this research. This is a problem that arose from “a concrete problem observed in reality” and “the researcher’s sense of professional responsibility to contribute to the enhancement of the underlying knowledge base underlying the delivery of certain services”.²⁶

Newman²⁷ defines research as the studious inquiry on examination, especially critical and exhaustive investigation, or experimentation having as its aim the discovery of new facts and their correct interpretation, the revision of acceptable conclusions, theories or laws in the light of newly discovered facts, or the practical applications of such new or revised conclusions, theories or laws. This study will inquire into the effectiveness and shortcomings of the diversion programmes and will make recommendations to improve these programmes.

1.5.1 DATA: COLLECTION METHOD

The research project will be carried out at the Westville Youth Centre and at Excelsior Place of Safety as the two places where children without guardians, caregivers or parents are detained. At both of these institutions the Department of Social Welfare and Development offers diversion programmes. The number of cases referred for diversion will be taken for the period between January 2006 to December 2006. The number of children successfully completing the programmes and the number of re-offenders will be examined to establish the success rate of the diversion programmes offered.

1.5.2 LIMITATIONS

- The findings will be based on only two institutions as diversion

²⁶ AS de Vos (edit) *Research at Grass Roots For the Social Sciences and Human Service Professions* (2002) at 96.

²⁷ WL Newman *Social Research Methods: Qualitative and Quantitative Approaches* (2000) at 6.

programmes for children in detention are done only at these institutions.

- The success rate will only cover a period of one year. Thus it does not take into account the long-term success or failure rate.

CHAPTER 2

THE CHILD JUSTICE BILL AND OTHER RELEVANT NATIONAL AND INTERNATIONAL INSTRUMENTS.

2.1 INTRODUCTION

Diversion is the referral of *prima facie* cases away from the criminal justice system, with or without conditions.¹ The process of diversion is in keeping with international instruments that have been ratified by South Africa.² In this chapter diversion will be looked at from the perspective of the international instruments, the current position regarding diversion and diversion in terms of the proposed Child Justice Bill, 2003.

2.2 INTERNATIONAL FRAMEWORK FOR DIVERSION

2.2.1 THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Article 40(3)(b) of the Convention deals with juvenile offenders and provides that '*Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected*'.

Article 40(4) makes provision for various dispositions, such as '*...care, guidance and supervision orders; counselling; probation; foster care;*

¹ Wood, C. *Diversion in South Africa. A review of policy and practice, 1990-2003*
www.iss.co.za/pubs/papers/79/Paper79.html.

² See p 3-4 chap 1.

*educational and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence’.*³

From the above it is clear that in appropriate cases, and also if it is desirable, the juvenile offender should be diverted away from judicial proceedings. In Article 40(4) various options are mentioned in the diverting process for example guidance and supervision orders, vocational training programmes and probation. The article further states that ‘... *and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*’

In terms of this article it is clear that each country that has ratified the Convention must make provision for programmes as a means of diverting juvenile offenders away from criminal proceedings. Due to the different circumstances in each country, each country should tailor-make programmes that the juvenile offender can follow.⁴

2.2.2 UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (BEIJING RULES) (1985)

In terms of the general principles of the United Nations Standard Minimum Rules of Juvenile Justice, (hereinafter referred to as the ‘Beijing Rules’) ‘*sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the*

³ *United Nations Convention on the Rights of the Child.*
www.rehydrate.org/facts/convention_full.htm.

⁴ South Africa ratified the United Nations Convention on the Rights of the Child (1989) on the 10th of June 1995.

law, and of, effectively, fairly and humanly dealing with the juvenile in conflict with the law.'

Rule 11 of the Beijing Rules make provision for diversion. The appropriate rules state as follows:⁵

Rule 11.1

Consideration shall be given, wherever appropriate, to deal with juvenile offenders without resorting to formal trial by the competent authority.

Rule 11.3

Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

It is submitted that in the South African context 'the competent authority' is the public prosecutor who has the discretion to offer a juvenile offender the opportunity to attend diversion programmes.

Rule 11.4

In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution and compensation of victims.

Rule 18 provides for various disposition measures which includes the following:

- Care, guidance and supervision orders;
- Probation;
- Community service orders;
- Financial penalties, compensation and restitution;

⁵ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* www.unhcr.ch/english/law/paf/crc.pdf.

- Intermediate treatment and other treatment orders;
- Orders to participate in group counselling and similar activities; educational settings.
- Orders concerning foster care, living in communities or other relevant.

Rule 24 provides for assistance to the juvenile offender in the rehabilitative process. The rule states that all efforts are to be made to assist the juvenile offender at all stages of the proceedings. Assistance includes lodging, education or vocational training or any assistance that is helpful and practical during the rehabilitative process.

Rule 25 makes provision for volunteers, voluntary organisations, local institutions and other community resources to contribute to the rehabilitation of a juvenile offender in a community setting.

It should be noted that the Beijing Rules were not ratified by South Africa but may nevertheless serve as guidelines in developing the diversion process. The Beijing Rules set out more comprehensively proposed programmes that can be used in the diversion process. The issue of community service is dealt with in Rule 11.3 that requires the permission from the juvenile offender or his/her parents. The Beijing Rules are the only international instrument that requires the consent of the juvenile offender before community service can be done. Consent can be given by the juvenile offender with or without the assistance of his or her parents but it also allows for the parents to give consent without requiring the juvenile offender to consent. This can lead to a situation where the juvenile offender does not want to do community service but is forced by his or her parents. The upside of the rule is that even if the parents do not want to consent to the juvenile offender doing community service, the juvenile offender can do so on his or her own.

It is submitted that the aims and objectives of the Beijing Rules are consistent with the aims and objectives for diversion in South Africa and should be utilised to develop the diversion process in South Africa.

2.2.3 THE UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY (1990) (RIYADH GUIDELINES)

The United Nations Guidelines for the Prevention of Juvenile Delinquency (1990) (Riyadh Guidelines) (herein after referred to as the Riyadh Guidelines) refer to diversion.⁶ The Riyadh Guidelines are guidelines to prevent juvenile delinquency. These guidelines also make provision for legislation to be passed to enforce diversion options.⁷ Articles 5(a) and (b) state as follows:⁸

- (a) The provisions of opportunities, in particular educational opportunities, to meet the varying needs of young persons and to serve as a supportive framework for safeguarding the personal development of all young persons, particularly those who are demonstrably endangered or at social risk and in need of special care and protection;*
- (b) Specialized philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and service delivery network aimed at reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions.'*

Article 58 states that:

'Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be

⁶ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) Adopted and proclaimed by General Assembly Resolution 45/112 of 14 December 1990. www.unhchr.ch/html/menu3/b/h_comp47.htm. And also Article 58 of the Riyadh Guide.

⁷ Supra. Also Article 52. 'Governments should enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons.'

⁸ Supra.

familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.'

This instrument has not been ratified by South Africa but it is a useful instrument to follow in the diversion process in South Africa as diversion programmes aim to teach juvenile offenders to avoid criminal activities.⁹

2.2.4 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF CHILDREN (1990)¹⁰

In terms of Article 17 of the African Charter *'Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'*.¹¹

The African Charter on the Rights and Welfare of Children (hereafter referred to as the Charter) states in general the right of a juvenile offender to special treatment. Diversion can be regarded as special treatment that would reinforce the juvenile offender's *'respect for human rights and fundamental freedoms of others'*.

2.3 DIVERSION IN SOUTH AFRICA

2.3.1 PROGRAMMES CURRENTLY OFFERED

South Africa attempted to comply with the abovementioned provisions by introducing diversion into the criminal justice system. There are presently two statutes that contain sections that steer juvenile offenders

⁹ Supra.

¹⁰ South Africa ratified the Charter on the 7th of January 2000 and it is therefore binding on South Africa.

¹¹ *African Charter on the Rights and Welfare of the Child*, OAU Doc.CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, www.umn.edu/humanrts/africa/afchild.html.

away from the criminal justice system, s 254 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the CPA) and s 11 of the Child Care Act 74 of 1983 (hereafter referred to as the Child Care Act).

Section 254 of the CPA states:

- (1) *If it appears to a court at the trial upon any charge of an accused under the age of eighteen years that he is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act 74 of 1983), and it is desirable to deal with him in terms of sections 13, 14 and 15 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in terms of section 5 of that Act and that he be dealt with under the said sections 13, 14 and 15.*
- (2) *If the order under subsection (1) is made after conviction, the verdict shall be of no force in relation to the person in respect of whom the order is made and shall be deemed not to have been returned.'*

This is the only section in the Criminal Procedure Act that permits a Magistrate to steer a juvenile offender away from criminal proceedings. This section, however does not make provision for diversion as intended in the Child Justice Bill. The juvenile offender is referred to the Children's Court to be dealt with in terms of the Child Care Act.¹²

Section 11 the Child Care Act states:

'If it appears to any court in the course of any proceedings before that court that a child has no parent or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children's court'.

The effect of s 11 is that the words 'any court' would include criminal courts and 'any proceedings' would include criminal proceedings. The effect of this section is that the criminal court can apply the Child Care Act

¹² Section 11 of the Child Care Act 74 of 1983.

to divert a child in conflict with the law away from criminal proceedings.¹³

Section 11 of the Child Care Act and s 254 of the CPA have limitations that would make them inadequate for the diversion process. Section 254 only applies to juvenile offenders at the trial stage. In terms of time spent in custody, if it is assumed that the juvenile offender has no parents, this can be from a few days up to a few months. In practice the courts do not refer a juvenile offender to the Children's Court without the recommendation of a probation officer. The courts normally require reports by probation officers, indicating that the juvenile offender is a child in need of care defined in s 14(4) of the Child Care Act, before making a finding that a juvenile offender should be dealt with in terms of s 254 of the CPA.

Section 11 of the Child Care Act can be implemented by any court at any stage of the proceedings. This section can be applied as soon as a juvenile offender appears in court for the first time or at any stage up to sentencing. Section 11 does not mention the option of diversion as contained in the Child Justice Bill.

In terms of s 11 of the Child Care Act, no distinction is made between a juvenile offender pleading guilty or one who pleads not guilty. Applying the abovementioned section and diverting a juvenile offender away from criminal proceedings and placing him/her at a place of safety would achieve very little, as the juvenile offender would in terms of the Child Care Act, only be placed in a place of safety or in foster care without any further "Life Skills" training.¹⁴ This is because there are no programmes in place to educate a juvenile offender on life skills. Life skills training includes the following: personal awareness, communication skills, conflict resolution and effective mediation, sexuality, crime awareness and crime prevention, gender sensitivity, leadership development and family life.¹⁵ It

¹³ A Louw and F van Oosten *Diverting Children From the Criminal Courts: Some Proposals* (2000) 61 THRH at 123.

