

# Diversion in South Africa

## A review of policy and practice, 1990–2003

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### INTRODUCTION

In South Africa, diversion initiatives have been practiced since the early 1990s. From 1996 onwards, a substantial growth in the number of children referred to diversion programmes has been noted.<sup>1</sup> This practice has occurred in the absence of a regulating legislative framework and consequently has been implemented in a selective and disjointed manner. It is anticipated that the situation will improve with enactment of the Child Justice Bill (Bill 49 of 2002, hereinafter referred to as Bill), considering that the Bill was specifically drafted to promote and regulate the diversion of cases away from formal court procedures.<sup>2</sup>

The purpose of this paper is to review the literature available on diversion in South Africa. The paper is divided into three parts:

- The first part examines the concept in its most general sense and traces the introduction and development of diversion in South Africa. This is followed by a description of the policy developments that culminated in the drafting of the Bill.
- The second part outlines the new procedures and mechanisms proposed in the Bill to ensure the expanded use and regulation of diversion. The duties and responsibilities of the relevant legal personnel are described in this section, followed by two central and innovative research studies commissioned for the purpose of gathering support for and directing the law reform process.
- The final section analyses developments in the field of diversion that have taken place in South Africa since 1997 in preparation for the implementation of the Bill. It then reports on the findings from a few programme evaluation studies that have been conducted.

The review concludes with guidelines from research about 'what works' to provide direction around important criteria to be considered for the development of effective diversion programmes.

### WHAT IS DIVERSION?

A standard youth justice textbook defines diversion as "strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted."<sup>3</sup> Thus, diversion can incorporate a variety of strategies from school based crime prevention programmes through to community based programmes used as an alternative to custody. Diversion does not necessarily require a child to be placed in a formal programme

but includes interventions such as receiving a police caution, writing an apology letter, participating in an alternative dispute resolution forum or being placed under supervision.

The practice of diversion developed concurrently with the establishment of separate child justice systems. Different periods have resulted in various diversion practices coming in and out of vogue. Initially, diversion interventions were based within institutions and were designed to provide treatment and moral re-education with the aim of preventing further offending. Later, there

was a move towards community based interventions in response to the criticism that institutions were stigmatising, dehumanising, criminogenic and costly.<sup>4</sup> With the rise of restorative justice, new diversion interventions that focus on repairing the harm caused by crime were developed including processes such as family group conferences, sentencing circles and victim-offender mediation.<sup>5</sup>

Despite its varied philosophical roots, the practice of diversion is believed to promote more humanitarian and less stigmatising responses to child offending than punitive sentences. Some academics have however countered that while diversion can be implemented in such a manner, this is not necessarily the case. Considering that these issues are discussed extensively elsewhere, this review will only briefly outline the main criticisms of diversion.<sup>6</sup>

Diversion is believed to promote more humanitarian and less stigmatising responses to child offending

The primary criticism of diversion is that it results in 'net-widening'. It is argued that diversion can often be a means for expanding the scope of more invasive measures of social control.<sup>7</sup> A counterargument proposes that diversion can be used as part of a process to 'define deviance down' which consequently has the opposite effect of net-widening. It allows certain individuals, usually those who have committed relatively minor offences or who are first offenders, to experience negligible state intervention. This, in turn, alleviates the pressure on an invariably overburdened criminal justice system and the state can appear to be productive with minimal effort and expenditure.<sup>8</sup>

Of great concern is that diversion is often initiated without the concurrent provision of measures to ensure the protection of children's legal rights. Coupled with this is the problem that the power to divert is often given to a limited number of professionals who are granted a wide discretionary authority.<sup>9</sup> This can result in race, class and gender prejudices influencing which children are afforded access to diversion interventions.<sup>10</sup> While these concerns regarding the just practice of diversion are valid, the establishment of a suitable legal framework

to govern the referral procedures, access and delivery of diversion interventions can provide sufficient protection. In South Africa, diversion has thus far been practiced without such a regulating legal framework.

## DIVERSION TAKES ROOT IN SOUTH AFRICA

The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), a non-governmental organisation, launched the first diversion initiatives in South Africa in the early 1990s in the Western Cape and KwaZulu-Natal. The first two programmes were the Youth Empowerment Scheme (YES) and Pre-Trial Community Service (PTCS). NICRO later expanded the range of diversion programmes to include Family Group Conferences (FGC), Victim-Offender Mediation (VOM) and The Journey (Text box 1).<sup>11</sup>

South African criminal law allows the Director of Public Prosecution to withdraw the charges against any accused person conditionally or unconditionally. In practice, this authority is delegated to prosecutors at district courts and it is through the withdrawing of charges that diversion has been legitimated.<sup>12</sup> In the

### Text box 1: NICRO's diversion programmes

*Youth Empowerment Scheme (YES):* This is a life skills programme that consists of six sessions that are held one afternoon per week over a period of six weeks. The programme normally accommodates a group of 15 to 25 children. The parent(s) or appropriate adult(s) attend both the first and last sessions. The programme makes use of interactive and experiential learning techniques to assist children in acquiring important life skills. The themes covered in the programme include: crime and the law, parent-child relationships, self-esteem, conflict resolution and responsible decision making. Children may be referred to the programme as a pre-trial diversion or as a postponed or deferred sentence.

*Pre-trial Community Service (PTCS):* In this intervention, instead of proceeding with prosecution, the child, on accepting responsibility for the offence committed, is ordered to perform a specified number of hours of community service. A NICRO worker, in consultation with the public prosecutor, determines the requisite number of hours and then monitors the child's progress. This information is reported back to the prosecutor. On average, a child performs between 20 and 60 hours of community service and is based at a non-profit organisation.

*Victim Offender Mediation (VOM):* This is a process in which both the victim and the child are brought together, under the facilitation of a specially trained NICRO mediator. During the mediation, both the victim and the child discuss the impact of crime on their respective lives. They then participate in a process

of devising a mutually acceptable plan that will strive to repair the harm caused by the crime while holding the child accountable for his or her behaviour. This plan is then drawn up into a contract, which is submitted to the prosecutor and monitored by a NICRO worker.

*Family Group Conferences (FGC):* This is a restorative justice intervention very similar to VOM. During this mediated intervention, other individuals, such as the child's family, community members, teachers, etc. are also included in the decision making process. A great emphasis is placed on preventing recidivism and the input of the other participants is viewed as important for developing a plan that will accomplish this objective. This plan is then drawn up into a contract, which is submitted to the prosecutor and monitored by a NICRO worker.

*The Journey:* This is a multi-component programme that has been designed for children who have committed offence(s) and are considered to be 'high-risk'. The programme normally accommodates a group of ten to 15 children. The children are often repeat offenders and have dropped out of school. The programme involves life skills training, vocational skills training and a wilderness component based on rites of passage theory, which is facilitated by a non-governmental organisation called Educo. In recent years, through a collaborative partnership with Big Brother Big Sister South Africa, children have been matched with a mentor for six months following the wilderness component of the Journey programme. Depending on the needs of the children, the programme runs for between three and 12 months.

majority of cases where diversion is authorised, the prosecutor withdraws the criminal charges on condition that the child completes a specified activity, such as a diversion programme or community service. It is uncommon for prosecutors to divert children unconditionally.<sup>13</sup> While diversion has been legitimately practiced in South Africa, it has occurred in the absence of a regulating policy. Consequently, children who committed offences experienced very cautious and highly discretionary administration of diversion.

In November 1997, the Inter-Ministerial Committee on Young People at Risk (IMC) circulated their Interim Policy Recommendations for the transformation of the child justice system. This was the first document to formally acknowledge the limited availability of diversion programmes and the unequal access to these programmes.<sup>14</sup> In order to remedy this situation, the IMC recommended that an effective referral process be developed; that diversion should be offered in range of levels; and that a new diversion option, Family Group Conferencing should be piloted.<sup>15</sup> The next section will discuss how these recommendations were slowly developed through the process of drafting the Bill.

## FORMALISING DIVERSION: THE CHILD JUSTICE BILL

The drafting of the Bill has been the most central child justice development in South Africa during the past decade. The Bill, which will hopefully be enacted in 2003, will be the first piece of legislation to comprehensively manage children accused of committing offences. One of the central objectives of the proposed child justice system is to promote the expanded use of diversion in a consistent and just manner. Before examining how the proposed child justice system intends to accomplish this, some of the significant events and processes that have shaped the drafting of the Bill will be briefly outlined.

Although the campaigning for the drafting of separate child justice legislation can be traced back to the 1980s, it was only with South Africa's readmission to the international community that this early advocacy work yielded results.<sup>16</sup> South Africa's new constitution provided special rights to children and on 16 June 1995 the United Nations Convention on the Rights of the Child (UNCRC) was ratified. With this, South Africa was obliged to develop discrete child justice legislation and in December 1996, the Minister of Justice established a Juvenile Justice Project Committee (hereinafter referred to as the Project Committee) for the purpose of drafting this legislation.

