ARTICLE 40
Volume 1 No. 2 August 1999

Editors:
Prof. Julia Sloth-Nielsen
Zola Madotyeni

From the Editors

Thank you to our readers and supporters for the great reviews and feedback on the first issue (see Notice Board). We are heartened by the enthusiastic response and, more pertinently, promises of articles and ideas for our next issues. It is apparent that juvenile justice development - the expansion of probation, the spreading support for diversion and alternative sentencing, and growing resourcefulness in addressing the problems of young people in trouble with the law - is proceeding apace. A highlight in this issue is the imaginative approach advocated by Judge Erasmus in S v Z in the arena of juvenile sentencing, setting new standards for the administration of juvenile justice in the Eastern Cape, and destined to bear fruit beyond the confines of the law reports. Already, the judgement is being debated within the provincial probation service, and ARTICLE 40 would like to encourage such judicial innovation in other provinces too. S v Z assisted us to select article 40(4) of the Convention as our front page excerpt for this issue.

Setting sentencing standards

Zola Madotyeni

In S v Z and four other cases 1999 (1) SACR 427, new standards for juvenile sentencing were laid donw for the Eastern Cape. The five cases came before Judge Erasmus on automatic review. All involved children under the age of 18 convicted of housebreaking and theft, and subsequently sentenced to a suspended term of imprisonment. The court remarked that the abolition of corporal punishment by the Constitutional Court should not be regarded as a negative development, but rather as an inspiration for the development of our legal system.

In an usually activist manner, the Judge proceeded to investigate the conditions under which children in that province actually serve sentences of imprisonment, on the supposition that suspended sentence may well be put into operation at a later stage, resulting in de facto imprisonment. Not only did the learned judge receive submissions from the prison authorities about local conditions of imprisonment for children, but he proceeded with an on - site inspection at St Albans, one of the three centres where most juveniles are held in the Eastern Cape. His observations included the following:

- there were opportunities for children to mingle with adults, despite the policy of separation
- in a cell supposedly holding juveniles, persons clearly older than 20 years were present
- not all children were attending prison school for a variety of reasons, such as the fact that pupils can only be admitted to school at the beginning of the school year, implying that is is seldom an option for those serving short term sentences
- mostly, the prisoners occupy themselves in the cells doing nothing at all

He was particularly horrified to learn that between July and September 1998, 18 children were held in prison waiting designation of a reform school. Some had been there for more than 16 months.

The remainder of the judgement was further influenced by a detailed memorandum furnished to the court by the Deputy Director of Public Prosecutions (DPP) in the province, which outlined prosecutorial policy and guidelines on diversion. The directive is quoted in full. Judicial support for NICRO's services in the province is evident: a letter from the provincial project manager of NICRO, giving details of the number of children successfully diverted in the province in 1998 and the low recidivism rate for those having attended NICRO programmes, is also cited in the judgement.

The point of departure is the principle that imprisonment for youthful offenders should be avoided altogether where possible. Further, the younger the accused, the less appropriate will imprisonment be; imprisonment is inappropriate for first offenders and short term imprisonment is rarely appropriate. Where direct imprisonment would not be appropriate, nor would a suspended sentence of imprisonment be appropriate. Thus, the correct approach is first to determine a suitable sentence, and then only to consider the possibility of suspension.

The judge appears to place considerable emphasis on the importance of "follow up" with juvenile offenders. A sentence which effectively ends the minute the child walks out of the court, the judge argues, is seldom suitable, and where a sentence is to be postponed or suspended, the child should be placed under some kind of supervision.

The Deputy DPP indicated that these supervisory services were available at any place in the province, through the probation services of the Department of Welfare. In addition, a wide range of other sentence options are available to sentencers under section 290 and 297 of the Criminal Procedure Act, which the judge spells out in the interests of encouraging innovative and imaginative sentencing. Two final points: the judge enjoined the courts to act dynamically to obtain full particulars of the juvenile accused's personality and personal circumstances, and to obtain pre-sentence reports from probation officers. The court is of the view that it is inappropriate to impose even a suspended sentence of imprisonment without such a report. Last, the ages of all under 21 must be properly determined and, if necessary, the age recorded on the charge sheet rectified. Because the Department of Correctional Services still regards those under 21 as juveniles, al those under 21 are affected by this, and not just children under 18 years.