¹⁴ Section 15 of the Child Care Act.

¹⁵ T Maepa(ed) *Diversion: A Central Feature of the New Child Justice System* in *Beyond Retribution Prospects For Restorative Justice in South Africa* (2005) 76 at 76.

is submitted that if the juvenile offender would have been exposed to such a programme before being placed in a place of safety or in foster care, he or she would have insight into the wrongfulness of being involved in crime. For criminal proceedings in terms of s 11 of the Child Care Act to take effect there is no need for a juvenile offender to take responsibility for his or her actions. This enables the juvenile offender to walk away from the whole process without any insight as to what he or she has done wrong. Thus the interests of the juvenile offender and the interests of the community have not been taken care of. Practical experience has shown that most of the juvenile offenders who have been referred to the Children's Court in terms of s 254 of the CPA abscond before the proceedings are held in terms of the Child Care Act.

At present diversion is not being implemented by way of legislation but only in an informal manner by virtue of a directive of the National Director of Public Prosecutors.¹⁶ NICRO is currently providing most of the diversion programmes. Various programmes are offered. The programmes are as follows:¹⁷

2.3.1.1 PRE-TRIAL COMMUNITY PROGRAMME

Charges against the juvenile offender are withdrawn on the condition that he/she performs free community service, to benefit the community, at a non-profit organisation. The number of hours of community service ranges from 10 to 120. Failure to comply with the conditions would result in the charges being reinstated.

2.3.1.2 YOUTH EMPOWERMENT PROGRAMME

This programme is a six-week course where a group of about 20 juvenile offenders attend the course one afternoon per week. The material covered in this course includes conflict management, responsible decision-making,

¹⁶ Supra.

¹⁷ *The Development of Diversion Options for Youth Offenders-Policing the Transformation.*
www.iss.co.za/Pubs/Monographs/No12/Muntingh.html.

parent-child relationships and street law. The parents of the juvenile offender are required to attend the first and the last sessions with the juvenile offender.

This programme focuses on the following sets of skills-¹⁸

- **RESILIENCE AND RESISTANCE:**

These skills enable juvenile offenders to recognise and challenge common misconceptions about crime and other high risk behaviour. They also enable the juvenile offender to deal with peer and media pressures that may portray crime as a quick fix solution to financial problems.

- **PERSONAL SELF-MANAGEMENT:**

These skills help juvenile offenders to examine their values and self-esteem and its effects on their behaviour. These skills also assist in setting goals and keeping track of personal progress, identify everyday decisions and how they may be influenced by others. They also assist in analysing problem situations and consider the consequences before making decisions.

- **GENERAL SOCIAL**

These skills provide the juvenile offender with the necessary skills to adapt to attitudes, to communicate effectively and to avoid misunderstandings.

2.3.1.3 VICTIM-OFFENDER MEDIATION

This programme is facilitated by a facilitator who mediates between the juvenile offender and the victim. The two parties meet face-to-face. The aim is to mediate an agreement between the parties that will satisfy their respective needs. The agreement can include a restitution payment,

¹⁸ NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 7.

community service, attendance of another diversion programme, or a combination of these. The main aim of this programme is to hold the juvenile offender directly accountable and to provide assistance and support to the victim.¹⁹

2.3.1.4 FAMILY GROUP CONFERENCE

This option is suitable for young juvenile offenders who present patterns of problematic behaviour. The family group conference (hereinafter called the FGC) is attended by the juvenile offender, the family of the juvenile offender, any other person/s who has a direct interest in the case or is significant to the juvenile offender and the youth worker as a facilitator. The aim of the FGC is to work out a plan of action that would prevent further behaviour problems and to provide a support structure for the juvenile offender and also to rebuild disruptive relationships where the focus is on correcting things and not on punishment.²⁰

Some of the benefits of this programme are:

- Providing a safe environment for all participants to talk about their mistakes and how to set things right;
- Giving the victim the opportunity to participate in the justice process;
- Lowering the possibility of repeating offensive behaviour; and
- Restoring the trust and safety in the community.²¹

2.3.1.5 ANGER MANAGEMENT PROGRAMME

This programme aims to bring about cognitive, attitudinal and behavioural change. It targets juvenile offenders that were charged with assault and malicious damage to property. This programme is not suitable for juvenile

¹⁹ NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 2.

²⁰ NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 3.

²¹ NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 3.

offenders charged with sexual offences, murder, rape, offences against children, violent offences(armed robbery), housebreaking where the owners were present during the break-in and arson. The programme is presented once a week for fourteen weeks.²²

The programme includes the following topics:

- General Orientation;
- Anger and Aggression;
- Triggers, Control and Power;
- Childhood Anger;
- Anger Management Techniques;
- De-escalation skills; and
- Relapse and Motivation for Changes.

2.3.1.6 ADOLESCENT DRUG ABUSE, PREVENTION AND TREATMENT PROGRAMME

This programme is aimed at juvenile offenders that present with drug related behavioural problems. The objectives of the programme include-

- To provide the juvenile offender with skills to prevent the use of drug;
- To prevent the juvenile offender from getting involved with drugs or to get further involved with drugs;
- To provide the juvenile offender with facts about the use of drugs, the effects of drugs on mental and physical health; and
- The improvement of communication between the juvenile offender, their friends , parents and the community.²³

²² NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 1.

²³ NICRO Programmes for Alternate/Non Custodial Sentencing Options and Adult Diversion at 10.

2.3.1.7 THE JOURNEY

This is a high-impact programme for juvenile offenders who require intensive and long-term intervention. This programme includes support by the community and mentors. The time frame for this programme is from between 6-12 months. The Journey includes wilderness and/or outdoor education and at least one residential workshop.

Topics normally covered during the diversion programmes are personal awareness and development, crime awareness, responsible decision-making, communication skills, conflict resolution, self-esteem, sexuality, gender sensitivity and leadership development.²⁴

A Project Committee commissioned by NICRO held interactive workshops with children to ascertain their opinion on the benefit diversion.

There were seven groups of children who fell into the following categories:

- Children who had had no contact with the justice system,
- Juvenile offenders in prison serving sentences,
- Juvenile offenders in prison awaiting trial,
- Juvenile offenders in reformatories,
- Juvenile offenders awaiting trial at places of safety,
- Juvenile offenders who had been placed in diversion programmes, and
- Juvenile offenders who were serving residential sentences.

Table 2 outlines the responses of the participants to the question '*What would be the benefits of diversion for a child arrested for committing an offence?*'²⁵

²⁴ *Diversion in South Africa, A review of policy and practice, 1990-2003.*
www.iss.co.za/pubs/papers/79/Paper79.html.

²⁵ *Diversion in South Africa, A review of policy and practice, 1990-2003.*
www.iss.co.za/pubs/papers/79/Paper79.htm

TABLE 2: Participant's opinions of the benefits of diversion

Benefits of diversion	Juvenile offenders already convicted and serving sentences	Children who have not had contact with the justice system
Helps the participant to learn from his/her mistakes; gives him/her a second chance for the future.	56%	48%
Prevents participants from getting a criminal record.	15%	13%
Teaches participants new skills.	9%	16%
Keeps participants out of prison.	5%	4%
No benefits because it allows guilty children to get off.	2%	0%
Unsure about the benefits of diversion.	17%	19%

Eighty-three percent of the juvenile offenders who attended the workshop were offered diversion. They were of the opinion that had they received one of the diversion options outlined in the Bill, it would have assisted them to change their lives. The juvenile offenders that were not offered diversion felt that if they had been given the opportunity of diversion when they first committed an offence, they:²⁶

- Would have changed their behaviour as they would have realised what was wrong with their behaviour;
- Could have learnt skills in making decisions and the consequences of the crime committed;
- Could have completed school and could have achieved some other ambition;

²⁶ *Diversion in South Africa, A review of policy and practice, 1990-2003.* www.iss.co.za/pubs/papers/79/Paper79.htm

- Could have spent their time better than spending time in prison; and
- Would have had a more meaningful life.

From the above responses of the participants at the workshops by NICRO it is clear that diversion programmes may have a positive effect on various aspects of the juvenile offenders' lives.²⁷

Very little criticism can be levelled against the diversion process except for the fact that it results in 'net-widening' in that more people are being involved in the remedial process and the scope of it is more invasive.²⁸ Diversion can in no way be regarded as being "soft on crime" as the diversion process makes provision for the juvenile offender not only to understand the impact of crime on others but also provides for retribution.²⁹

2.4 CASE LAW AND THE SOUTH AFRICAN LAW COMMISSION'S ISSUE PAPER ON JUVENILE JUSTICE³⁰

Due to the fact that the issue of diversion is an option that can only be considered by the prosecutor, very few cases are reported on this issue in the law reports. The power to institute and conduct criminal proceedings is vested in the prosecuting authority. The function of the prosecuting authority is to institute and conduct criminal proceedings and to discontinue criminal proceedings.³¹ In terms of s 32(1)(b) of the National Prosecuting Act 32 of 1998 *'no organ of State and no member or employee of an organ of State or any other person shall improperly*

²⁷ Supra. *Diversion in South Africa, A review of policy and practice, 1990-2003.*
www.iss.co.za/pubs/papers/79/Paper79.htm

²⁸ S Cohen *Visions of Social Control* at 25.

²⁹ *What is Diversion?* www.capegateway.gov.za/eng/pubs/public_info/W/47586 on 1 and
Frequently Asked Questions www.childjustice.gov.za/faq.htm on 5

³⁰ No. 9, Project 106, 1997.

³¹ Section 20 of the National Prosecuting Act, Act 32 of 1998 and also E du Toit (ed)
Commentary on the Criminal Procedure Act (2006) at 1-4A.

*interfere with, hinder or obstruct the prosecuting authority in the exercise, carrying out or performance of its, his or her powers, duties and functions.*³² The High Court will only interfere with a prosecutor's decision under certain circumstances.³³

In the unreported case of *M v The Senior Public Prosecutor, Randburg and Another*³⁴ an application for review was brought by the mother of a juvenile offender (a girl) who had been charged with shoplifting. The juvenile offender had been convicted of theft after she had pleaded guilty. The review was not brought because of the conviction but on the grounds that the prosecutor had not applied his mind to the possibility of diversion as an alternative option to criminal proceedings. The juvenile offender's co-accused was offered diversion as an alternative option to criminal proceedings which was accepted by her co-accused. The prosecutor was given the opportunity to file papers as to the question on whether or not he had applied his mind in considering diversion in the case before the review court. Unfortunately no papers were submitted by the prosecutor.