The enshrining of children's rights in the South African Constitution and the ratification of the UNCRC not only provided the impetus to commence drafting the Bill, but also greatly influenced the legislation that was

developed. Article 40(3)(b) of the UNCRC stipulates that child justice systems should develop diversion options when appropriate and with structures to ensure the protection of children's due process rights. The Project Committee could therefore develop a legal framework that would both improve access to and regulate the administration of diversion. However, it was not just this obligation that led to diversion occupying a central place in the Bill but rather the desire to "further entrench the reality of diversion as part of child justice practice."<sup>17</sup>

The Project Committee initially produced and circulated an Issue Paper in May 1997.<sup>18</sup> Submissions were received in response to the Issue Paper and a number of consultative processes were initiated. Feedback was captured in the Discussion Paper, released in December 1998, which also included a draft version of the Bill.<sup>19</sup> Again, thorough consultation followed with the various sectors including the Departments of Justice and Constitutional Development, Social Development, Safety and Security, Correctional Services, as well as diversion service providers, other concerned NGOs, legal aid providers, academics, concerned citizens and children. On the 8 August 2000, the Project Committee released their final Report on Juvenile Justice, with a revised Bill attached.<sup>20</sup> The Bill was introduced into Parliament on 13 August 2002 after the state law advisors had made some changes, which were largely cosmetic and not substantial.<sup>21</sup> At the time of writing, the Justice and Constitutional Development Portfolio Committee had finished hearing the oral submissions and had begun the process of informally discussing the Bill.<sup>22</sup>

Children who committed offences experienced very cautious and highly discretionary administration of diversion

The understanding of diversion in South Africa has evolved through these various Project Committee documents.<sup>23</sup> Initially, the Issue Paper developed the IMC's earlier Interim Policy Recommendations through presenting a series of questions designed to get feedback around how the legislative framework should be structured for diversion. It was in the 1998 Discussion Paper that diversion was elevated to become a "central objective of the proposed new system." In order to accomplish this objective, the Discussion Paper included proposals for a more effective referral process.<sup>24</sup> Regarding diversion, the Bill did not deviate much from the Discussion Paper. The next section will discuss the framework for diversion proposed by the Bill.<sup>25</sup>

## Expanding and regulating diversion

One of the central objectives of the proposed child justice system is to increase the number of cases that are diverted away from formal court procedures. The

Bill prioritised developing mechanisms to ensure that this occurred in a consistent and just manner. The drafters devoted an entire chapter to the regulation of diversion including the following sections: Purposes of diversion (s48); Minimum standards applicable to diversion and diversion options (s49); Availability of diversion options and the keeping of records (s50); Diversion only to occur in certain circumstances (s51); Diversion options (s52); Family group conference (s53); Victim-offender mediation or other restorative justice process (s54); and Powers of prosecution (s55). Diversion is defined as “the referral of cases of children alleged to have committed offences away from formal court procedures with or without conditions.”<sup>26</sup> Thus the Bill broadens the definition of diversion and makes provision for it to be allowed at any stage of the criminal justice process, with or without conditions. Text box 2 outlines the Bill’s intended purposes of diversion. The Bill states that diversion should only to be initiated in cases where there is sufficient evidence to

otherwise prosecute. If, however, the decision has been taken to proceed to trial, it is stipulated that diversion must be considered in each and every case. The decision to prosecute a child can only be considered if he or she falls within the age parameters of this legislation. The Bill covers the procedures to be followed for children who, at the age of committing the offence are under the age of 18 years. The Bill retains the *doli capax* and *doli incapax* presumption and provides that the minimum age of criminal responsibility should be ten years. However, children between the ages of ten and 14 years are presumed not to have the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation. This presumption can only be rebutted by the submission of a certificate from the Director of Public Prosecutions.

With regard to diversion, however, the Bill stipulates that the prospect for diversion must be considered for all children over the age of ten years. Children below

**Text box 2: The purpose of diversion**

Section 48 of the Bill states that the purposes of diversion are to:

- (a) encourage the child to be accountable for the harm caused;
- (b) meet the particular needs of the individual child;
- (c) promote the reintegration of the child into the family and community;
- (d) provide an opportunity to those affected by the harm to express their views on its impact on them;

- (e) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (f) promote reconciliation between the child and the person or persons or community affected by the harm caused;
- (g) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
- (h) prevent the child from having a criminal record.

**Text box 3: Offence schedules**

**Schedule 1** offences include: assault where grievous bodily harm has not been inflicted; malicious damage to property does not exceed R500; trespass; any offence relating to the illicit possession of dependence producing drugs where the quantity does not exceed R500; theft where the value of the property does not exceed R500; possession of suspected stole goods where the value of the property does not exceed R500; loitering with the intention of committing prostitution; any statutory offence where the maximum penalty determined by that statute is a fine of less than R1,500 or three months imprisonment; and conspiracy, incitement or attempt to commit any offence referred to in this schedule.

**Schedule 2** offences include: public violence; culpable homicide; assault including assault involving the affliction of grievous bodily harm; arson; housebreaking, robbery and theft where the amount involved in the offence does not exceed R20,000; possession of car-breaking and house-breaking implements; any offence relating to the illicit possession of dependence producing drugs; forgery, uttering or fraud, where the amount concerned does not exceed R20,000; any conspiracy, incitement or attempt

to commit any offence referred to in this Schedule; any statutory offence where the penalty concerned does not exceed R20,000.

**Schedule 3** offences include: murder or attempted murder; rape or attempted rape; robbery or attempted robbery where there are aggravating circumstances; robbery or attempted robbery that involving the taking of a motor-vehicle; *indecent assault involving the infliction of grievous bodily harm*; *indecent assault on a child under the age of 16 years*; any offence related to the illicit possession of or trafficking of dependence producing drugs or any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft, where the amount concerned is more than R50,000 or in the case of acting in the execution or furtherance of a common purpose or conspiracy more than R10,000; any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments; any offence relating to the possession of an automatic or semi-automatic firearm, explosives or armaments; any conspiracy or incitement to commit any offence referred to in this Schedule.



the age of ten years who commit offences may still be referred to a diversion option,<sup>27</sup> but the referral channel is different—these children are referred via a conference.<sup>28</sup> During parliament’s informal deliberations, it was proposed that diversion should be expanded to accommodate individuals between the age of 18 and 21 years, if they have committed schedule one and two offences.<sup>29</sup> Text box 3 includes a breakdown of the three schedules of offences outlined in the Bill.<sup>30</sup>

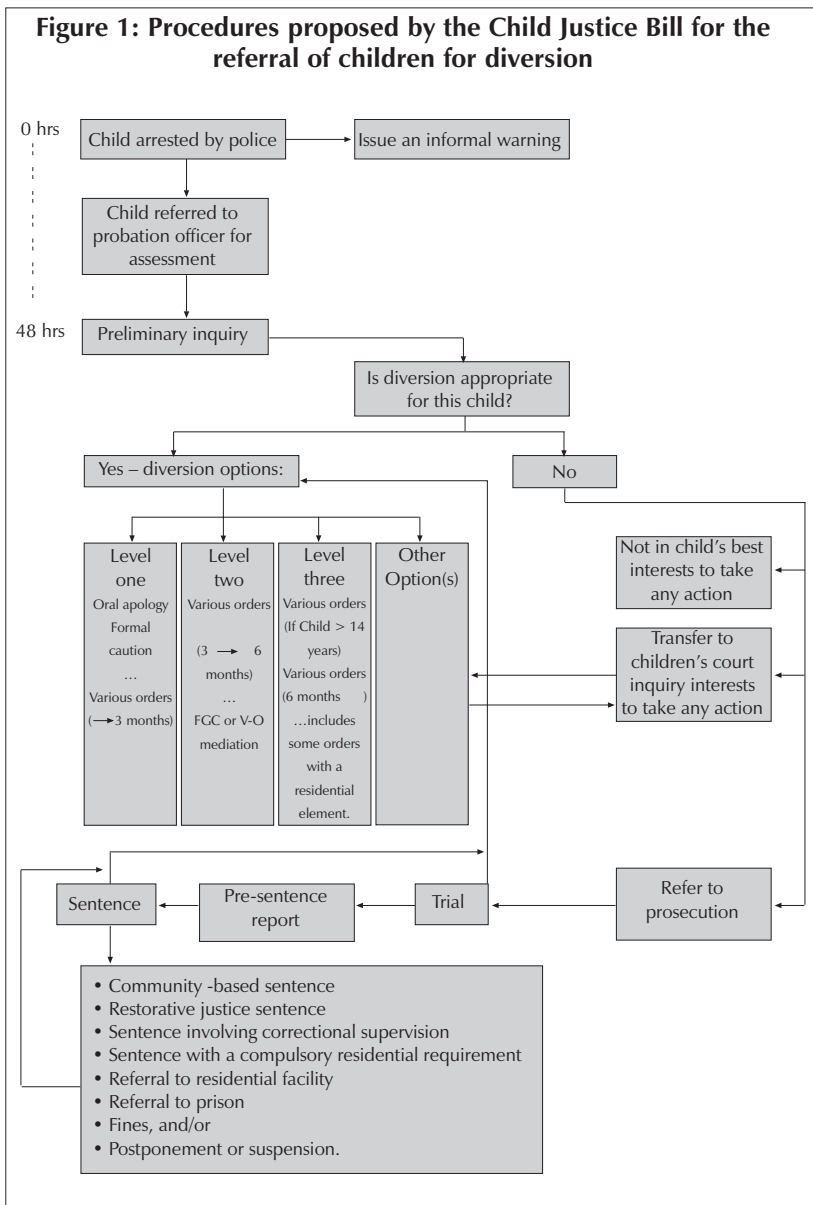
The Bill did not originally prescribe a cut-off in terms of repeat offending or category of offences for which a child can or cannot be diverted.<sup>31</sup> Unfortunately, during the parliamentary discussions, some members argued that diversion should not be an option for children who commit serious offences. Instead, it was proposed that children should be sentenced to attend these diversion programmes in prison. The committee decided to exclude children who committed schedule three offences, except those italicised in Text box 3, from diversion. This decision was taken in spite of the support both the Community Law Centre and the South African Young Sex Offenders Project (SAYStOP) presented in their submissions regarding the provisions in the Bill not to exclude certain categories of offences from being diverted.<sup>32</sup>

The Bill provides for a number of new procedures and mechanisms to facilitate the referral of children into suitable diversion options (Figure 1).<sup>33</sup>

The proposed legislating of a compulsory assessment of each and every child arrested is the first new procedure that has been included to streamline the diversion of cases. It is envisaged that this assessment will be carried out by a probation officer within 48 hours of the child’s arrest.<sup>34</sup> One of the main goals of this assessment would be to explore and make recommendations regarding the appropriateness of diversion.