But the seminar nature of this judgement lies not just in establishing principles relevant to suspended prison sentences. Far more significant is the implicit judicial recognition of the importance of inter-sectoral collaboration to ensure an

effective juvenile justice system. Correctional Services, Welfare, probation services and NGO's are all affected by the import of this case.

It was ordered that a copy be supplied to every magisterial district in the province.

Statistics: Youth convictions

A Saturday Argus banner headline on 10 July 1999 read "YOUNG CRIMINALS ARE WAITING IN THE WINGS". The story commenced: "South Africa's crime nightmare is getting worse as a new generation of young criminals emerge, many of them the orphans of parents who have died or will shortly of AIDS ".

But what do the statistics say?

Lukas Muntingh analyses data from Central Statistical Services (CSS):

The media is often quick to sensationalise stories on children accused of committin. serious violent offences and it does not take long before child offenders are seen as a substantial threat to society and good order. We indeed know very little of youth crime figures and related trends, such as how many children are arrested by the police annually or what types of sentences children actually receive. This article asks two basic questions, namely: How many children are convicted? and What are they convicted for? Figures from Central Statistical Services (CSS) reports dating back to 1977/8 are presented, showing a significant decline in the number of children convicted. It is also shown that approximately 80% of children who are convicted, commit four typical offences.

How many children under the age of 18 are convicted?

FIGURE 1: Number of Children Convicted per Year [Ed. Note: graph not included]

Figure 1 shows the number of children convicted annually from 1977/8 to 1995/6. Despite peaks in 1980/1 and 1990/1 the numbers have shown a general decline; from above 50 000 in 1980/1 to 17 526 in 1995/6. This trend is also echoed in the number of convictions for all age groups - ie adults too - and should not be regarded as a distinct trend pertaining to children. The number of convictions for all ages peaked in 1984/5 at nearly 400 000 per annum, but by 1995/6 this figure had dropped to just below 224 000, a decrease of 43%. For children this decrease was even more drastic: the number of convictions has decreased by 66% from the high of 1980/1.

FIGURE 2: Child Convictions as a Percentage of Total Convictio. [Ed. Note: graph not included]

Not only has the actual number of children convicted decreased, but also the proportion, as seen in relation to the total number of convictions (Figure 2). In 1980/1 children constituted 13.9% of the total number of convictions, by 1995/6 this percentage had dropped to 7.8%.

Although it might be thought that the above trend could have been influenced by the increased use of diversion programmes, this is unlikely: diversion

programmes got off the ground in the early 1990's, and only started seeing significant numbers of children by the mid-1990's.

What are children convicted for?

Offence categories used by CSS are:
Class A - Government Authority and Good Order
Class B - Communal Life
Class C - Personal Relations
Class D - Property
Class E - Economic Affairs
Class F - Social Affairs

FIGURE 3: Percentage of Convictions per Offence Class: General [Ed. Note: graph not included]

Figure 3 shows that for the period 1994/5 to 1995/6 the proportion of convictions for property offences (Class D) declined slightly from 75.8% to 74.5% of the total, and convictions for violent offences against the person (Class C) increased by nearly the same percentage. The overwhelming proportion of children convicted for Class D (Property Offences) warrants closer examination.