The High Court will only interfere with a decision made by a prosecutor if it can be shown that the decision was made *mala fide* or that it was grossly unreasonable.³⁵

Based on the fact that the prosecutor had not submitted any papers to the review court, the court accepted that the prosecutor had not considered diversion and accordingly found that the prosecutor had not applied his mind to diversion as an option. The conviction was set aside and referred back to the prosecutor to consider diversion as an alternative option to criminal proceedings.³⁶

³² Supra.

³³ Supra and also *Gillingham v Attorney General* 1909 TS 572.

³⁴ Case 3284/00 WLD.

³⁵ *The Development of Diversion Options for Youth Offenders-Policing the Transformation*.www.iss.co.za/PPubs/Monographs/No12/Muntingh.html. See also *S v D* 1997(2) SACR 673(C).

The case of *S v D*³⁷ was the first reported case that mentioned diversion. The facts of the case were that four juvenile offenders had been arrested for possession of dagga at 8h00. The matter was taken to court on the same day and the juvenile offenders were convicted on the same day by 11h00. On application for special review it was averred that some weeks earlier a similar matter had been converted which meant that the juvenile offenders concerned did not acquire a criminal record. It was also brought to the court's attention that similar drug related matters had been referred for diversion. The court had no problem with the conviction of the juvenile offenders. The judge found that it was possible the juvenile offenders' rights were not properly explained to them. The judge expressed sympathy for the idea of diversion but the court said that the prosecutor as *dominus litis* had the discretion to divert the matter or to proceed with criminal charges.

In the case of *S v Z en Vier Ander Sake*³⁸ an interesting development occurred on the issue of *dominus litis*. As a rule, magistrates do not interfere with a prosecutor's decision in criminal matters.³⁹ In this case the court suggested that the court should play an active role in the diversion process. The Judge suggested that a court should, before proceeding with a trial against a juvenile offender, advance the referral of a juvenile offender for diversion. Obviously not all cases would be appropriate for diversion but if a magistrate is of the opinion that the matter might qualify for diversion, it should be posed to the prosecutor for consideration.

The above decision is clearly in accordance with s 28 of the Constitution of the Republic South Africa which states that '*the best interest of a child should be paramount*'.

³⁶ Sloth-Nielson. J "M v Senior Public Prosecutor, Randburg case no 3284/00(W).
Reviewing the prosecutorial decision not to divert" (2001) 34(3) *De Jure* 194 at 195.

³⁷ 1997(2) SACR 673(C).

³⁸ 1999(1) SACR 427 (EC).

³⁹ For example the decision to withdraw charges against an accused person.

It should be pointed out that there are no reported cases where the diversion process was utilised in respect of juvenile offenders that were in custody. The abovementioned cases are discussed to illustrate the development in the diversion process in South Africa.⁴⁰

The general rule has always been that magistrates are not to descend into the arena but to remain impartial.⁴¹ From the abovementioned case law and the South African Law Commission's Issue Paper on Juvenile Justice it is clear that the role of the magistrate in respect of juvenile offenders is changing. The magistrate may now descend into the arena and may suggest diversion to the prosecutor in cases where juvenile offenders are appearing on criminal charges. This change is for the better as in cases where you have an inexperienced prosecutor, such person may now be guided by the Magistrate to consider the option of diverting the juvenile offender away from the criminal justice system.

2.5 THE CHILD JUSTICE BILL

One of the main objectives in the Child Justice Bill, 49-2002 (here after referred to as the Bill) is to promote and expand the use of diversion in a just and consistent manner.⁴² It should be pointed out that once the Bill is promulgated as law, for the first time in South Africa all aspects of diversion and the process of diversion will then be legislated. In terms of s 45(1) of the Bill no juvenile offender is to be excluded from a diversion programme due to an inability to pay any fee required for diversion.

The Bill covers diversion in great length in chapter 6. This chapter covers the following issues:

⁴⁰ It was suggested in the South African Law Commission's Issue Paper on Juvenile Justice, that 'In deciding the outcome of any matter involving a young offender, the presiding officer should be guided by the principles of proportionality, the best interest of the child, the least possible restriction on the child's liberty and the right of the community to live in safety'.

⁴¹ *S v Msithing* 2006(1) SACR 266(N) and also *S v Jaipal* 2005(1) SACR 215 (CC).

⁴² Wood, C *Diversion in South Africa. A review of policy and practice, 1990* 2003 www.iss.co.za/pubs/papers/79/Paper79/html.

- The purpose of diversion,⁴³
- when diversion can be considered,⁴⁴
- the minimum standards applicable to diversion and the diversion options,⁴⁵
- the development of diversion options and record keeping of juvenile offenders who have been involved with diversion,⁴⁶
- the diversion options,⁴⁷
- the referral of a child in conflict with the law to a family group Conference,⁴⁸ and
- the referral of a child in conflict with the law to victim-offender mediation.

Section 40 is applicable in the event that a juvenile offender fails to comply with a diversion order and s 39 gives guidelines to prosecutors in considering diversion.

Section 44 covers the circumstances under which a juvenile offender **has** to be considered for diversion. The circumstances are the following:

- the juvenile offender voluntarily acknowledges responsibility for the offence;
- he or she understands his or her right to remain silent;
- he or she has not been unduly influenced to acknowledge responsibility;
- there is sufficient evidence to prosecute; and
- the juvenile offender **and** his or her parent or appropriate adult consent to diversion and the diversion option.⁴⁹

⁴³ Section 43.

⁴⁴ Section 44.

⁴⁵ Section 45.

⁴⁶ Section 46.

⁴⁷ Section 47.

⁴⁸ Section 48.

⁴⁹ Appropriate adult according to the Bill “means any member of a child’s family or a custodian or guardian of a child but excludes a parent or a primary care-giver as

This implies that diversion can only be considered if there is a parent or appropriate adult to consent to diversion. In the programmes that are offered by the Department of Social Welfare the requirement of a parent or appropriate adult does not play a role. It is submitted that this is the correct approach as the fact that the child has no parent or appropriate adult should not be held against him or her and should not be a factor to exclude him or her from the possibility of being diverted away from criminal proceedings.

The Bill makes provision for the following diversion orders:

- ***A supervision and guidance order***

This involves placing a child under the supervision and guidance of a schoolteacher, a probation officer, a social worker, or a community member etc also referred to as a mentor or a peer role model.

- ***A reporting order***

This order requires a child to report to a specified person (e.g. police officer, school principal, probation officer etc.) When and how often the child has to report depends on the magistrate.

- ***A compulsory school attendance order***

This order requires a child to attend school every day for a specified period of time. Their attendance must be monitored by a specified person.

- ***A family time order***

This order requires a child to attend a specified number of hours with his/her family. Activities such as attending church, spending time at home or assisting with household chores may be specified as part of this order.

defined in section 1 of the Social Assistance Act, Act 59 of 1992".

- ***A positive peer association order***

This order requires a child to associate with persons who can contribute to the child's positive interest in sport etc.

- ***A good behaviour order***

This order requires the child to abide by an agreement made between the child and his/her family to comply with a certain standard of behaviour (e.g. arriving home for meal times, no drinking or taking illegal drugs etc).⁵⁰

For a court to make the abovementioned orders the child needs a parent or guardian who will take responsibility to ensure that all the conditions of the order(s) are complied with. Suggestions will be made in this regard.

In terms of s 52 of the Bill the juvenile offender should be assisted by a parent or an appropriate adult. Section 52(2) provides that if a parent or an appropriate adult cannot be traced after reasonable efforts and any further delay would cause prejudice to the best interest of the juvenile offender, the court may dispense with the obligation that the juvenile offender be assisted by a parent or an appropriate adult. Section 52(6) makes provision for an independent observer to be present, if such observer is available, on request of a juvenile offender. An independent observer is in terms of s 1 of the Bill '*a representative from a community or organisation, or community police forum, who is not in the full-time employ of the State and who is accredited in this Act*'.

The Bill makes provision for the juvenile offender to be assisted by an independent observer during court proceedings but is silent about

⁵⁰ Wood, C *Diversion in South Africa. A review of policy and practice, 1990-2003*
www.iss.co.za/pubs/papers/79/Paper79/html.

assistance for juvenile offenders in custody that may qualify for diversion. Recommendations will be made in this regard.

2.5.1 THE DIVERSION PROCESS IN TERMS OF THE CHILD JUSTICE BILL

In terms of the Bill juvenile offenders may only be arrested under certain circumstances. Section 7 states that *'unless there are compelling reasons justifying an arrest'* no juvenile offender may be arrested for committing assault where no bodily harm has been inflicted, malicious injury to property where the damage does not exceed R500, trespass, illicit possession of dependence producing drugs where the value does not exceed R500, theft where the value of the property does not exceed R500, any statutory offence where the maximum penalty does not exceed three months imprisonment or a fine in equivalence with the Adjustment of Fines Act, 1991⁵¹ or conspiracy, incitement or attempt to commit any of the abovementioned offences.⁵² From the above offences it is clear that juvenile offenders must be released from detention for less serious offences. It is submitted that if a juvenile offender commits an offence mentioned in the schedule he or she will be considered for diversion.

Once a juvenile offender has been arrested, a social worker in whose area the arrest took place must be informed of the arrest by a police officer.⁵³ The juvenile offender must be taken to a preliminary inquiry within 48 hours after the arrest.⁵⁴ An assessment report of the juvenile offender must then be submitted to the prosecutor before the commencement of the preliminary inquiry.⁵⁵ The assessment report will contain inter alia recommendations as to the prospect of diversion and the placement of a juvenile offender in a particular place of safety, secure care facility or prison, in the absence of any parent or responsible adult; and whether or

⁵¹ Act 101 of 1991.

⁵² Schedule 1 of the Bill.

⁵³ Section 7 (4).

⁵⁴ Section 7 (5) (a).