The introduction of a preliminary inquiry is the second proposed mechanism to increase the opportunity for diverting children. This is one of the most striking aspects of the Bill and the amendments made by the state law advisors resulted in the preliminary inquiry being positioned as “the central and defining feature of the new child justice system.”<sup>35</sup> The preliminary inquiry is a compulsory procedure that should be held within 48 hours of a child’s arrest, prior to his or her plea.<sup>36</sup> The Bill proposes that this should be presided

**Figure 1: Procedures proposed by the Child Justice Bill for the referral of children for diversion**



over by a designated district court magistrate, who should conduct this procedure in an informal manner and provide for the participation of justice personnel present, the child and the child’s parent(s) or an appropriate adult(s). A central purpose for convening such a meeting would be to ensure the possibility and appropriateness of diversion. Thus, it is anticipated that the preliminary inquiry will provide a systematic approach to procedure in child cases, sifting the serious from the minor cases, and the divertible from those that must proceed through the justice system. There are three possible outcomes for a child following a preliminary inquiry: diversion, conversion to the Children’s Court, or trial.<sup>37</sup>

The Bill thus aims to ensure the expanded use of diversion through strengthening the referral phase with these two new compulsory procedures. The Bill also proposes an expanded range of diversion options to be used as possible sanctions for children. These diversion options have been categorised into three levels, depending on the seriousness of the offence (Figure 2).<sup>38</sup>

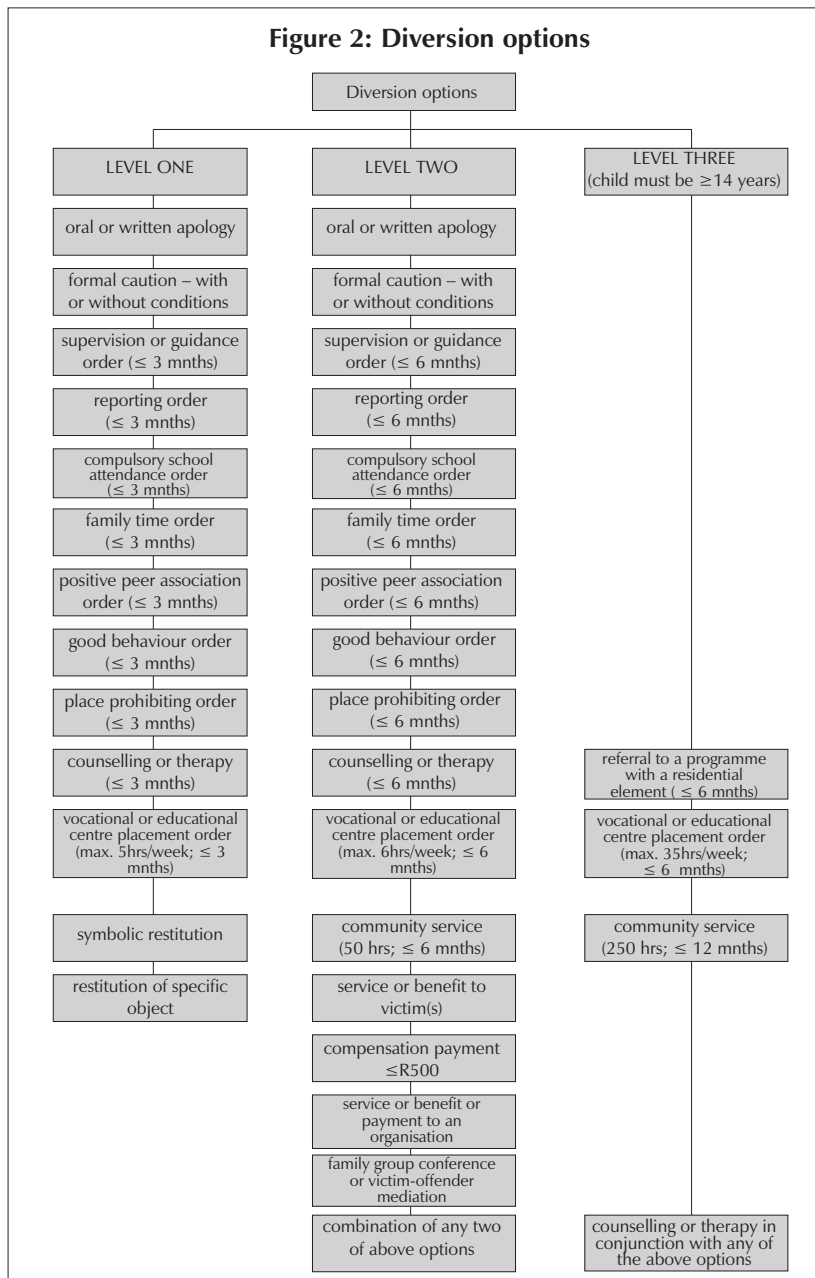
Level one options are the least onerous and include oral apologies, formal cautions and a variety of orders which may not exceed a three month time period. Level two orders include all the level one orders but they may be applied for a longer duration that is, between three to six months. Level two also includes a few additional restorative justice diversion options such as family group conferences, victim-offender mediation and other restorative justice process.

Level three orders are for matters involving serious or repeat offending, and include orders of six months or more, with a possible residential element. The Bill states that level three orders can only be used in cases involving a child of 14 years or older and where the inquiry magistrate believes that if this child was tried and convicted they would receive a sentence involving detention for a period exceeding six months. However, these lists of options are by no means designed to be exclusive and instead the Bill advocates that children can be placed in any registered diversion option as long as it attempts to fulfil the broader objectives of diversion listed earlier in Text box 2. These levels are intended to provide for the adopting of an individualised response while simultaneously balancing proportionality in the selection of diversion options.<sup>39</sup>

In scanning through the various diversion options, it is apparent that the Bill has made a concerted effort to move away from the conception that diversion always involves referring a child to a specific programme or agency. Instead, the Bill provides for a number of new, inexpensive diversion orders, which are outlined in Text Box 4.<sup>40</sup> These diversion options hold particular relevance for under-resourced areas where formal diversion options are currently not available and where resources for embarking upon elaborate interventions are scarce.

In terms of regulating the practice of diversion and the above distinct procedures, the Bill stipulates minimum standards applicable to diversion and diversion options. For example, punishment and public humiliation are prohibited and instead diversion interventions must promote dignity and well-being, and assist the child to view him or herself as having something valuable to contribute to society. Children should be channelled into diversion interventions that are appropriate to their age and maturity and these should ideally impart skills.

**Figure 2: Diversion options**



Diversion programmes must not interfere with a child's schooling and economic factors are not allowed to become a barrier to a child's inclusion in a diversion programme.

These minimum standards have been developed to prevent children from being subjected to harmful and exploitative practices. In order to monitor this, the Bill insists that any diversion option, consisting of a predetermined content and duration, should be registered.

Diversion options have also been encouraged to incorporate elements of restorative justice. With regards to traditional restorative justice processes, the Bill stipulates the procedures to be followed. These include the referral process, time frames, stipulations around who may attend, and guidelines for devising and documenting plans. During the parliamentary informal discussions, Adv de Lange, chair of parliament's Justice and Constitutional Development

#### Text box 4: Definitions of diversion orders

*A supervision and guidance order:* This involves placing a child under the supervision and guidance of a mentor (e.g. school teacher, probation officer, social worker, community member, parent, relative, etc) or peer role model (e.g. school prefect, sports captain, etc) in order to monitor and guide the child's behaviour.

*A reporting order:* This order requires a child to report to a specified person (e.g. police officer, school principal, probation officer, etc) at a time or at times specified in such order so as to enable such a person to monitor the child's behaviour.

*A compulsory school attendance order:* This order requires a child to attend school every day for a specified period of time. Their attendance is to be monitored by a specified person (e.g. school teacher, parent, relative, etc

*A family time order:* This order requires a child to spend a specified number of hours with his or her family. Activities (such as attending church, helping with household chores, going on family outings, spending meal times and evenings at home, etc) may be specified as part of this order.

*A positive peer association order:* This order requires a child to associate with persons who can contribute to the child's positive behaviour (e.g. youth group, sports group, etc).

*A good behaviour order:* This order requires a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour (e.g. arriving home for meal times, no fighting with siblings or peers, no drinking, no taking of illegal drugs, etc).