CSS gives the sub-classes for Class D as follows:
.D 1. Burglaries and related matters
.D 2 - Theft from person, or gaining advantage by means of force or threats
.D 3 - Theft of livestock and related matters
.D 4 - Other thefts
.D 5 - Falsitas and related behaviour
.D 6 - Other matters relating to property
.D 7 - Animals

FIGURE 4: Percentage of Convictions per Offence Class: Property [Ed. Note: graph not included]

Sub-class D - 4 (Other thefts) accounts for the highest proportion of property convictions although it has declined from 55.4% in 1994/5 to 52.17% in 1995/6. The second highest is Sub-class D-1 (Burglaries), which increased from 32.3% to 35.7% during the two years under review. A more detailed analysis of Sub-class D - 4 reveals that 26% of children convicted were convicted for shoplifting, 12% for thefts not elsewhere specified, and 7% for thefts from motor vehicles. Collectively these three categories account for approximately 46% of all child convictions annually. With the burglary data added to this, the overall picture emerges that children are convicted essentially for four types of offences: burglary, shoplifting, other thefts and thefts from motor vehicles account for approximately 80% of convictions.

The number of convictions has decreased by 66% from the high of 1980/1. 1 526 children were convicted in 1995/6.

80% of children are convicted essentially for four types of offences: burglary, shoplifting, other thefts and thefts from motor vehicles.

Children's Views on a new Child Justice System

ARTICLE 40

Louise Ehlers - NICRO, Cape Town

NICRO was recently asked to undertake an exciting survey to ascertain the opinions of children on the new draft Chid Justice Bill, released by the SA Law Commission in December 1998 (see Article 40, vol. 1 - May 1999). The aim of the process was to augment the responses to the Bill received by the Commission's Project Committee on Juvenile Justice through a sharing of children's experiences and by gathering their ideas on how the criminal justice system for children in trouble with the law could be reformed.

Children's participation is an important feature of the Convention on the Rights of the Child. Article 12 of the CRC enshrines children's rights to "express their views freely in all matters affecting the child" and the involvement of children in political, social and legal decision-making has begun to be a focus of child rights advocacy world wide.

This particular project was of a limited nature: seven groups of children who had had some contact with the juvenile justice system were chosen to participate in a series of interactive workshops in which the specifics of the proposed Child Justice Bill were debated. The groups were selected from children in prisons, in reformatories, in places of safety and from children placed in diversion programmes. A further control group of high-schoolers who had no prior contact with the criminal justice system was also recruited.

The key themes on which the children were asked to comment included the minimum age of prosecution and age determination, police powers and duties, assessment and referral, diversion, the proposed idea of a preliminary inquiry, the child justice court, sentencing, legal representation and expunging of records. Some interesting observations and a selection of findings are summarised here.

Minimum Age of Prosecution and Age of Determination

Children found the issue of criminal capacity and the problem of where to fix the minimum age of prosecution extremely controversial. The majority (89.7%) of the sample felt that children of 7 and under are incapable of planning and carrying out a criminal act. As regards possible minimum ages, 52% opted for 14 years as the minimum, whilst 30% chose 12 years.

Children were asked to consider the three options set out in the draft bill.

- 24.1% chose Option 1 (child who is 7{or 10} but has not yet turned 14 is rebuttably presumed to be dole incapax).
- 20.7% chose Option 2 (sets a minimum age of prosecution, regardless of the individual criminal capacity of the child).
- 55.2% chose Option 3 (sets a minimum age and provides specific exception to the rule, linking exceptions to the seriousness of the offence).

Police Powers and Duties

Most of the participants had a negative perception of the police, describing the experience of being arrested as frightening, confusing and humiliating. Physical assault was also reported. The majority felt that the new proposals provided children with increased protection during police procedures. However, participants added the following suggestions:

- children in custody should have prompt access to medical attention in order to ensure that, should the child be assaulted during the arrest process, evidence of an injury could be formally noted
- policemen should be held accountable should an assault occur.
- Revealingly, more than half the participants felt that the option proposed in the Bill of being escorted home by police, who could there inform their parents of an assessment date, would be sufficient to ensure their presence in court. [Editor's Note: this assertion might, of course, be disputed by the police and magistrates.]

Diversion

The facilitator started this session by explaining the principals underpinning diversion as well as the minimum standards for diversion as set out in the draft Bill. The participants strongly supported the idea that all children should have access to diversion and that diversion should not depend on specially designed programmes. It was felt that prosecutors, probation officers and social workers should be allowed to be creative in devising programmes that would meet the needs of the individual child. They did not feel that access to diversion should be limited by the type of crime with which the child had been charged.