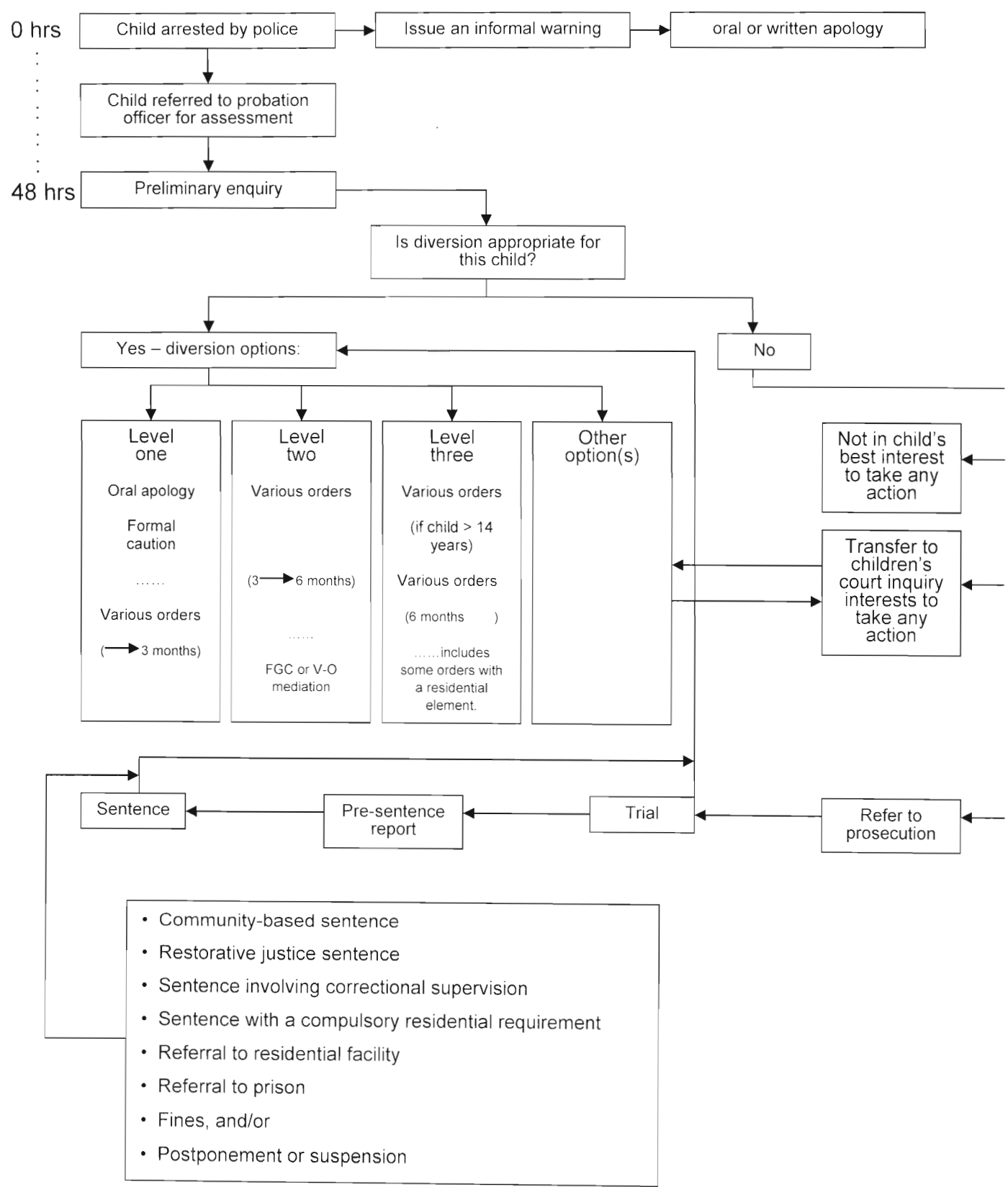
⁵⁵ Section 23 (9).

not the juvenile offender intends to acknowledge responsibility for the alleged offence.⁵⁶ In terms of s 11 of the Bill the juvenile offender may be detained in custody if the parents or an appropriate adult cannot be located after all reasonable efforts were made to locate the parents or an appropriate adult or if the parents or an appropriate adult are not available. See table 3 for procedures proposed by the Bill for the referral of juvenile offenders for diversion.⁵⁷

⁵⁶ Section 23 (8) by implication.

⁵⁷ Wood, C *Diversion in South Africa. A review of policy and practice, 1990-2003* at 4 www.iss.co.za/pubs/papers/79/Paper79.html.

Table 3: Procedures proposed by the Child Justice Bill for the referral of children for diversion.



2.5.1.1 THE PRELIMINARY INQUIRY

The preliminary inquiry is regarded as a first appearance in court.⁵⁸ The preliminary inquiry must be held in respect of every juvenile offender prior to plea.⁵⁹ The objectives of the preliminary inquiry are to:

- *Establish whether the matter can be diverted before plea;*
- *Identify a suitable diversion option, where applicable;*
- *Establish whether the matter should be transferred to a children's court in terms of the Child Care Act;*
- *Provide an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial;*
- *Ensure that all available information relevant to the juvenile offender, his/her circumstances and the offence is considered in order to make a decision and placement of the juvenile offender;*
- *Ensure that all the views of all persons present are considered before a decision is taken;*
- *Encourage the juvenile offender and or his/her parent or appropriate adult in decisions concerning the juvenile offender;*

At the preliminary inquiry the magistrate must ensure that the juvenile offender, the legal representative and parent or appropriate adult know of the recommendations in the probation officer's report and are also informed of any diversion options available. The aims and content of such option must be explained to the juvenile, the legal representative and parents or appropriate adult.⁶⁰ If a juvenile offender is defended by an inexperienced or ignorant attorney, the shortcoming of the attorney is cured to the benefit of the juvenile offender. At present there are legal representatives that are ignorant of the diversion options and are therefore unable to promote diversion. This can be at the expense of his or her client.

In terms of s 44 a juvenile offender has to be considered for diversion if he or she voluntarily acknowledges responsibility for the offence(s), he or she understands

⁵⁸ Section 25 (1).

⁵⁹ Section 25 (1).

⁶⁰ Section 29 (3).

he right to remain silent, has not been unduly influenced to acknowledge responsibility and he or she and his or her parent or an appropriate adult consents to diversion and the diversion options.

An interesting development in the Bill is the option of a court to divert a matter, if a prosecutor indicates that the matter may be diverted at any time before the matter is finalised.⁶¹ At present, if a prosecutor wishes to divert a matter during a trial, the prosecution has to be stopped in terms of s 6(b) of the Criminal Procedure Act. This procedure is not followed at present as it is a drawn out process. The procedure is that the Director of Public Prosecutors has to authorise such procedure and it is normally done only as an exception. Should a juvenile offender not acknowledge responsibility before a plea is taken, the matter is finalised even if the juvenile offender wishes to acknowledge responsibility before the case is concluded. The juvenile offender will then be sentenced and will have a criminal record. In terms of the Bill the juvenile offender can at any stage of the criminal proceedings accept responsibility and be given the option of diversion. The charges will then be withdrawn and the juvenile offender will not have a criminal record.

2.5.1.2 AIMS AND OBJECTIVES OF DIVERSION

Once the decision is made that a juvenile offender qualifies for diversion the magistrate has to make a decision on what the diversion should entail. Diversion options are divided into three levels. In selecting a diversion option the magistrate has to take the following into consideration:

- the options available from the appropriate level;
- the religious, cultural and linguistic background of the juvenile offender;
- the educational level, cognitive ability, domestic and environmental circumstances of the juvenile offender;
- the proportionality of the option to the circumstances of the juvenile offender, the nature of the offence and the interest of society; and

⁶¹ Section 59.

- the age and developmental needs of the juvenile offender.⁶²

The diversion option should, where reasonably possible, focus on the following:

- imparting useful skills;
- include a restorative justice element which is aimed at healing relationships, including the relationship with the victim;
- include an element which seeks to ensure that the juvenile offender to be presented at a location reasonably accessible to the juvenile offender;⁶³
- promote the dignity and well-being of a juvenile offender;
- develop the juvenile offender's sense of self-worth;
- the ability to contribute to society;
- it may not be exploitive, harmful or hazardous to the juvenile offender's physical or mental health; it must be appropriate to the maturity and age of the juvenile offender.⁶⁴

Where the juvenile offender is in custody the magistrate, for obvious reasons, will not include a compensation of restitution order in the diversion programme.

2.5.1.3 DIVERSION LEVELS

Section 47 (3) of the Bill creates three levels of diversion options. Level one comprises of the least onerous options and level three the most onerous options. Figure 1 over leaf sets out the levels of diversion.⁶⁵