Portfolio Committee, felt that it was inappropriate to have one diversion option outlined in such detail and suggested that the drafters should review these clauses.<sup>41</sup>

In order to monitor the implementation of this legislation, including issues such as the development and provision of diversion services, the number of children diverted, etc, the Bill recommended a three-tiered monitoring system.<sup>42</sup> This included the development of a register to record the children diverted, and which interventions they were diverted to. The state law advisors, however, removed the contents of the chapter on monitoring and instead argued that these should be included in regulations to the Bill.<sup>43</sup>

Reflecting on the Bill, Sloth-Nielsen argues that in relation to diversion, the Bill achieves four essential things:

- Through defining objectives and creating distinct compulsory procedures, the Bill has succeeded in strengthening the referrals process for diversion.
- The Bill takes into account the scarcity of resources and provides for innovative alternatives to formal diversion programmes. By arranging these options in user-friendly tiers, the Bill creates conditions to ensure that children are channelled into the most suitable diversion options available in their area, while encouraging proportionality in selection.
- The Bill provides for the statutory inclusion of procedures for restorative justice.
- The Bill provides for the regulation of diversion thereby ensuring that children's rights are protected throughout the diversion process.<sup>44</sup>

### Duties and responsibilities

The effective implementation of the Bill is dependant on the cooperation of all the relevant government

departments, welfare agencies and other youth service providers. The Bill has been drafted to provide clarification regarding the duties and responsibilities of the police, probation services, justice personnel, legal representatives, and diversion service providers. In relation to diversion, the Bill creates new roles and responsibilities for probation officers, prosecutors, and magistrates.

#### *Probation officer*

Probation officers have been granted a more central role especially in the initial assessment phase and in making recommendations regarding the use of diversion and placement of the child. The probation officer is expected to make every effort to locate the child's parents or an appropriate adult to attend both the assessment and later the preliminary inquiry.<sup>45</sup> Having gathered all the appropriate information during the assessment interview, the probation officer is required to produce an assessment report that indicates whether the child accepts responsibility for the offence he or she is charged with and outlines the prospects of diversion. If the child is below the age of ten years, the probation officer can:

- refer the child to the children's court;
- refer the child or family to counselling or therapy;
- arrange support services for the child or family;
- arrange a conference; or
- decide to take no action.

The probation officer's assessment report should be submitted to the prosecutor at the earliest opportunity. The officer should make a concerted effort to attend the preliminary inquiry and may be elected by the inquiry magistrate to monitor the diversion plan developed.

## Prosecutor

The prosecutor has the responsibility to decide whether the charges pending against the child should be withdrawn or whether a preliminary inquiry should be arranged.<sup>46</sup> In cases where an assessment has not been conducted, it is the prosecutor's duty to either arrange an assessment or, if this is not possible, set up a preliminary inquiry. At the preliminary inquiry, the prosecutor is responsible for ensuring that the inquiry magistrate possesses the probation officer's assessment report. As the Bill is currently drafted, the prosecutor is the central figure at the preliminary inquiry in deciding whether or not a child should be diverted and if this should occur conditionally or unconditionally.

## Magistrate

The main role of the inquiry magistrate is to preside over the preliminary inquiry in a manner that allows the gathered information to be shared and additional information to be elicited for the purpose of assisting the prosecutor to make an informed decision as to whether the child should be diverted.<sup>47</sup> In order to accomplish this, the inquiry magistrate is expected to share the probation officer's recommendations with everyone present at the preliminary inquiry and facilitate the clarification and development of these recommendations. Adv de Lange, during the parliamentary informal deliberations, insisted that the inquiry magistrate should be in possession of and make available information regarding a child's record of previous diversions during this procedure.<sup>48</sup>

The inquiry magistrate may question any of the various members attending the preliminary inquiry and should create a climate where the child, the child's parents and all other persons present are given an opportunity to express their views and actively take part in the decision making process.<sup>49</sup> The inquiry magistrate is also expected to be able to provide the forum with information on the various diversion options available in the area and the purpose of these interventions.

Diversion can only be embarked upon if the child accepts responsibility for the offence and it is the inquiry magistrate's responsibility to establish such willingness from the child. After due discussion, the inquiry magistrate must establish whether the prosecutor is willing to divert the child. If the decision is taken to divert the child, the inquiry magistrate is required to make an order regarding the most appropriate diversion option(s). In order to place a child in a suitable diversion option, the inquiry magistrate needs to bear in mind:

- the purpose and minimum standards of diversion;
- the appropriate level from which a diversion option should be selected;
- the diversion options available in the region; and

- all the available information regarding the child, his or her circumstances and the offence allegedly committed.

The inquiry magistrate must then identify either a probation officer or another suitable person to monitor the child's compliance with the conditions of the selected diversion options. This provision enables community members to be drawn in to monitor the execution of diversion orders. This holds particular significance for rural areas, where children's access to probation officers are often infrequent or nonexistent and could otherwise impede the child's access to diversion.<sup>50</sup>

If the child fails to comply with their diversion order, the person elected above to monitor the child's compliance is expected to inform the inquiry magistrate in writing.<sup>51</sup> Thereafter, the inquiry magistrate will reconvene an inquiry to establish the reason for the child's non-compliance. The outcome of such a meeting may result in:

- the application of additional conditions and/or diversion options to the original diversion order;
- the issuing of a new diversion order(s); or
- the prosecutor may decide to proceed with prosecution.

Parliament has extensively debated the duties and responsibilities of the various role-players. Some members of parliament's Justice and Constitutional Development Portfolio Committee were concerned that the inquiry magistrate was not granted more authority with regards to the decision to divert a child. Adv de Lange proposed that the drafters should create a mechanism to allow the inquiry magistrate to influence decisions.<sup>52</sup>

## Mobilising support for the Child Justice Bill

The Project Committee considered consultation to be essential to the development and successful implementation of the Bill. Over and above consulting widely with the various government sectors and other concerned child justice advocates, in 1999 the Project Committee commissioned two research projects aimed at gathering support for and directing the law reform process. Both these research projects, which are outlined below, used the proposed new child justice system as outlined in the Discussion Paper.

### *Consultations with children*

The Project Committee commissioned NICRO to hold interactive workshops with children to ascertain their opinions on the proposed new child justice system.<sup>53</sup> The Committee felt that this research would serve a dual purpose. It would provide children with a forum to voice their opinion on matters affecting them, as



promoted in Article 12 of the UNCRC. The research would also provide an opportunity to gather alternative recommendations for the restructuring of the criminal justice system to counter the 'get tough' stance that was being advocated in the media.<sup>54</sup>

NICRO held workshops with seven groups of children, ranging from learners who had no contact with the criminal justice system to those who were serving residential sentences. The groups included children in prison (both serving sentences and awaiting trial), in reformatories (serving a sentence), in places of safety (awaiting trial), who had been placed in diversion programmes, and those who had not had any contact with the criminal justice system. In terms of diversion, the facilitators explained the principles underpinning diversion, the minimum standards for diversion, and the new diversion orders. A discussion around specific questions was then facilitated and the children were required to fill in their responses on worksheets provided as outlined in Table 1.<sup>55</sup>

These results indicate that the majority of the children supported the proposed diversion orders. The children felt that both supervision orders and guidance orders would prevent them from re-offending. Most of them suggested that social workers, school principals or teachers would be the best people to administer these orders. They also considered probation officers, psychologists, community members and parents to be potentially suitable.

In relation to the reporting order, the children felt that it would be most effective if the inquiry magistrate ordered the child to report to a police twice a week. Compulsory school attendance orders were seen to offer a dual benefit of both occupying the child's time and thereby preventing him or her from offending while also providing the child with the knowledge that would prevent him or her from re-offending. The children suggested that in order for family time orders to be useful, the inquiry magistrate should stipulate activities such as attending church with family members, completing certain household chores, participating in family outings, etc.

In relation to good behaviour orders, the children felt that behaviour such as respect for parents, come home on time, informing parents of their whereabouts, no smoking, drinking, drugging or parties, no fighting, being helpful, and attend school were all possible options that would prevent them from engaging in criminal behaviour. In making out a prohibition from visiting a specified place order, the children felt that the inquiry magistrate should ban children from frequenting places that would provide easy access to drugs, alcohol, and gangs. The children gave ambivalent responses in relation to positive peer

association orders. While just over half of the group felt that it could be an effective order, a significant proportion of the children felt that it was not the court's place to decide with whom they should be friends. They were doubtful about the long-term effectiveness of this order.<sup>56</sup>

Considering the value of the children's input, the Child Justice Alliance<sup>57</sup> commissioned NICRO to facilitate a second round of consultative workshops with children in 2001. During this second study, 17 workshops were facilitated with children ranging from those who had no contact with the criminal justice system (schools groups) to children already convicted and serving sentences (criminal justice system groups). The sample selected for the study was broader than the previous study as it included children from the following four provinces: Western Cape, Eastern Cape, North West and Limpopo. These provinces were selected to capture the opinions of children who had encountered criminal justice systems that varied in terms of their level of development of infrastructure, staff capacity, and provision of specialised services.<sup>58</sup>

During this second stage of consultation, the children were not asked specifically about each of the individual diversion options. Instead, the facilitators explored how and which type of diversion options might have benefited their lives. Table 2 outlines the children's responses to the question, "What would be the benefits of diversion for a child arrested for committing an offence?"