The proposed new orders envisaged in the draft Bill elicited a great deal of interest, and the children were asked to comment on whether they thought these orders, used as diversion options, would have been suitable in their own cases. 70.7% were in favour of the orders, and thought they could have been usefully applied in their cases, but queried who would bear responsibility for ensuring adherence to the order.

In Court

The facilitator noticed tat when the participants discussed their experiences of the criminal justice system, their language expressed fear, intimidation and confusion. In response, she asked the children to suggest what they would do if they had the task of making courts more child-friendly. These are some of their suggestions:

- There should be a more informal "set-up".
- Children should be tried in a closed court.
- "They must speak so that we understand"
- Court must be more child-like with colour posters, paint, furniture, sweets.
- Someone should be on hand to explain what is going to happen.
- Parents and a social worker should be present.
- The majority of the children (67.2%) felt that adults who are co-accused should not be allowed to be tried with the child accused. First, they reasoned, the adult could blame the child, knowing that the child might not be punished. Second, they were worried that the adult could intimidate the child during court proceedings and force him or her to take the blame. Those children who supported joint trials motivated this on the grounds that an adult can support and protect the child in the criminal process, and that delays might occur if trials were separated.

Sentencing

For this section, child participants gave input to the group on what they believed to be most effective form of punishment for serious crime. Some where, of

course, themselves serving custodial sentences for serious offences. This did not seem to affect their opinions on sentencing, and as the chart shows, their views still reflected extremely traditional attitudes on punishment. Their somewhat hardline views are probably also coloured by a lack of knowledge of possible alternatives. A lot of work still needs to be done to promote the idea of restorative justice and alternative sentencing!

Children's Views on Sentencing for Serious Offences:

57.0% Long Term Imprisonment
15.6% Unspecified
8.6% Death Sentence
8.6% Hard Labour
3.4% Amputation of Limbs
3.4% Solitary Confinement
1.7% Street Justice
1.7% Corporal Punishment

The group was asked to consider a minimum age for imprisonment and to motivate why they chose a particular age. The most common response (31%) was that 16 should be the minimum age, although 24.1% felt that a person should be 18. The next significant grouping was those who suggested 14 as the minimum age for sending children to prison. As only 32.5% felt that children of 15 or younger should qualify for this sentence, there was a clear indication that they believe younger children do not belong in prison. 94% of participants though that life sentences were unsuitable for convicted children, and proposed a maximum sentence option ranging between 6 and 15 years imprisonment.

Legal Representation

The facilitator was particularly keen to elicit responses based on the participants actual experiences with legal representation. Of those in the sample who had some involvement with the criminal justice system (pre-trial or sentenced), 51.7% had enjoyed legal representation. The remaining 48.3% had not. The perception of 83.3% of those who had legal representation was that having a lawyer was a positive factor influencing the outcome of their case. Of the participants who had no legal representation, 66.7% felt that having a lawyer would positively influence the outcome of a case.

The majority of the participant who had legal representation (80.0%) were in agreement with the draft Bill's proposals that a child should not be able to refuse legal representation, except in the case of a minor offence. Even amongst participants who did not have legal representation, there was a substantial degree (66.7%) of agreement with this proposal.

When discussing legal aid, 46.7% of those who did have legal representation said that they had experienced problems with services by lawyers acting on legal aid briefs. The most common problems listed were as follows:

- Children did not feel the lawyer was 100% on their side.
- The lawyer does not should up for court, which leads to postponements.
- Children tell the lawyer one story and he in turn tells the court another.
- Lawyers try to convince the child to turn state witness.
- Lawyers plead guilty without consulting the child.

Conclusion

Consulting with children on the proposed law reform proved to be an enlightening experience. Despite initial concerns that their views might be tainted by what they though they could gain in their own individual cases, their responses were remarkably objective. Most children participated in the project, not as children who have been accused or convicted, bus as ordinary citizens with a stake in the future of our society. For the most part, they clearly separated their own situation in the criminal justice system at the time of the workshops, enabling them to provide opinions aimed at promoting the best interests of society as a whole. Consultation with children is vital when embarking on projects which directly influence their well-being. Usually draft legislation is based on international standards and relevant comparative literature without child participation, but at the end of the day most policy-makers will never have what these children can offer - personal experience at the hands of the system under reform.