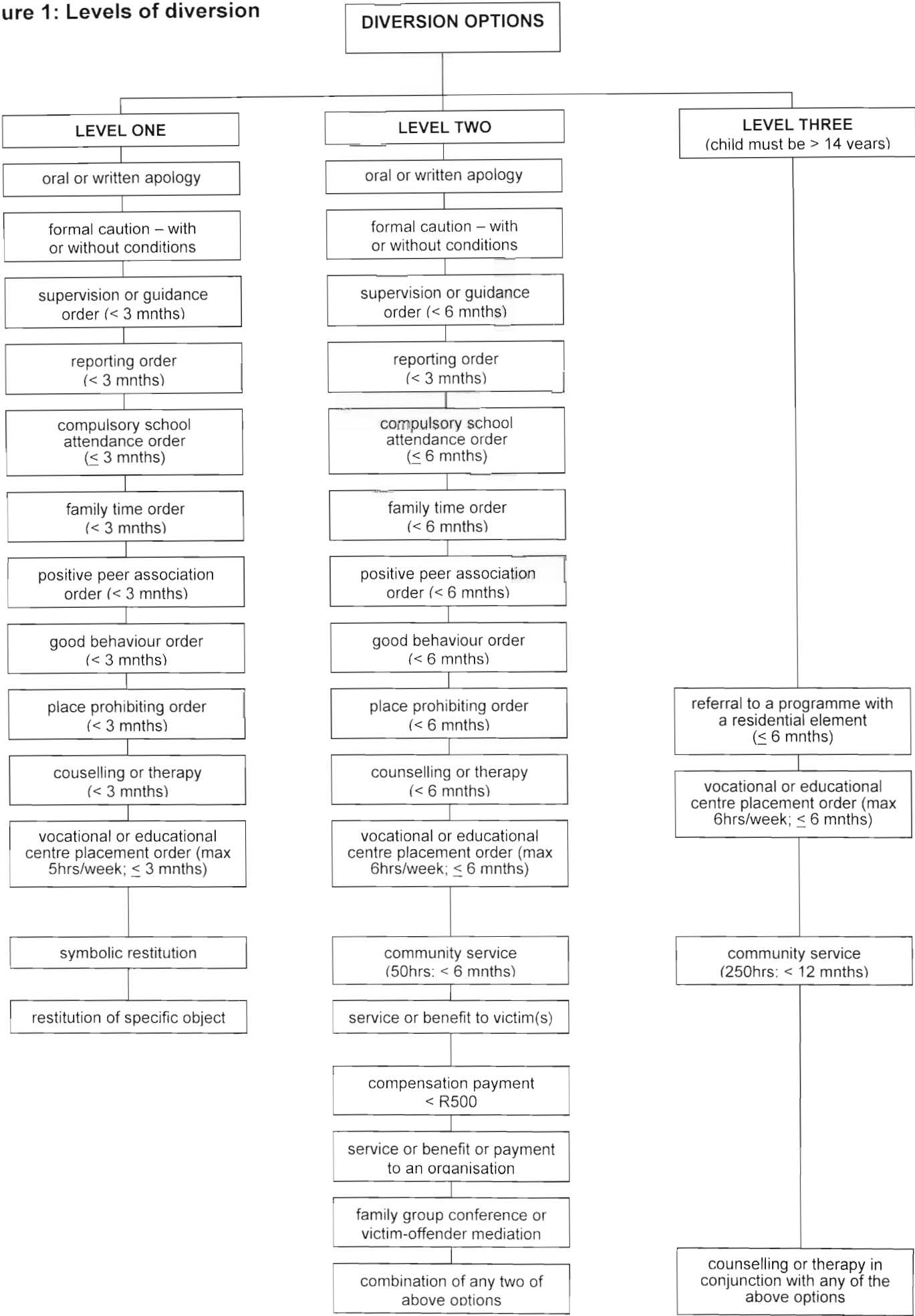
⁶² Section 47 (2).

⁶³ Section 45 (4).

⁶⁴ Section 45 (3).

⁶⁵ C Wood *Diversion in South Africa A view of policy and practice, 1990-2003* at 6
www.iss.co.za/pubs/papers/79/paper79.html.

Figure 1: Levels of diversion



2.5.1.4 LEVEL ONE

- an oral or a written apology to a specified person(s) or institution;
- a formal caution with or without conditions;
- placement under a supervision and guidance order for a period not exceeding three months;
- placement under a reporting order for a period not exceeding three months;
- The issue of a family time order for a period not exceeding three months;
- the issue of a positive peer association in respect of a specified person(s) of specified place for a period not exceeding three months;
- the issue of a good behaviour order;
- the issue of an order prohibiting the juvenile offender from visiting, frequenting or appearing at a specified place;
- a referral to therapy or counselling for a period not exceeding three months;
- the issue of an order for compulsory attendance at a specified place or centre for a specified vocational or educational purposes for a period not exceeding five hours a week, for a period not exceeding three months;
- a symbolic restitution to a specified person(s), group or institution; and
- the restitution of a specified object to a specified victim(s) of the alleged offence where the object concerned can be returned or restored.⁶⁶

2.5.1.5 LEVEL TWO

Any of the two options listed below may be used in combination.

- All the options available in s 47 (3) but the period that can be considered should not exceed six months; or

⁶⁶ Section 47 (3).

- The issue of an order for compulsory attendance at a specified place or centre for a specified vocational or educational purposes for a period not exceeding eight hours a week, for a period not exceeding six months.⁶⁷

There are other options available in terms of s 47(4) that would not be able to be utilised for juvenile offenders in custody. An order that requires the juvenile offender to attend for example therapy or counselling, at an institution will serve no purpose as the juvenile offender will not be able to attend to the said institution due to the fact that he or she is in custody. It is submitted that any order made to compel the juvenile offender to treatment outside of the institution he or she is detained in will be a futile exercise as there would be no form of control to ensure that the order is complied with. If the order is not complied with it would be difficult to enforce s 40 as it would be difficult to track down the juvenile offender who for example lives on the street.

2.5.1.6 LEVEL THREE

Level three diversion options apply to juvenile offenders over the age of fourteen years and in cases where there is a conviction. For the purpose of this study this level is not applicable as the focus of this research is on the juvenile offender who has acknowledged responsibility for the alleged offence without being put on trial for the offence.

2.5 PROCEEDINGS WHERE THERE IS A FAILURE TO COMPLY WITH DIVERSION ORDER

Section 40 of the Bill covers the proceeding that has to be followed should a juvenile offender not comply with the diversion order.

The option of diversion is conditional, meaning that the juvenile offender is to meet certain conditions before a matter can be finalised. Should a juvenile

⁶⁷ Section 47 (5).

offender fail to attend the diversion programmes the charges may be reinstituted.

2.6 CONCLUSION

In this chapter the current situation of diversion was discussed against the background of the international instruments and the proposed Bill. Despite the fact that diversion is not codified, South Africa attempts to give effect to the treaties it has ratified. From the cases discussed it is clear that the courts acknowledge diversion options as part of our criminal justice system.

From the preceding discussion it is clear that diversion is beneficial to juvenile offenders and that diversion acknowledges that the best interest of the juvenile offender is of paramount importance.

While development is taking place in the juvenile criminal justice system to promote and implement diversion it is submitted that this should be developed country-wide to also accommodate the juvenile offender in custody.

The benefits of the Bill are that it codifies diversion; explains what diversion is together with the aims thereof, prescribes the process thereof and gives the court different options that could be utilised to ensure that the aims and objectives of diversion and the Bill are met.

A very important aspect of the Bill is that it differentiates between diversion as a sentence in lieu of imprisonment and diversion as an instrument to remove the juvenile offender from the criminal justice system.⁶⁸ Levels 1 and 2 of diversion are aimed at diversion before conviction and level 3 for juvenile offenders who have been convicted.

Section 45(1) of the Bill clearly states that no juvenile offender is to be excluded from a diversion programme. The Bill unfortunately does not differentiate between juvenile offenders in custody and juvenile offenders who have an adult into whose care he or she may be released. Therefore in terms

⁶⁸ Section 47.

of the Bill, programmes would have to be offered to juvenile offenders in custody. Recommendations will be made in this regard in the final chapter.

The Bill also does not make provision for juvenile offenders who were in custody and are released after they have completed the diversion programme to prevent any further delinquency. Recommendations will be made on this aspect in the final chapter.

In terms s 44 of the Bill the juvenile offender and his or her guardian have to consent to diversion and the diversion options. As pointed out this could lead to a situation where a juvenile offender who has no guardian or parents cannot qualify for diversion. Recommendations will be made in this regard in the final chapter.

The various diversion options in terms of the Bill are:

- supervision and guidance orders,⁶⁹
- reporting orders,⁷⁰
- compulsory school attendance orders,⁷¹
- family time orders,⁷²
- positive peer association orders,⁷³ and
- good behaviour orders.⁷⁴

These orders are clearly structured for the juvenile offender who is *not* in custody. Recommendations will be made in this regard in the final chapter.

Section 59 of the Bill provides for diversion even after a plea has been taken. This gives the juvenile offender the opportunity to acknowledge responsibility for an offence at any stage during the trial. However this leaves the door open to abuse of the diversion process as the juvenile offender can avoid being convicted after evidence has been led. If a juvenile offender realises that the case against him or her is watertight he or she can then acknowledge

⁶⁹ Section 47(g).

⁷⁰ Section 47(f).

⁷¹ Section 47(b).

⁷² Section 47(c).

⁷³ Section 47(e).

⁷⁴ Section 47(d).

responsibility for the offence that would give him or her the option of being considered for diversion. Recommendations will also be made in this regard in the final chapter.

CHAPTER 3

THE ROLE OF THE SOCIAL WORKER AND THE PROBATION OFFICER.

3.1 INTRODUCTION

Social workers and probation officers play a very important role in the juvenile criminal justice system.¹ A social worker has to be registered in terms of s 17 of the Social Services Professionals Act (hereafter referred to as the Social Services Act).² The Social Services Act does not specify the duties of a social worker. A social worker's duties and powers are however contained in various other statutes, for example the Child Care Act.³

Probation officers are social workers who work in the juvenile criminal justice system.⁴ Probation officers are appointed in terms of the Probation Services Act (hereafter referred to as the Probation Services Act).⁵ The duties of the probation officer in so far as juvenile offenders are concerned are as follows:⁶

- (a) The investigation of the circumstances of a juvenile offender with a view to reporting to the court on his or her treatment and committal to an institution, as well as the rendering of assistance to his or her family;
- (b) The rendering of assistance to a juvenile offender in complying with his

¹ Synopsis 2003 Child Justice Bill Child Justice www.childlawsa.com/docs/CJB%20synopsis.pdf. at 5.

² Act 110 of 1978.

³ Regulation 2(4) of the Child Care Act as amended.

⁴ *Who are Probation Officers?* www.capegateway.gov.za/eng/pubs/publicinfo/WA/47585

⁵ Act 116 of 1991.

⁶ Section 4 of the Probation Services Act 116 of 1991. 110 of 1978.

or her probation conditions in order to improve his or her social functioning;

- (c) The immediate reporting to the court or to the Commissioner when a juvenile offender does not in any manner comply with or in any manner deviates from his or her probation conditions;
- (d) The reception, assessment and referral of a juvenile offender and the rendering of early intervention services and programmes, including mediation and family group conferencing;
- (e) The investigation of the circumstances of a juvenile offender and the provision of a pre-trial report recommending the desirability or otherwise of prosecution; and
- (f) The establishment of programmes or services which are aimed at the prevention and combating of crime;⁷

From the above mentioned it is clear that the probation officer plays a major role in combating crime and also in the juvenile criminal justice system.

3.2. THE ROLE OF THE SOCIAL WORKER AT THE EXCELSIOR PLACE OF SAFETY AND THE WESTVILLE YOUTH CENTRE

At the Excelsior place of safety (hereafter referred to as Excelsior) and at the Westville Youth Centre (hereafter referred to as the Youth Centre) social workers play an important role in the diversion process.⁸ During the period

⁷ Section 3 of the Probation Services Act.

⁸ Interview with Mrs. R.Veerassamy, Principal social worker of Excelsior Place of Safety and Westville Youth Centre, at Pinetown on 17 October 2006.