The majority of the children in the criminal justice

**Table 1: Children's support for the various diversion orders**

Diversion order	Positive support
Supervision order	70.7 %
Guidance order	86.0 %
Reporting order	96.6 %
Compulsory school attendance order	94.8 %
Family time order	91.4 %
Positive peer association order	58.4 %
Good behaviour order	94.8 %
Prohibition from visiting a specified place order	94.8 %

system groups (83%) felt that if they had received one of the diversion options outlined in the Bill, this would have assisted them to change their lives. The children in these groups who had not been diverted felt that, given the opportunity of diversion when they first committed an offence, they:

- would have realised what was wrong with their behaviour and changed;
- could have learnt decision making skills and the consequences of the crime;
- could have completed school and some of their other ambitions;
- could have spent the time better than being in prison; and
- would have had a more meaningful life.

## Costing the Child Justice Bill

From the outset, the Project Committee was aware that there would be limited funds made available for the creation of a new child justice system. While the proposed system has been designed to rely heavily on existing resources and has developed a number of innovative and inexpensive diversion options, the Committee remained concerned that anticipated increased expenditure might prevent or delay the introduction of the Bill. As a result, the Applied Fiscal Research Centre (AFREC) at the University of Cape Town, was commissioned to project the likely cost of the new child justice system and develop a strategy for implementation. This was the first time that the economic implications of implementing draft legislation had been calculated.<sup>59</sup>

AFREC evaluated the cost of implementing the Child Justice Bill by initially calculating the current expenses involved in processing children through the criminal justice system. Considering that five national departments (those responsible for policing, social welfare, justice, correctional services, and education) and policing and welfare departments at a provincial level are involved in managing child justice, together with the limited available data, this proved to be a challenging exercise. The research team calculated the probable annual baseline cost of arrest, detention, trial and sentence of children in the present system (the 'baseline' scenario). Both the anticipated increases and decreases in the proposed new system were then plotted against the baseline scenario. AFREC calculated the cost-effectiveness of the proposed child justice system at both a halfway point in the process of implementation (the 'rollout' scenario) and at the ultimate point of implementation (the 'full' scenario). These three scenarios were then compared.<sup>60</sup>

AFREC estimated that the government currently spends R675 million per year on child justice. Of this amount, three million is spent on diversion. In the baseline scenario, the research team calculated that 20% of children (or 27,617 children) who enter the criminal justice system are diverted or sentenced. Of this group, they found that just less than 30% (12,985 children) were diverted. With the implementation of the Bill, it was anticipated that more than half the total number of children (71,901) that allegedly commit offences and enter the criminal justice system would be diverted, receive an alternative sentence or a residential sentence.

In the 'full scenario' it was anticipated that 85% of these children (61,525) would be diverted. Increased expenditure would obviously be incurred in the

**Table 2: Children's opinions on the benefits of diversion**

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

expanded provision of diversion interventions. In particular, the Department of Social Development would experience the greatest increases through the employment of extra personnel where it was calculated that the costs involved would increase from R2 million to R6 million, and the development, administration and monitoring of new diversion schemes. AFREC reckoned that the cost of diversion would increase to R17.2 million in the 'rollout' scenario and R18.5 million in the 'full' scenario. Therefore, at the ideal stage of the Bill's implementation, the government would be spending R15.5 million more on diversion than it currently does.<sup>61</sup>

Overall, however, AFREC found that by the time the Bill has been completely implemented, the government would be spending R429 million per year on child justice. When compared to the baseline statistics, this represents a saving of R247 million per year. This substantial saving of over 35% will come about as a result of the increased use of diversion and consequential reduction in the use of places of safety or custody for children. Diversion interventions will obviously need to be in place to accommodate these referrals. The inexpensive nature of many of the proposed diversion options will help to lower the costs of implementing the proposed child justice system.

The AFREC report further stresses the importance of reallocating resources to the earlier stages of the proposed child justice system namely, the assessment and preliminary inquiry processes. This is viewed as crucial to ensuring the increased referral of children into diversion and alternative sentencing options and consequently reducing the costs incurred when children are placed in detention. The different levels of diversion have, therefore, been identified as essential in channelling children out of the system and into more cost-effective interventions.<sup>62</sup>

The government will only accomplish the above savings if resources are reallocated both within

government—that is, shifted from national departments to provincial departments—and between government departments. Looking at the anticipated costs related to diversion, it is clear that the bulk of the additional spending will fall on the provincial welfare departments. The AFREC report recommends that the national Department of Social Development provide the provincial departments with conditional grants to facilitate them meeting their child justice obligations. The study highlighted that provinces which are predominantly urbanised are home to a greater proportion of the total number of children who commit offences. These provinces should therefore receive larger grants. Over and above the provision of conditional grants, the national Department of Social Development will also require additional funding to monitor the functioning of the new child justice system. Considering that the Department of Correctional Services should realise substantial savings as a result of the decrease in children placed in their facilities or under their supervision, it has been proposed that their budget allocation be cut and re-allocated to the Department of Social Development.<sup>63</sup> Considering the central role the preliminary inquiry will play in expanding the use of diversion, it has been emphasised that the Department of Justice and Constitutional Development will need to provide active support through freeing up magistrates' and prosecutors' time to enable them to attend these procedures.<sup>64</sup>

The United Nations Child Justice Project, established to provide technical assistance in the field of child justice to the South Africa government (referred to below as the Child Justice Project), supported government departments in their development of an implementation strategy and budget. The project worked with each department to estimate current budgetary allocations and outline proposed new activities that need to be funded. A three-year graded funding plan has been devised to indicate the "reprioritised funds," the "new funds" required, and the "donor funds" allocated to specific activities. This is the first time that an inter-sectoral budgeting initiative has been embarked upon so early in the law-making process.<sup>65</sup> This will hopefully ensure that the Bill is implemented with adequate resources and that sufficient finances have been allocated to ensure that a full continuum of suitable diversion interventions are developed throughout South Africa.

## DIVERSION IN PRACTICE THUS FAR

This section examines developments in the field of diversion in South Africa between 1997 and 2002, in preparation for the implementation of the new child justice system.

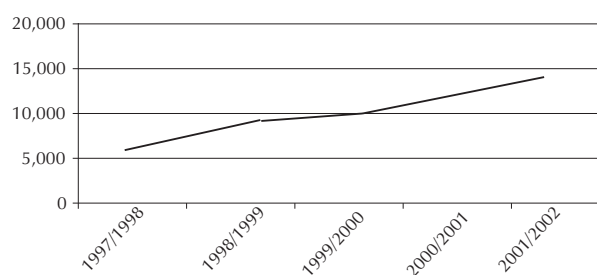
## National Institute for Crime Prevention and the Reintegration of Offenders

NICRO remains the primary provider of diversion programmes in South Africa. Over the last decade the organisation has increased its service area and in 2000 accomplished its mission of offering diversion programmes in all nine provinces.<sup>66</sup> Diversion services were established in North West in 1998/1999 and in Limpopo in 1999/2000. NICRO has also embarked on several collaborative partnerships in recent years. Since 1997, the organisation has played a central role in the development and implementation of the SAYStOP diversion programme.<sup>67</sup> And in 2000, NICRO in partnership with Big Brother Big Sister South Africa, started recruiting and training mentors in the Western Cape to offer support and guidance to children who had completed one of their diversion programmes.<sup>68</sup> Figure 3 shows the increase in the number of cases diverted to NICRO programmes.

NICRO facilitated a total of 16,211 diversion programmes in 2001/2002. The provincial breakdown is as follows:

- Gauteng: 4,112;
- Western Cape: 2,865;
- KwaZulu-Natal: 2,626;
- Eastern Cape: 2,196;
- Northern Cape: 1,725;
- North West: 963;
- Free State: 822;
- Mpumalanga: 598; and
- Limpopo: 304.<sup>70</sup>

**Figure 3: Number of children diverted to NICRO programmes, 1997–2002**



Sources: Various <sup>69</sup>

Despite ensuring national service delivery, NICRO has experienced disproportionate referrals of diversion cases in the different provinces. In 2000/2001, 73% of NICRO's diversion cases were processed in the Western Cape, KwaZulu-Natal, Northern Cape and Eastern Cape provinces. During the same period, the Gauteng, Mpumalanga, Northern West and Limpopo provinces, which together account for 45% of South Africa's population, only processed 23.5% of NICRO's diversion cases.<sup>71</sup>

An audit of diversion practices between the period July 1999 and June 2000 supports the above analysis that diversion is still being implemented in a disjointed and disparate manner.<sup>72</sup> The audit found that diversion was practiced in just over 100 of South Africa's 500 courts and that there was a considerable disparity in the practice of diversion across provinces. The largest number of diverted cases was in the Western Cape (2,491), followed by KwaZulu-Natal (2,030). At the other end of the spectrum, Limpopo only dealt with only ten diversion cases, while no cases were recorded in North West. The study found that the courts practicing diversion was predominantly based in the larger urban centres such as Durban, Pietermaritzburg, Johannesburg, Pretoria and Cape Town. When diversion was practiced in rural and peri-urban towns, these were predominantly former 'white' towns such as Lichtenburg in North West, Meyerton in Gauteng, Louis Trichardt in Limpopo, and Lydenburg in Mpumalanga.