(The full research report is available from the Community Law Centre and NICRO)

Report on the SA Law Commission seminar on Age and Capacity

Getting to grips with the thorny question where a country should fix the minimum age of criminal capacity, and whether or not to retain any form of presumption of incapacity for younger children is no easy matter. Both local and international participants gathered at the Centre for Child Law, University of Pretoria, to debate the practicalities of the task facing the Project Committee on Juvenile Justice. The contributors were drawn from a range of disciplines: psychology, education, the magistracy and other branches of the legal profession, social anthropology, development studies, criminology and perhaps most tantalisingly, political analysts steeped in the current debates about organised crime, recruitment of children into gangs, and the effects of our violent past upon the present generation of youngsters.

Theoretically, the present presumption that a child between 7 and 14 lacks criminal capacity until the State proves this beyond reasonable doubt is a protection for young children, though most participants were in agreement that the rule does not serve this goal in reality. Many, though, were reluctant to see a departure from the doli rule, based on the psychological and anthropological evidence that children mature at different rates, especially in a country as culturally diverse as ours. Most participants also fully supported raising the minimum age from its present level, with a broad consensus being voiced that children younger than 10 years should not be prosecuted. On a more practical level, various options for the actual assessment of a child's capacity were also mooted, ranging from requiring expert evidence, to utilising probation officers to undertake preliminary screening. A third proposal opted instead for a certificate to be issued by the Director of Public Prosecutions where young children face prosecution, which (it was argued) could obviate the need for expensive expert evidence in all but the most necessary cases.

Answers to the questions about the proposed age of criminal liability in the new child justice system have been greatly advanced by the intensive two-day focus on this single issue at the seminar.

The final report of the Commission regarding child justice is expected at the end of 1999.

There were ten children aged 7 to 13 serving sentences of imprisonment in South Africa at the end of April 1999, according to the Department of Correctional Services.

The figure is substantially the same as this time last year, and lower than that for 1997.

Four children were serving sentences for aggressive offences, two for sexual offences, and only two for economical offences.

One child is serving a 15 - 20 year sentence, and three are serving sentences of 7 - 15 years. One was serving a short term sentence of 0 - 6 months.

African focus: Juvenile Justice in Kenya

Ann Skelton

Kenya is set for reform in the field of juvenile justice as a comprehensive Children's Bill is expected to be debated in parliament this year. Ann Skelton recently led a project identification mission on juvenile justice in Kenya, at the request of the Royal Netherlands Embassy in Nairobi. In this article she highlights some of the findings of the mission.

Background

The mission to Nairobi coincided with COMESA - a commercial trade gathering of Eastern and Southern African States. For this special occasion, many street children had been rouded up and were in custody. The juvenile remand home at Kabete, designed for 80, was housing 360 children (the usual population being 250 children). It has no running water or sanitation, and no programmes. Ironically, to impress the foreign delegates at COMESA, the Kenyan government had put up a special fountain in Nairobi. Water for visitors to look at, but none for children in the remand home to wash with!

The context

Juvenile crime in Kenya is firmly rooted in poverty. 80 % of children appearing before the juvenile court are street children, some arrested for committing crimes, and some taken in to be 'processed' by the care and protection system. Free and compulsory education, once provided for Kenyan children, is no longer a reality, and this is seen to be a major cause of children conflicting with the law.

The Kenyan criminal justice process for children (both in current and future law) is mostly benign, focussing on "rehabilitation" and "education" rather than on punishment. Even the current law does not use the terms "conviction" and "sentence", imprisonment is rarely used, and children do not get criminal records. These features indicate a leaning towards welfarism, the danger being that in reality the system may be far less benign than it seems. Children are not sent to prisons - but the alternatives to imprisonment may be equally damaging.