January 2005 – December 2005 161 juvenile offenders were offered diversion programmes at the Youth Centre. At the time the interview was held 210 re-offenders were recorded to have been sent to the Youth Centre.⁹

Diversion programmes and activities offered at Excelsior and the Youth Centre are –

- The youth empowerment scheme (YES) used by NICRO;
- Sport and recreation;
- Court readiness;
- Indoor games and
- Getting parents involved where possible.

3.3. ACTIVITIES AT THE EXCELSIOR PLACE OF SAFETY AND THE WESTVILLE YOUTH CENTRE

3.3.1 THE YOUTH EMPOWERMENT SCHEME

Only trained social workers present the programmes to all the juvenile offenders aged 14 years – 17 years. The Youth Empowerment schedule involves life skills discussions about:

- The disadvantages of crime;
- Anger management;
- Court procedure;
- Stereo typing and labelling.
- Decision making.

The social workers prepare the programmes on a weekly basis. The programmes are topic related. The social worker researches the specified topic. Topics are chosen by asking the juvenile offenders what they would like

⁹ No numbers were made available at Excelsior.

to discuss. An example of a topic is sexuality. In this topic issues about rape, sodomy, HIV/AIDS and domestic violence are discussed. The main aim is to create awareness of the issue, getting to know what the consequences are and prevention. Other topics include the significance and the purpose of some public holidays for example Freedom Day. The month of October is welfare month and as part of the programme motivational speakers are invited to address the juvenile offenders. Speakers include attorneys from the Justice Centre, juvenile offenders that have previously been involved with crime or any other speaker who may be of interest.

3.3.2 SPORT, RECREATION AND INDOOR GAMES

These activities are done on the respective premises of Excelsior and the Youth Centre.

3.3.3 COURT READINESS

The juvenile offender is prepared to appear in court. Court procedures and what can be expected in court are covered by the programme.

3.3.4 INVOLVEMENT OF PARENTS

A family-finding programme is in place where social workers that are designated to the area the youth offender resides or used to reside in are contacted to try and trace the parents.

If the parents or guardians of a juvenile offender can be traced the social workers invite them to get involved in family discussions. They also assist the parents or guardians to understand the juvenile offender.

3.4.1 THE PROCESS OF DIVERSION AT THE EXCELSIOR PLACE OF SAFETY AND THE WESTVILLE YOUTH CENTRE

When juvenile offenders are remanded in the custody of Excelsior or the Youth Centre, they can be divided into two groups: juvenile offenders who are sent by the court for diversion; and juvenile offenders who admit guilt to the social worker.

Once the juvenile offender completes the programme, as set out above, a notification of compliance is forwarded to the court. The matter would then in all likelihood be withdrawn against the juvenile offender. If the juvenile offender was not referred for diversion by a court and admits guilt to the social worker, he or she will be given the opportunity to do the diversion programmes. When the diversion is completed, the social worker will notify the court that the juvenile offender has admitted guilt and has completed the diversion. In the notice sent to court a recommendation is made that the matter be withdrawn.

3.4.2 THE FOLLOW UP AFTER THE WITHDRAWAL OF A MATTER

Prior to April 2006 a juvenile offender would be referred to Child Welfare or to a service office of the Department of Social Welfare for ongoing service to the juvenile offender and his or her family. If a juvenile offender requested to be trained in a skill then he or she would be referred to the district Welfare office for participation in a development programme. The name of the juvenile offender would be put onto a waiting list at the Illovo Development Training Centre. Skills training offered at the Illovo Development Centre include brick laying, carpentry or any skill that would assist the juvenile offender in finding employment.

If the juvenile offender did not have any parent or guardian he or she would

be released without any further services. The juvenile offender may return to a shelter.

If attempts to trace the youth offender's parents or an appropriate adult are in vain, attempts are made to refer him or her to a shelter. The juvenile offender is encouraged to seek social work intervention from the district office where he or she resides.

An organisation named Khulisa was engaged by the Provincial office of Welfare to render after-care services to juvenile offenders who are released from Excelsior or the Youth Centre. Before the juvenile offender is released Khulisa workers will visit Excelsior and the Youth Centre on a Monday to brief the juvenile offender about the programmes that are on offer after his or her release. The aim is to get the juvenile offender involved in the Travellers programme in an attempt not to re-offend.

This programme is run on a Saturday. The Travellers programme aims to get the juvenile offenders involved with community-based sport organisations and community youth groups. Attending the programme is voluntary.

3.5. THE DIFFERENCES AND SIMILARITIES IN THE PROGRAMMES OFFERED BY NICRO AND THE WESTVILLE YOUTH CENTRE AND THE EXCELSIOR PLACE OF SAFETY.

All the institutions offer the Youth Empowerment Scheme ('YES').

The Westville Youth Centre and the Excelsior Place of Safety (hereafter referred to as the Institutions) do not offer the Victim Offender Mediation programme for security purposes. Both Institutions also do not offer the Adolescent Drug Abuse, Prevention and Treatment programme or the Journey for the same reasons.

NICRO offers a separate anger management programme but the Institutions offers this as an aspect of the Yes programme.

NICRO does not offer a programme on court readiness or sport and recreation unlike the Institutions which offer both these programmes.

The Institutions attempt to get the parents, care givers or guardians involved in the juvenile offender's life but this can only happen if they can be traced or are interested in the juvenile offender. NICRO offers a Family Group Conference whereby a plan is put together to prevent the juvenile offender re-offending.

3.6. THE ROLE OF THE SOCIAL WORKER AND THE PROBATION OFFICER IN TERMS OF THE PROPOSED BILL.

The Bill is silent on the role of the social worker. The Bill instead refers to a probation officer as the main role player in diversion.

In terms of s 7(4) of the Bill the police official must inform the probation officer, in whose jurisdiction the juvenile offender was arrested, about the arrest not later than 24 hours after the arrest. In terms of s 7(7)(a) of the Bill a probation officer is to be informed if a juvenile offender under the age of 10 years has committed an offence, together with particulars relating to the juvenile offender. In terms of s 9(4)(b) of the Bill the police officer who handed a warning to a juvenile offender to appear in court, is to inform the probation officer concerned accordingly.

In terms of s 19 it is the duty of the probation officer, who received notification from a police officer that a juvenile offender has been arrested or received a warning or a summons to appear in court, to assess the juvenile offender

before the preliminary enquiry.

The probation officer can permit 'any other person' including a researcher to attend a preliminary enquiry.¹⁰ The probation officer also has the powers to exclude the prosecutor or the juvenile offender's parents from attending an assessment if the probation officer is of the opinion that the presence of such a person is obstructing the completion of the assessment.¹¹

The Bill specifies the powers and the duties of the probation officers before an assessment and at the assessment.¹²

Section 23 states as follows-

'A probation officer may at any time before the assessment of a juvenile offender issue a notice in the prescribed manner to a parent of the juvenile offender or an appropriate adult to appear at the assessment or, where the interest of justice require, orally request the parent or appropriate adult to appear at the assessment.'

- A police officer must deliver the aforementioned notice to the parent or an appropriate adult of the juvenile offender on request of a probation officer.
- The parent or an appropriate adult of the juvenile offender who does not wish to appear at the assessment may apply to the probation officer to be exempted from attending the enquiry. Should the said person be exempted from attending the assessment the exemption must be in writing.
- The probation officer may request a police officer to-
 - obtain any documentation required for the completion of the assessment of the juvenile offender;

¹⁰ Section 21(3)(e) of the Bill.

¹¹ Section 21(4) of the Bill.

¹² Sections 22 and 23 of the Bill.

- locate a juvenile offender's parent or an appropriate adult; and
- provide transport to a juvenile offender, parent or an appropriate adult to attend the assessment.
- The probation officer must make every effort to locate the juvenile offender's parent or an appropriate adult and only if all reasonable efforts have failed may the assessment be concluded in the absence of the aforementioned person.

In terms of s 23 the probation officer must complete an assessment report with recommendations as to-

- > the prospects of diversion;
- > the possibility of releasing the juvenile offender who is in custody into the care of a parent or an appropriate adult;
- > the placement of a juvenile offender in a particular place of safety, secure care facility or prison; and
- > recommendations with reasons that the juvenile offender be transferred to a children's court,

If the juvenile offender does not acknowledge responsibility for committing an alleged offence it must be indicated in the assessment report.

In terms of s 24 of the Bill the probation officer must estimate the age of a juvenile offender if his or her age is uncertain. The estimation of the juvenile offender's age must be submitted to the inquiry magistrate before the preliminary inquiry.

If a juvenile offender is referred to appear at a family group conference the probation officer appointed by the inquiry magistrate must convene the conference within 21 day after the referral was made. The probation officer has to-

- Set the time and the place of the conference and
- Notify the parties who may attend the conference of the date, time and place of the conference.¹³

The Bill does not specify who should chair the family group conference but it can be inferred from the provisions of s 48(7) that the probation officer is the chairperson. It is the duty of the probation officer to record the details and reasons for any plan agreed to at the family group conference and to hand a copy of the record to the juvenile offender and to a suitable person who had been identified by the inquiry magistrate or the designated probation officer to monitor the compliance of the diversion order by the juvenile offender.¹⁴ The Bill does not specify that the probation officer must draft a plan but it can be inferred from the balance of the section. In s 48(5) reference is made to subsection (3) as to what the plan should entail. However, subsection (3) refers to what is to be done should a family group conference fail. It is therefore not clear what the plan should entail.

In terms of s 48(7) if the participants cannot agree on a plan, the family group conference must be closed and the probation officer must refer the matter back to the inquiry magistrate for consideration of another diversion option.

The probation officer also plays the main role in victim-offender mediation. The designated probation officer must convene the victim-offender mediation and may regulate the procedure to be followed in the mediating process.¹⁵

3.7 CONCLUSION

The Bill does not provide for diversion for juvenile offenders in custody as

¹³ Section 48 of the Bill.

¹⁴ Section 48(6)(a) and s 47(6)(a).

¹⁵ Section 49 of the Bill.

most of the diversion options are intended to be performed outside the prison environment.¹⁶ All the diversion options require the assistance of a parent or an appropriate adult. Recommendations will be made in this regard in the final chapter.

In terms of the Bill the social worker will have no function in the diversion process. From the research conducted by the writer, it is apparent that the social workers are currently playing a very important role in the diversion process especially at Excelsior and at the Youth Centre. It is submitted that the Bill should also include social workers in the diversion process. Recommendations will be made in this regard in the final chapter.