NICRO still finds that the majority of its participants are pre-trial referrals. Prosecutors are the main source of referrals (approximately 80%). However, the number of referrals received from magistrates has increased from 7% in 1997/1998 to 15% in 1998/1999.<sup>73</sup> The overall compliance rate for NICRO's five core diversion programmes is above 80%, signifying that very few of these cases are returned back to court.<sup>74</sup>

NICRO's typical diversion participant is a male between 15 and 17 years of age who has committed his first offence. He usually lives with his parents and has completed one or two years of secondary schooling.<sup>75</sup> For the period 2000/2001, 77% of NICRO's participants were still attending school, 4.5% were employed and 18% were unemployed.<sup>76</sup> The race profile of children participating in NICRO's diversion programmes for the period 2001/2002 was: African (62%), coloured (28%), white (7%) and Asian (3%).<sup>77</sup>

On the whole, children were referred for having committed a minor property offence, usually theft and shoplifting and occasionally housebreaking. In the majority of these property related cases, the value of the property was less than R200.<sup>78</sup> For the period 2001/2002, NICRO recorded the following offence profile: property related cases (74%), crimes against persons (14%), and victimless/other crimes (12%).<sup>79</sup> While the proportional relationship between different offence categories has changed slight over recent years, it appears that diversion is still predominantly being used for minor property offences. In terms of the Bill's ultimate objective to see an increase in the number of children diverted, these figures indicate that there is still a great deal of scope for further expansion of diversion interventions, especially for children who have committed more serious offences.

The Youth Empowerment Scheme (YES) remains

NICRO's most popular diversion intervention. In 2001/2002, the programme served 8,371 clients. In terms of the breakdown of cases per programme for 1999/2000, the YES programme absorbed 67% and the Pre-Trial Community Service, Journey, Family Group Conferences, Victim-Offender Mediation, and other programmes received 22%, 3%, 2%, 1%, and 5% respectively. In recent years, NICRO has noted a slight decrease in the proportion of cases referred to the YES programme. This is attributed to the development and increased used of other more specialised diversion interventions.<sup>80</sup>

## Other diversion projects

Since 1996, there has been a significant increase in the development and provision of new diversion initiatives. These interventions have been facilitated by a variety of individuals and organisations including state-employed probation officers, concerned prosecutors, non-governmental organisations and collaborative initiatives.

One of the main objectives of the Child Justice Project is to assist government with the implementation of the Child Justice Bill and with developing new systems for dealing with children accused of committing offences. In terms of supporting diversion, over and above providing information, assisting with the development of training material and a monitoring process, the Child Justice Project aims to assist in "enhancing the capacity and use of programmes for diversion and appropriate sentencing of children."<sup>81</sup> This led the project to conduct an audit of diversion programmes—both those currently offered and those identified as potential options.<sup>82</sup> These programmes have been collated into a database and the aim is to produce a resource manual that will:

- outline the range of current programmes;
- provide some tools for diversion, such as guidelines and examples of contracts; and
- provide a comprehensive paper database of diversion programmes offered throughout South Africa.<sup>83</sup>

The audit has categorised diversion interventions into seven categories, which are outlined below.<sup>84</sup>

### *Developmental life skills and life centre models*

Interventions in this category include programmes that offer life skills education. Topics that are commonly covered in these programmes include personal awareness and development, crime awareness, responsible decision making, communication skills, conflict resolution, self-esteem, sexuality, gender sensitivity and leadership development. The content and duration of these programmes varies considerably.

### Case study 1: Noupooort Youth At Risk Project<sup>85</sup>

Noupooort is a small town in the Eastern Cape. Towards the end of 1999, the town's social worker moved away, leaving no one to facilitate any diversion programmes. The prosecutor, when faced with matters involving children who had committed petty offences, was left with little option than to withdraw the charges. This angered the local community. In order to address the problem, Magistrate Roberts established the Noupooort Child Justice Committee, which set about developing and implementing a diversion programme. The committee received some initial training after which it selected and trained local volunteers to assist in facilitating the diversion programme.

The Noupooort Youth At Risk Project has been designed for children who have committed an offence and fall between the ages of 12 and 18 years. The children should preferably be attending primary or secondary school. The programme aims to "develop responsible, well informed and healthy well rounded young people who are capable of taking control of their own lives." The programme comprises of six sessions held one afternoon per week over a period of six weeks. The topics covered in these sessions are: self-concept, self-awareness, communication, assertive behaviour, risk taking, and decision making. Workshops are also facilitated on substance abuse, teenage pregnancy, HIV/AIDS, crime awareness and sexual assault.

### Case study 2: South African Young Sex Offenders Project (SAYStOP)<sup>86</sup>

SAYStOP was established in 1997 for the purpose of developing innovative and effective interventions to treat and manage children accused of committing sexual offences in South Africa.<sup>87</sup> Considering the scarcity of specialised services in South Africa, and in line with child justice developments taking place at the time, SAYStOP decided initially to focus its efforts on developing a diversion programme.

The diversion programme has been designed for children between the ages of 12 and 18 years who: have committed a sexual offence, are first offenders, and where—according to the available evidence—there are few aggravating factors.

It comprises of an assessment phase and ten structured sessions and has a psychosocial life skills development and educational focus. In its standard application, the structured sessions are two-hour long and are held one afternoon per week over a period of

ten weeks. However, the programme can be implemented in an adapted form to accommodate the needs and constraints of rural and peri-urban contexts. The central aim of the programme is to encourage the child to take responsibility for his actions and to develop insight regarding the impact of his behaviour on the victim.

The sessions have been designed to be interactive and call for on-going participation and engagement from the children. Each session has set objectives within a specific theme. Exercises and activities have been developed to accomplish these objectives and to assist children to acquire important life skills. The child's parent(s) or an appropriate adult attend both the first and last sessions. The topics covered in the SAYStOP diversion programme include: crime awareness, self-esteem, sexuality, socialisation and gender myths, victim empathy, anger management, relapse prevention and preparing for the way forward.

The first case study illustrates the feasibility of developing and implementing a diversion programme in a rural and peri-urban area that requires limited resources. The second case study highlights how life skills education programmes can be designed for children with specialist needs.

#### *Peer/youth mentorship*

These programmes make use of peers, older youth and adults from the community who have undergone training to act as mentors to children. The mentors are linked with a child and the emphasis is on building a unique relationship that offers support, guidance and friendship. In most programmes, the mentors provide the programme manager with feedback on the child's progress. Mentors can also be brought in to supervise level one diversion orders such as supervision and guidance orders or reporting orders. Peer/youth mentorship interventions are frequently used in

combination with other diversion programmes, where they strive to support the child's effective reintegration back into their families and communities. In this form, they are considered suitable level two diversion options.<sup>88</sup> Research conducted by International Big Brother Big Sister found that children who are matched with a mentor are 52% more likely to stay in school, 46% less likely to take drugs and 32% less likely to engage in violent behaviour.<sup>89</sup>

#### *Wilderness/adventure therapy*

These programmes, using outdoor experiential education, take children through a therapeutic process that fosters personal growth. Many of these programmes are targeted at children who present with serious behavioural and emotional difficulties and include a residential component. Thus, it is anticipated that some of these interventions will be

### Case study 3: National Youth Development Outreach (YDO)<sup>90</sup>

The Youth Development Programme offers a joint adolescent development and youth mentorship intervention for children who have committed offences. YDO accepts referral from the Pretoria magistrate court. The children are assessed and then matched with a mentor. The children then attend the YDO's adolescent development programme, which lasts three months. The mentor provides aftercare support and monitoring after the child has completed the programme. The mentorship lasts for a period of not less than three months.

The YDO defines a mentor as "a loving brother or sister wanting what is best for the younger brothers or sisters. He or she looks for ways to help them from childhood into adulthood, by making his or her personal strengths, resources, and networks of friendships and contacts available in order to for the child to reach his or her full potential." In certain cases the YDO also facilitates a Family Group Conference as part of the mentoring diversion option.

### Case study 4: Educo Africa's Siyavuka Youth at Risk Programme<sup>92</sup>

The Siyavuka ("we are waking up") programme was started in 1996 and is run in partnership with NICRO. This wilderness diversion programme is based on rites of passage theory. It provides children with an opportunity to tell their stories and through using adventure based experiential learning, the children explore their inner resources and quality of character. The duration of the programme can vary from seven days to three weeks.

During the wilderness component, children are exposed to wilderness rites of passage, environmental awareness, leadership styles, team building and adventure education. The group based activities with children from different backgrounds provide an opportunity to learn about

multiculturalism and develop important life skills such as communication, positive expression of feelings, conflict management, leadership styles and facilitation, decision making and team work.