Although the care and protection system is conceptually separate from the criminal justice system, in practice the two systems have begun to merge. In Nairobi both groups of children are picked up off the streets by the police and held in police cells. At court they are kept together in the same holding cells, and share the benches in the courtroom. Children from either group might be remanded temporarily back to the police cells, or might be sent to the Juvenile Remand Home. Once there, no distinction is made between the two groups of children. The experience of all the children is one which traumatises and hardens them. Although the new Children Bill states that in residential facilities children in need of care and protection will be separated from children accused of crimes, Kenyans believe that this will be difficult to achieve in practice without significant reorganisation and expenditure.

Arrest or apprehension

There is no specialisation within the police regarding arrested children. Commonly, the majority of children are held in police cells for the 48 hours between arrest and the first appearance in court. Rarely do police contact parents or guardians during the first 48 hours after the arrest to inform them about the first court appearance. Unnecessary delays occur because the court then postpones the matter for a few days, sending the children back to the police cells, so that they can "point out" their parents.

Court

At court, children in need of care and protection and children accused of crimes are treated similarly. Although the officers of the court may see the distinction between the different groups of children, it is unlikely that the children themselves would be able to discern the difference.

Kenya does not have a separate professional prosecution service - criminal cases are presented by police prosecutors. Those prosecuting and investigating juvenile cases are often junior members of the force.

People in Kenya working in the child rights field are concerned about the length of time elapsing between the first appearance and conclusion of cases. There are no official time limits (although Bill will change this), and with over-crowded court rolls, cases tend to drag on. This is particularly worrying where children are being held in the Juvenile Remand Home, or where those 15 years and older are held together with adults in adult remand centres awaiting trial.

Legal representation of children is rare, and these is currently no state-paid legal aid system. The new Children Bill does seem to offer some assistance to children who cannot afford lawyers, although how extensive this will be and how it will be funded remains to be seen. People working in the field are sceptical about the likelihood of a fully - fledged legal aid system for children. On the positive side, an NGO called Children Legal Action Network (CLAN) sees the legal representation of children as an important cause, and some lawyers in private practice have already embarked upon such work.

Positive factors

Kenya has a sound legislative framework for the administration of juvenile justice. Currently several different laws have to be read simultaneously, but this

will be improved by the introduction of te Children Bill, which is also more compatible with CRC and other international instruments. The legal framework supports Juvenile Courts, although such courts are not really "separate" - Nairobi is the only place in Kenya where a completely separate court sits as a Juvenile Court at present.

Another favourable aspect is that imprisonment is rarely used, and will disappear altogether under the new law. In addition, children do not get criminal records, which eases their reintegration as productive members of society.

The prevalence of serious or violent crime amongst Kenyan children is very low. A difficulty, though, is that poverty-related crimes (the majority) are amongst the most difficult to prevent without broad reaching socio-economic reform.

However, it is far easier to build and maintain a child-friendly juvenile justice system if there is tolerance towards children in society, which exists in Kenya. Also, Kenya has range of committed individuals (in both government and non-government circles) who are determined to see improvements in juvenile justice. Interviewees were very open to discussing challenges, and a desire for change and improvement was evident.

Book Notice: Restorative justice, contemporary themes and practice

(Forwarded by Sir Michael Hardie Boys, GNZM, GCNG Governor-General of New Zealand)

Edited by Helen Bowen & Jim Consedine
Christchurch, Ploughshares Publications, 1999

This is a collection of articles and essays reflecting the experiences of Restorative Justice workers in New Zealand. The essays begin with anecdotal experiences and thereafter analyse the country's restorative justice programme. In New Zealand, as in South Africa, the majority of the offenders come from the poor and disadvantaged members of the indigenous population. The facilitators have drawn important lessons from the cultural and customary practices of the local population which has resulted in the introduction of innovative and culturally responsive solutions. The use of culturally based solutions is important for the legitimacy and acceptance of the programme among the participants. This book will serve as useful guide to those child justice workers who wish to broaden their knowledge of restorative justice.