The Probation Services Act makes provision for the observation, treatment and supervision of persons who have been released from a prison or a reform school, and who are probationers or who have been placed in the custody of any person in terms of any law.¹⁷ The Probation Services Act does not provide for any assistance to a juvenile offender if he or she did not serve a custodial sentence. Recommendations will also be made in this regard in the final chapter.

¹⁶ Section 47 of the Bill.

¹⁷ Section 3 (e) of the Probation Services Act.

CHAPTER 4

DISCUSSIONS AND RECOMMENDATIONS REGARDING THE BILL

4.1 INTRODUCTION

This chapter will focus on the differences between the international instruments and the Bill. Recommendations on the shortcomings of the Bill, regarding juvenile offenders in custody will be made.

4. 2. THE DIFFERENCES BETWEEN THE INTERNATIONAL INSTRUMENTS AND THE BILL¹

From the aforementioned international instruments, the present diversion programmes and those contained in the Bill, the main aim is to divert juvenile offenders away from the criminal justice system. There are differences between the international instruments, the present diversion programmes and the Bill. The differences are as follows:

4.2.1 ORDERS

The United Nations Convention on the Rights of the Child and the Beijing Guidelines make provision for guidance and supervision orders.² The Bill also makes provision for similar orders.³ These orders require that the juvenile offender must have a guardian or parent to give effect to the orders. It is suggested that if the court makes such orders the juvenile offender should be

¹ The Child Justice Bill 49 of 2002.

² The (4) and also the Beijing Rules rule 11.4 and rule 18.

³ Section 45 of the Bill and article 40 of the Convention.

placed in foster care or in a children's home in order to ensure that there is an adult that can provide the necessary guidance and supervision as envisaged by the order.

The African Charter and the Riyadh Guidelines are silent on possible orders that can be made in the diversion process.

4.2.2 TREATMENT ORDERS

The Beijing Guidelines makes provision for intermediate and other treatment orders.⁴ In terms of Article 59 of the Riyadh Guidelines *'legislation should be enacted and strictly enforced to protect children and young persons from drug abuse and drug traffickers'*.

The Bill does not make provision for treatment orders. It is submitted that treatment orders are very important as drug and alcohol abuse amongst juvenile offenders are high.⁵ At present a court may order, with the consent of the prosecutor, that an enquiry be held in terms of s 22 of the Prevention and Treatment of Drug Dependency Act, Act 20 of 1992.⁶ It is submitted that, if it becomes clear to a Magistrate that a juvenile offender has a drug or alcohol problem then the juvenile offender should be ordered to go for treatment and not 'ask' the consent of the prosecutor. There is thus a shortfall in the Bill regarding this aspect that needs to be included as part of the diversion order. The court should have the discretion to make an order similar to that set out in the Drug Dependency Act. In terms of s 22(6) the court can make the following order:

That the person concerned is to be detained in a treatment centre or

⁴ Rule 18 of the Beijing Rules.

⁵ *South African Community Epidemiology Network on Drug Use (SACENDU)*.
www.sahealthinfo.org/admodule/sacedu7.htm.

⁶ Section 255 of the Criminal Procedure Act, 1977.

registered treatment centre designated by the Director-General'.

It is further submitted that institutions that specialise in alcohol and drug abuse amongst juvenile offenders should be identified in order for the court to refer the juvenile offender for treatment.

4.2.3 CONSENT TO DIVERSION

The Beijing Rules requires the consent of the juvenile offender or his or her parents where community or other services are being considered.⁷ All the other international instruments are silent on the issue of consent by the juvenile offender and his or her parents in any of the diversion options. In terms of s 44 of the Bill, the juvenile offender and his or her parent or an appropriate adult should consent to diversion and the diversion option. As a result juvenile offenders in custody cannot be considered for diversion as there is no parent or responsible adult to consent to the diversion options. The Bill should therefore make provision for a juvenile offender that is *doli capax*⁸ to be able to consent to diversion without the assistance of a parent or responsible person and for such a juvenile offender to be assisted by a social worker appointed for that purpose. It should be made a requirement that the presiding officer must satisfy him or herself that the juvenile offender has given informed consent to diversion especially in the case of a juvenile offender that is *doli incapax*. Diversion for a juvenile offender who is *doli incapax* should only be considered in exceptional circumstances.⁹

⁷ Rule 11.3 of the Beijing Rules

⁸ A child over the age of 12.

⁹ Example a juvenile offender that is a repeat offender and repeatedly absconds from a Place of Safety before the Children's Court enquiry in terms of S 11 of the Child Care Act, can be finalised.

4.3 HUMAN RIGHTS

The Convention makes provision for diversion but also states that human rights and legal safeguards are respected.¹⁰ The implication of this is that the human rights of others should also be taken into account in the diversion process. The African Charter provides that diversion should reinforce the juvenile offender's '*respect for human rights and fundamental freedom of others*'.¹¹ In terms of the present programmes the element of respect of other's human rights is covered in the Youth Empowerment programme.¹² The Bill only makes provision for restitution to a victim but does not make provision for a programme that focuses on respect of the rights of others.¹³ It is submitted that the Bill should specify that programmes should include the element of respect for the rights of other people.

4.4. THE JUVENILE OFFENDER IN CUSTODY

None of the international instruments, the present diversion options or the Bill makes provision for diversion for the juvenile offender in custody. The only aspect of custody covered in the Bill is the provision that juvenile offenders are to be kept in custody for the shortest period and only in exceptional circumstances.

In terms of the Convention, care, supervision, guidance, counselling, probation, foster care, educational training and vocational training orders can be made. The Beijing Rules have similar orders including community service, restitution, compensation, intermediate treatment and other treatment orders. The programmes offered at NICRO and the orders in terms of the Bill overlap

¹⁰ The Convention Article 40(3)(b).

¹¹ Article 17. The African Charter.

¹² Supra at 2.2.1.2.

¹³ Section 47(3) of the Bill.

with the orders in terms of the Convention and the Beijing Rules. All the orders by their nature require the assistance of a parent or a guardian as they are structured to be done outside the incarcerated environment.

At present the requirements are that the juvenile offender must attend the programmes at the designated places and perform free community service at a place that NICRO designates. The juvenile offender in custody is clearly disadvantaged as there is no parent or guardian into whose custody he or she can be released, in order for the juvenile offender to attend diversion programmes.

In terms of Riyadh Guidelines, it is clear that steps are to be taken to prevent delinquency. The following guidelines should be taken into account:

Article 5(b)

The need for, and importance of progressive delinquency prevention and the systematic study and the elaboration of measures should be recognised. These should avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:

Specialised philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and service delivery networks aimed at reducing the motivation, need and opportunity for, or conditions giving rise to the commissioning of infractions.

Article 9(i)

Comprehensive prevention plans should be instituted at every level of Government and include specialised personnel at all levels.¹⁴

From the abovementioned guidelines, it is suggested that diversion

¹⁴ Also Article 58 of the Riyadh Guidelines.

programmes be 'taken' to the juvenile offender in custody. This would require the Bill to make provision for diversion programmes for juvenile offenders in custody. Special programmes should be introduced for the juvenile in custody that would include some form of restitution and a form of community service whilst in custody. The community service can be done on the prison premises for e.g. light duties in the garden or in the kitchen. Specialised personnel should offer the diversion programmes and the community service should be done under the supervision of a social worker to avoid exploitation of the juvenile offender. The magistrate ought to play a more active and innovative role in making orders within the ambit of the Act to suit the juvenile offender in custody, for example that community service of 2 hours per day be performed for one week. Where juvenile offenders are not in custody, community service could normally be performed over weekends.

4.5. THE AFTER CARE

Once a juvenile offender has completed the diversion programme the charges are unconditionally withdrawn. The juvenile offender who has been in custody, due to him or her not having a parent or a guardian will then be released with no adult supervision. The aims of diversion are to divert the juvenile offender away from the criminal justice system and to prevent re-offending. The possibility of the juvenile offender re-offending after his or her release is a reality especially if there is no adult supervision. This situation is contrary to the aims of diversion and the provisions of Art 5(b) of the United Nations Guidelines for the prevention of Juvenile Delinquency (1990) and s 28(1)(c) of the Constitution. The Constitution clearly states that 'every child has the right to shelter and social services' and in terms of s 28 (1) (b) 'the right to family care or parental care'.

From the above it is clear that the courts have a duty to ensure that the rights of a child are adhered to. As the practice is at present it infringes on the

juvenile offender's rights to a shelter and or family or parental care as no steps are taken to ensure that the aforementioned rights are taken care of.

It is suggested that social workers should ensure that the juvenile offender upon release, is placed at a shelter or is provided with alternative care if no guardian or parent can be traced. Alternative care can include foster care or placing the juvenile offender in a children's home.¹⁵ The aforementioned will assist to ensure that the juvenile offender is taken care of. It is further suggested that if the juvenile offender is placed in foster care a social worker should be appointed to supervise the foster parents for a period not exceeding two years.¹⁶ The aim of the supervision is for the foster parent and the juvenile offender to have access to professional assistance should the need arise for further assistance.

4.6 THE PROPOSED CHANGES TO THE BILL BY THE JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE.

Public hearings on the Bill took place in 2003 which led to extensive considerations of the provisions of the Bill by the Justice and Constitutional Development Portfolio Committee (herein after referred to as the JCDPC).¹⁷ The JCDPC was requested to make numerous changes to the Bill after deliberations were held during March, August and September 2003. The proposed changes to the Bill were not publicly issued, and thus the original

¹⁵ Section 15(1)(b) and 15(1)(c) of the Child Care Act 74 of 1983.

¹⁶ A similar provision appears in s 15(3) of the Child Care Act 74 of 1983.

¹⁷ Skelton, A. *The influence of the Theory and Practice of Restorative Justice in South Africa With Special Reference to Child Justice*. 2006. Unpublished LLD thesis, University of Pretoria. Also Ehlers, L. *Child Justice Comparing the South African Child Justice Reform Process and the Experiences of Juvenile Justice Reform in the States of America* at 5 www.childjustice.org.za/publications.htm#childjustice

Child Justice Bill 49 of 2002 remains the official version.¹⁸ This study will only reflect on the proposed changes to the Bill (herein after referred to as the new Bill) in respect of diversion.