The 'wilderness journey' is followed by a welcoming ceremony where the child's friends and family are included in an attempt to facilitate the child's reintegration back into the community. The programme is followed up with ongoing weekly support meetings and some of the children are also matched with Big Brother Big Sister mentors. Depending on the intensity and duration of the programme, this intervention can be suitable for both level one and level two diversion options.

suitable level two and level three diversion options. After receiving some initial input, the children are often taken on a 'wilderness journey' for a specific period of time. Here, through interacting with the natural environment and the rest of the group, they learn to cope with different challenges and work together as a supportive team. Some of these programmes incorporate traditional cultural practices on rites of passage while others focus specifically on bringing together children who were former antagonists.<sup>91</sup>

#### *Skills training and entrepreneurship programmes*

These programmes offer vocational skills training, such as computer training, arts and crafts, hairdressing, motor mechanics, catering, book keeping, etc. They are often targeted at unemployed and out-of-school children. Some of these programmes are run through residential facilities and have been identified as suitable level three diversion options. A number also assist or provide the participants with job placements after they have completed the programme and provide on-going support.<sup>93</sup>

#### *Restorative justice programmes*

Programmes in this category include interventions that focus on repairing the harm caused by criminal behaviour to all concerned parties namely, victims, offenders and communities. This is accomplished by either actively or symbolically involving all stakeholders in the justice process for the purpose of devising a reconciliation plan that also holds the offender accountable for his or her actions. Family group conferencing and victim offender mediation are the two most common restorative justice processes offered in South Africa. These interventions require highly skilled facilitators and unfortunately are only available in limited parts of the country.<sup>95</sup>

#### *Counselling and therapeutic programmes*

It is recognised that some children who commit offences may have coexisting behavioural and emotional problems that require treatment. The audit has as a result included a scan of both inpatient and outpatient counselling and therapeutic programmes as possible diversion interventions. Some of these programmes include a residential element and it is anticipated that they could be suitable level three diversion options. Unfortunately there are a limited number of these interventions available for children in South Africa.<sup>97</sup>

### Case study 5: School Leavers Opportunity Training (SLOT)<sup>94</sup>

SLOT is not currently being used as diversion programme but has been identified by the Child Justice Project as having the potential to be used as a level three diversion option. The programme offers residential placement and is recommended for older children who have left school and would benefit from receiving training to prepare them for the job market.

The SLOT programme provides both vocational training and life skills development. The children initially

participate in a screening period where they are taking through a process of developing self-awareness, exploring their potential talents and are supported in setting goals for the future. This period is used to identify the child's work interests and capabilities. The child is then placed in a suitable specialised training option. The training areas offered include: computer training, farming, hairdressing, child care, fashion designing and dressmaking, catering and motor maintenance

### Case study 5: Restorative Justice Centre (RJC)<sup>96</sup>

The RJC is a non-governmental organisation that was established in 1998. It developed out of the Inter-Ministerial Committee on Young People at Risk (IMC) project established for the purpose of testing the idea of Family Group Conferences. The RJC offers three recognised diversion interventions to the Pretoria and Mamelodi magistrate's courts:

1. Family group conferences: These are community meetings that bring together the offender, the offender's family, the victim and support people to participate in a structured process to discuss the crime that has been committed and how the harm caused can be repaired. A trained facilitator guides the process, ensuring that the victim is given an opportunity to express their feelings and that the family is encouraged to support the offender in taking responsibility for his or her actions. A plan is drawn up which is then submitted to the

prosecutor and monitored by a RJC staff member.

2. Victim offender mediation: In these interventions a skilled mediator chairs a meeting between the victim and the offender for the purpose of facilitating reconciliation between the two parties.

3. Drama therapy: Drama is used as a medium to "increase participant's self-awareness and enhance their self expression." Children attend drama therapy classes once a week for a period of six weeks. Techniques such as role-playing, rituals, story telling, fantasy and games are used to assist the child to take responsibility for his or her behaviour. The classes cover important themes including the effects of crime, victim empathy, and goal setting. The children are encouraged to write a letter to the victim of their offending behaviour. After the programme, the children are followed up every six months.

### Case study 7: SANCA Alcohol and Drug Centre<sup>98</sup>

South African National Council on Alcoholism Drug Dependency (SANCA) offers a variety of treatment services for children and young people with substance abuse problems.

These are located in the following provinces: Gauteng, Eastern Cape, Western Cape, Northern Cape, KwaZulu-Natal, Northern Province, North West and the Free State. These services are not currently being used as diversion programmes but have been identified by the Child Justice Project as potential options.

SANCA offers three in-patient treatment programmes namely, Horizon Clinic in Boksburg, Laphalame Drug Addiction Unit in Pretoria, and Warman House Adolescent Unit in KwaZulu-Natal. Services offered through the in-patient programmes include assessment, detoxification, counselling, family intervention, support and after care services. These treatment programmes could be suitable level three diversion options.

SANCA also offers out-patient treatment and adolescent programmes, which would be suitable as level one and level two diversion options.

### Combined programmes

Programmes in this category incorporate a few of the various components outlined above to provide a richer intervention. Consequently, these programmes are very varied.

The diversion database developed by the Child Justice Project confirms that considerable progress has been made towards identifying suitable diversion interventions, other than those offered by NICRO, in preparation for the Bill's introduction. The majority of these programmes are located in Gauteng, KwaZulu-

Natal and Western Cape. This is however reasonable considering that together these three provinces account for the highest numbers of arrests: in 2001, these three provinces accounted for 66% of arrests.<sup>100</sup> In terms of current practice, only one third of the diversion interventions included in the database are utilised as diversion options. It is encouraging to observe that just under one third of the total number of identified diversion options have been considered suitable level three diversion options. Unfortunately, the majority of these programmes (83%) are not currently being used as diversion options. This suggest

### Case study 8: Diversion into Music Education (Dime)<sup>99</sup>

Dime is a collaborative diversion initiative between the University of the Western Cape (UWC) and the University of South Florida that was established in 2001. The programme has been designed for children who live in Khayelitsha in the Cape Metropole and have committed a range of less serious offences.

All the children referred to this diversion programme first complete the NICRO YES programme. They are then invited to participate in DIME as a reintegration programme. The programme has two components.

The first component is music tuition where the children attend weekly sessions, for a ten-week period, in order to learn how to play marimba instruments. The premise underlying the programme is that "teaching the children demonstrable musical skills on culturally relevant instruments, to performance standard within a relatively short period of time and in a community setting, would

enhance self esteem and consequently the children's ability to reintegrate into their society and community after the commission of a criminal offence." The group tuition classes also provide the children with an opportunity to socialise with other children and acquire important social skills such as communication, positive expression of feelings, leadership skills, sharing of resources, and team work.

The second component is mentoring. All the children are matched with a specially trained UWC student mentor. The mentors attend the music practice sessions and public performances, and also visit the children in their communities. The student's role is to provide the child with support and guidance, especially in terms of dealing with family problems, school related problems and peer group issues. The mentors provide feedback on the child's progress to the DIME project team.

that there is still a great need to develop a continuum of diversion interventions and test the suitability of these more intensive programmes with children who have committed serious offences.

### Evaluation of existing diversion interventions

South Africa has seen a growth in the number, scope and intensity of diversion programmes for children. Despite this development, very few studies have been conducted to evaluate the effectiveness of these interventions.

The following three studies all examined recidivism as an important aspect of evaluating programme effectiveness.<sup>101</sup> In all three studies, recidivism was defined as the commission of another offence after completing the diversion programme. This is a broad definition of recidivism in that the mere commission of an offence would result in a child being defined as a recidivist regardless of whether they had actually been arrested, charged, and/or convicted for the alleged offence. Unfortunately due to the absence of reliable statistical data in South Africa, the researchers were all reliant on self-disclosure by the children and/or significant others.

NICRO conducted the first two studies that evaluated diversion in South Africa. The purpose of these two follow-up surveys was to evaluate recidivism and the effectiveness of their diversion programmes in preventing re-offending.<sup>102</sup> In 1998, 468 individuals, selected from a stratified sample of 640 NICRO clients who had participated in a NICRO diversion programme at least 12 months prior to the survey, responded to a questionnaire. The questionnaire was then followed up with an interview with participants (64%) or a significant other in cases where the

respondent was not available (36%). The study found that only 7% of the participants had re-offended in first 12 months after participating in the diversion programme. On average, the identified recidivists re-offended seven months after completing the programme.

In 2000, the same group of 468 participants were approached and 356 of these returned questionnaires. Fifty five percent of the follow-up interviews were conducted with the participant, and 45% with a significant other. The second study found that a further 10% of participants had re-offended. Figure 4 presents the cumulative re-offending rate reported.

This information illustrates that over half the re-offending occurred in the first 12 months and 84% within 24 months of the participant completing a NICRO diversion programme. In terms of the offence committed during the recidivism period, the majority of the identified recidivists reported having committed a property offence (18). Five of the respondents reported that they had shifted from a property offence to a violent offence. One participant who had committed a violent offence re-offended similarly, and three participants shifted from a property offences to a victimless offence. When a reason for the re-offending could be provided, being influenced by friends or gang members, economic reasons, and being under the influence of alcohol were the three most commonly cited reasons.<sup>103</sup>

In both studies the respondents gave very positive feedback on the programme that they had attended. The only negative feedback related to discomfort around having to disclose shameful information about the offending behaviour. In particular, the participants reported that they liked the experiential and adventure educational techniques used. The



respondents could recall a fair amount of detail about the programme and the majority reported that the programme had brought about positive personal change, especially in assisting them to be able to make more responsible decisions. In assessing the participant's motivation for complying with the conditions of diversion, avoiding re-arrest and conviction were the most commonly cited reasons.