Chapter 2 part 5 refers to the referral of matters according to schedules. The new Bill has introduced 6 schedules setting out various offences. Schedule 3 has been divided in 3 parts. Each schedule refers to various sections that are applicable in considering diversion, for example schedule 1 is applicable to the following sections: 5(3)(d), 15(a) and (b), 17(1), 17(5)(a), 21(1), 23(1), 24(4)(a), 26(a), 30(1)(b), 41(1), 43(a)(i), 72(1)(b)(v), 88(2), (3) and (5); and 97(2)(a).

Section 15 reads as follows-

“ In each case where a child aged 10 years and older but below the age of 18 years is alleged to have committed an offence, such child must be dealt with in one of the three following ways:

- (a) if a child is accused of an offence referred to in Schedule 1, the matter must be referred to a prosecutor to consider the diversion of the matter in terms of Chapter 6;*
- (b) if a child is accused of committing an offence referred to in Schedule 1, where the matter has not been diverted by the prosecutor in terms of Chapter 6, or an offence referred to in Schedule 2 or Part 3 of Schedule 3, the matter must be referred to a preliminary inquiry for consideration of diversion of the matter in terms of chapter 7; or*
- (c) if a child is accused of committing an offence referred to in Part I or II of Schedule 3, or where the matter is not been diverted in terms of Chapter 6, or 7 and the provisions of section 49(3) apply, the child must be brought before a child justice court to be dealt with in terms of Chapter 8.”*

¹⁸ Supra.

4.6.1 DIVERSION BY THE PROSECUTOR IN RESPECT OF MINOR OFFENCES

The role of the prosecutor in deciding to divert a matter and to select a diversion option before the juvenile offender appears before a magistrate is a substantial change to the proposed Bill.¹⁹

From the above it would appear that the prosecutor must deal with any offence committed by a juvenile offender, referred to in Schedule 1 without a preliminary inquiry. The prosecutor has the discretion to divert the matter and to select a diversion option.²⁰ Should the prosecutor not divert the matter in terms of chapter 6 the matter must be referred to a preliminary hearing for consideration by a magistrate.²¹ The prosecutor will not have the discretion to divert a matter where the juvenile offender has committed an offence in terms of Schedule 2 or Part 3 of Schedule 3 without a preliminary inquiry. In terms of this section only a magistrate can consider diversion after a preliminary inquiry has been held and the prosecutor has consented to the diversion.²²

In terms of s 42(2) the diversion option selected by the prosecutor will be made an order of court in the presence of the juvenile offender and, where possible, his or her parent or an appropriate adult.

¹⁹ Section 41 (1)(a) and s 42(1) of the new Bill.

²⁰ Section 42(1)(a) of the new Bill.

²¹ Section 44 Chapter 7 of the new Bill.

²² Section 49 of the new Bill.

4.6.2 THE PRELIMINARY INQUIRY

In terms s 25 of the proposed Bill a preliminary inquiry has to be held in respect of every juvenile offender before plea. The prosecutor has no authority to consider diversion before a preliminary inquiry whereas in terms of s 15 of the new Bill the prosecutor has the discretion to divert a matter if the offence committed falls within Schedule 1 without a preliminary inquiry.

In terms of the new Bill a preliminary inquiry can only be held if the prosecutor does not divert the matter or the offence committed fell within Schedule 2 or Part 3 of Schedule 3. The magistrate will consider diverting the matter if :

- the juvenile offender acknowledges or intends to acknowledge responsibility for the offence committed,
- there is a *prima facie* case against the juvenile offender,
- the juvenile offender has not been unduly influenced to acknowledge responsibility,
- the juvenile offender and his or her parent, or an appropriate adult, consent to diversion and the diversion option; and
- the prosecutor consents to the diversion of the matter.²³

4.6.3 THE CHILD JUSTICE COURT

In terms of s 15(c) a child justice court will have to deal with a juvenile offender who has committed an offence referred to in Part I or II of Schedule 3 in terms of chapter 8. The child justice court will also have to deal with matters that were not diverted in terms of chapter 6 or 7 and where the provisions of s 49(3) apply.

²³ Section 49 of the new Bill.

A 'child justice court' means a court for plea and trial.²⁴ This would mean that any criminal court, including a regional court can deal with a matter involving a juvenile offender. The court would be regarded as a child justice court.²⁵

A child justice court may divert a matter at any time before the conclusion of the matter if –

- the juvenile offender acknowledges or intends to acknowledge responsibility for the offence committed;
- there is a *prima facie* case against the juvenile offender;
- the juvenile offender has not been unduly influenced to acknowledge responsibility;
- the juvenile offender and his or her parent, or an appropriate adult, consent to diversion and the diversion option; and
- the prosecutor consents to diversion.²⁶

The child justice court can not divert the matter if the offence committed by the juvenile offender falls within item 4 of part I of schedule 3 and part II of schedule 3.²⁷

4.7 CONCLUSION

In this chapter the current situation of diversion was discussed against the background of the international instruments, the proposed Bill and the proposed changes to the Bill. Despite the fact that diversion is not codified, South Africa attempts to give effect to the treaties it has ratified.

²⁴ Section 1 read with s 62 of the new Bill.

²⁵ Section 62.

²⁶ Section 68 of the new Bill.

²⁷ Supra.

Although the proposed Bill makes provision for diversion, the reality is that diversion services are not available in all jurisdictions.²⁸ The fact that there are no diversion services available should not prevent magistrates and prosecutors from diverting juvenile offenders from the criminal justice system. The following may serve as guidelines in establishing diversion services in a jurisdiction where diversion services are not available:²⁹

- What is available in the community in terms of interested organisations, possible programmes and other resources?
- What NGOs and community based organisations are active in the community, and which of them may be interested in becoming involved?
- Can any of them assist in setting up a diversion programme?
- Can any of them make any other contribution?
- Are there any government services available that may be of assistance?
- What will the diversion programme look like?
- What are the aims of the diversion options?
- Who will report to whom on the progress of the case if it is diverted?
- How and who will keep records of the assessed and diverted cases?
- What will the procedure be in case of non-compliance by a juvenile offender?

²⁸ Munting, A. and Skelton, A. Diversion in *Child Law Manual for Judicial Officers* at D-14

²⁹ Supra.

- Who will oversee the entire diversion service, and how will monitoring be done?
- How will the diversion service be evaluated?

From the above it is clear Government has to work hand in hand with the communities in those areas where resources and Government services are limited to ensure that diversion services are made available to each and every juvenile offender.

When new diversion services are established it is important to keep the guidelines of the proposed Bill in mind.³⁰ It is submitted that the mentioned guidelines should be followed when diversion for juvenile offenders in custody is considered.

The benefits of the Bill are that it codifies diversion, prescribing in great detail the purposes of diversion and gives the court different options regarding diversion.

A very important aspect of the Bill is that it differentiates between diversion as a sentence in lieu of imprisonment and diversion as an instrument to remove the juvenile offender from the criminal justice system.³¹ Levels 1 and 2 of

³⁰ The guidelines of the proposed Bill are as follows:

- to be presented at a location reasonably accessible to the juvenile offender;
- promote the dignity and well-being of a juvenile offender;
- develop the juvenile offender's sense of self-worth;
- the ability to contribute to society; and
- it may not be exploitive, harmful or hazardous to the juvenile offender's physical or mental health.

³¹ Section 47.

diversion are aimed at diversion before conviction and level 3 for juvenile offenders who have been convicted.

Section 45(1) of the Bill clearly states that no juvenile offender may be excluded from a diversion programme. The Bill unfortunately does not differentiate between juvenile offenders in custody and juvenile offenders who have an adult into whose care they may be released. Therefore in terms of the Bill programmes would have to be offered to juvenile offenders in custody. The Bill will have to make provision for diversion options that should be made available to all juvenile offenders in custody and appoint specialised social workers to present the programmes to the juvenile offenders.

The Bill also does not make provision to prevent any further delinquency of juvenile offenders who were in custody and are released after they have completed the diversion programme. It is suggested that the Bill should make provision for a social worker in the district where the juvenile offender is following the diversion programmes, investigates the juvenile offender's circumstances and makes recommendations to the court on possible foster care or to place the juvenile offender in a shelter.

In terms of s 44 of the Bill, the juvenile offender and his or her guardian have to consent to diversion and diversion options. As already pointed out this could lead to a situation where a juvenile offender who has no guardian or parent cannot qualify for diversion. It is suggested that a social worker, a probation officer or a legal representative be appointed by the court to assist the juvenile offender in making a decision to accept responsibility for any crime committed. Appointing the foresaid would take care of the requirement of consent to diversion and the diversion options.

In terms of s 59 of the Bill if a juvenile offender acknowledges or indicates that he or she intends to acknowledge responsibility for the alleged offence, the

prosecutor may divert the matter. It is suggested that the prosecutor should look at the reasons for the juvenile offender's change of heart to ascertain whether he or she is trying to abuse the diversion process to escape conviction. If the prosecutor is of the opinion that the juvenile offender is abusing the diversion process, he or she should not be given the opportunity of diversion. The prosecutor should therefore in the event of the juvenile offender abusing the diversion process refuse to divert the matter and inform the court as to the reasons.

The Bill clearly reflects South Africa's commitment as a signatory, to upholding the standards required in the various international instruments³² regarding juvenile justice. Initially it will have teething problems, as the concept of diversion will be new to many practitioners. Training in this field of all the role players is of utmost importance. It suggested that government makes training accessible to all state departments and also to private practitioners free of charge. It is further suggested that the Bill should provide that only parties who have been trained have right of appearance in the juvenile courts as this would ensure that the best interest of the child is always taken care of.

It is submitted that the Bill provides the necessary protection of the juvenile offender's rights. However the only issue, as discussed in this dissertation, is that of the juvenile offender in custody. It is submitted that if this issue is addressed the Bill will then provide protection without 'discriminating' against the juvenile offender who does not have a parent or a guardian.

³² United Nations Convention on the Rights of the Child United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the 1990 United Nations Rules for the Prosecution of Juveniles Deprived of their Liberty, the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency and the African Charter on the Rights and Welfare of Children (1999).

In chapter 3 ³³ the number of juvenile offenders re-offending exceeded the number of juvenile offenders that were offered diversion programmes. This indicates that the diversion process offered for the juvenile offenders in custody is not effective. This supports the argument that diversion could be more effective if the juvenile offender is taken care of after his or her release for example by placing the juvenile offender in foster care.

The aims and objectives of diversion is most definitely in the best interest of juvenile offenders and all necessary steps should be taken by Government to make the diversion process effective for those not in custody as well as those in custody.

³³ See page 47

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