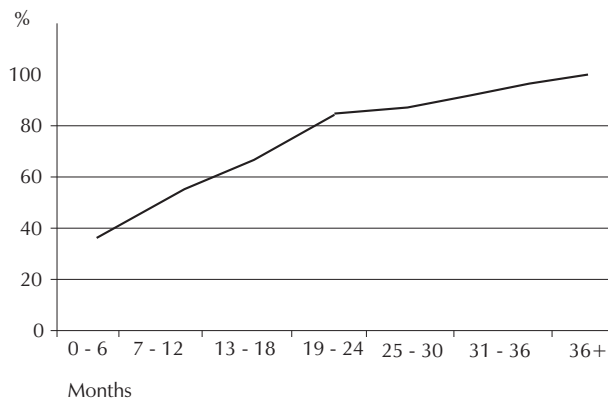
SAYStOP also conducted an evaluation into the long-term impact of their diversion programme.<sup>104</sup> This was considered important in order to respond to the concerns raised, from both sceptics and advocates of the programme, about its effectiveness given its short duration. The study attempted to determine the programme's success through gauging recidivism rates, assessing the impact of the programme content, and exploring the children's experience of attending the diversion programme. Semi-structured interviews were conducted with 25 children who had completed the programme at least 12 months prior to the interview date.

The results suggested that SAYStOP's intervention was useful for holding children accountable and teaching them to take responsibility for their abusive behaviour. It was also fairly successful in accomplishing the set aims and objectives of each session held with children. The programme was less effective in assisting children to develop respect and empathy for their victim. Overall, the information on programme content was regarded as positive and apart from the more entrenched beliefs about gender stereotypes and notions of power, the participants retained many of the concepts taught. Group work was seen to be a necessary and beneficial aspect of the intervention.

None of the children interviewed reported any sexual re-offending after attending the programme and only one child had recommitted a non-sexual criminal offence. The children suggested that the programme might be more effective if it were lengthened or additional follow-up measures were incorporated.

In terms of the controversy surrounding the use of diversion for children who commit sexual offences, the evaluation supported SAYStOP's programme. The evaluator recommended that the programme be preserved in its current form (rather than lengthening it) and used as a cost-effective starting point for all children believed to be appropriate candidates. It was also recommended that at the end of the ten sessions, the facilitators re-assess each participant as to whether the programme was adequate or whether on-going, more intensive and specialised intervention of a longer duration was needed.

**Figure 4: Cumulative re-offending rate among NICRO's diversion programme participants**



Source: Muntingh, 2001

Both NICRO and SAYStOP were unable to validate their research findings with secondary official data sources. In order to improve both the administration and management of diversion services and support future evaluations, both organisations stressed the importance of developing an integrated information system.<sup>105</sup> Hopefully, this will be achieved with the establishment of the diversion register as stipulated in s50(3) of the Child Justice Bill.

DIME conducted an evaluation to test the effect of music and mentoring on reintegration and crime prevention. Pre- and post-interviews were held with all the children, their parents and teachers. Qualitative analyses of the mentor's reports on the children were also conducted. DIME found that parents reported significant improvements in their child's self-concept, academic performance and family and peer relationships after attending the programme. The children, however, only reported improvement in family and peer relationships. During the post-programme phase (a period of six months), only one of the 13 children who participated in DIME 1, and two of the 14 children from DIME 2, re-offended.

While the results from these few evaluations of diversion programmes in South Africa have been favourable, the findings from international research have been less flattering. Although an extensive meta-analysis found no substantial evidence to support the overall effectiveness of diversion programmes, a later study found that programmes that consisted of a greater number of hours of intervention were more effective than those running for a shorter duration.<sup>106</sup>

In terms of developing useful diversion programmes in future, it is important to bear in mind the principles of effective practice, developed as part of the research on 'what works'. Interventions have been effective in reducing recidivism when they were judged to be appropriate in terms of the principles of risk, criminogenic need, and responsiveness:

- The principle of risk implies that the assessment of risk and the prediction of recidivism should determine the service provided. That is, intensive services should be offered to a child who is assessed to be a high risk for re-offending, whereas a child assessed to be a low recidivism risk should receive minimal intervention. In terms of developing diversion programmes in South Africa, this principle highlights the need for a continuum of services that will comprehensively respond to the treatment needs of children who commit offences.
- The principle of criminogenic need stipulates that interventions should focus on altering those risk factors associated with re-offending that are changeable. Examples of such factors would be drug or alcohol use, improving self-control, increasing self-motivation, relationship problems, unemployment, etc.
- The principle of responsiveness motivates that interventions should ensure that learning techniques and treatment approaches are suitable for the developmental capabilities of their target group.<sup>107</sup>

Other important principles of effective practice are that community based interventions are more effective than those based in institutions. In the former, the child learns to apply his or her new coping skills in their own environment and can make use of family and peer support during the process of implementation.<sup>108</sup> Programmes are also encouraged to employ a variety of methods to address the child's problems, and should be properly managed, use trained staff and be run with clearly identified aims and objectives which are adhered to consistently.<sup>109</sup>

## CONCLUSION

Since the early 1990s, South Africa has experienced significant growth in the number and scope of diversion programmes for children. Children have expressed their support for these developments and see these interventions as more beneficial than punitive sentences. A cost analysis of diversion revealed that the initial investment required for developing suitable diversion interventions will quickly be recouped by the reduction in the amount of time that children spend in custody. Yet the practice of diversion in South Africa remains unregulated and inconsistent, with the result that a child accused of committing a minor offence that appears in the Wynberg Magistrates Court will be treated very differently to one who finds him or herself before a magistrate in Mafikeng. While in part this is due to the uneven distribution of diversion interventions, the wide discretionary power granted to prosecutors has contributed to the unjust and erratic use of diversion.

The Child Justice Bill has been designed to address this inconsistent application and ensure that children's rights are protected throughout the diversion process. The proposed new system creates new procedures and cost-effective mechanisms to ensure the expanded use of diversion. In preparation for the new system, a number of new interventions have been developed. NICRO still remains the primary provider of diversion programmes, but increasingly the landscape has become more diverse. While these are all promising changes, the Bill is yet to be enacted. And despite the thorough preparatory work for its implementation, concerns still lurk as to whether the proposed new system will be adequately resourced.

## NOTES

- 1 The term child means any person under 18 years of age. In this paper the term 'child' will be used to refer to a person under 18 years of age who has been accused and/or convicted of committing an offence whereas the term 'victim' will be used to refer to the person who had the offence or alleged offence committed against them.
- 2 It is important to note that at the time of writing the Justice and Constitutional Development Portfolio Committee was in the process of holding informal deliberations on the Bill, which may have resulted in substantial changes to the content of the Bill. Therefore, any reference to the Bill in this paper draws upon the recommendations for a new child justice system presented to this parliamentary portfolio committee. However, until the Bill is promulgated, significant changes may be made to this draft. See The Parliamentary Monitoring Group (PMG) website for the minutes of these portfolio committee meetings: <http://www.pmg.org.za>
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- 21 Minutes of these meetings can be found at PMG website <<http://www.pmg.org.za>>
- 22 Sloth-Nielsen, 2000, op cit.
- 23 SALC, 1998, op cit, par 8.33.
- 24 It is important to emphasise that at the time of writing, the Justice and Constitutional Development Portfolio Committee was holding informal discussions on the Bill. These discussions might result in substantial changes to the content of the Bill. Where possible, the researcher has included recommendations from these committee meetings. Of great significance was that the Portfolio Committee had not yet had an opportunity to look at the details of the clauses pertaining to the purpose of diversion and the minimum standards applicable to diversion and diversion options. See PMG Justice and Constitutional Development Portfolio Committee Meeting Minutes: Child Justice Bill Deliberations, 25 March 2003, <<http://www.pmg.org.za/docs/2003/viewminute>>
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- 29 This text box includes the revisions to these schedules as discussed by the Portfolio Committee. Adv de Lange identified a couple of problems with these schedules especially schedule three. He referred these back to the legislative drafters for further clarification. Consequently the schedules outlined in this review are likely to change further; PMG, 10 March 2003, op cit; PMG, Justice and Constitutional Development Portfolio Committee Meeting Minutes: Child Justice Bill Deliberations, 11 March 2003, <<http://www.pmg.org.za/docs/2003/viewminute>>
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- 56 Community Law Centre, 2001, op cit.
- 57 The Child Justice Alliance (CJA) was established at the beginning of 2001 and consists of various individuals and organisations working in the area of child justice. The Alliance was established for the purpose of ensuring that accurate information on child justice matters is made available to government and civil society to facilitate informed debate on the Bill. See the CJA's website for further information <<http://www.childjustice.org.za>>
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## About this paper

Since the early 1990s, the number and scope of diversion programmes for children has grown in South Africa. Children have expressed their support for these developments and see these interventions as more beneficial than punitive sentences, which rarely succeed in discouraging young people from committing crime again. A cost analysis has shown that the initial investment required for developing suitable diversion programmes will quickly be recouped by the reduction in the amount of time that children spend in custody. Yet in practice, diversion is occurring in the absence of a regulating legislative framework and has been implemented in a selective and disjointed manner. This situation will undoubtedly improve with the enactment of the Child Justice Bill (49 of 2002) drafted specifically to promote and regulate the diversion of cases away from formal court procedures. This paper reviews the literature available on diversion in South Africa, examining the concept, the formalisation of diversion practice through the Child Justice Bill, and the practice of diversion thus far in South Africa.

## About the author

Catherine Wood is a clinical psychologist currently working in the United Kingdom. This monograph was written while she was a joint appointment employee at Valkenberg Hospital and the Department of Psychiatry and Mental Health, University of Cape Town. She was previously employed by the Institute of Criminology where she co-ordinated the work of the Youth Justice Project. She was a founder member of SAYStOP and was centrally involved in the development, implementation, and evaluation of the diversion programme developed by this organisation. A further key research area was monitoring and researching of policy and legislation for the development of a new child justice system.

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