

EDITORIAL

FEAR FOR CHILDREN OR FEAR OF CHILDREN? CHILD JUSTICE BILL BREACHES THE DIVIDE

Children do not commit the most crimes. The available official statistics reveal the reality that they make up a small number of the offenders committing serious, violent crimes. The number of children in prison, whilst not a clear indicator of crime trends, is the only reliable set of statistics regarding child offenders in South Africa that have been consistently gathered over the past decade. The Report of the Inspecting Judge of Prisons for 2006-2007 revealed that people below the age of 18 years make up 1.28% of the inmates (sentenced and unsentenced) in prison.¹ The number of children being held in prison awaiting trial has been steadily dropping since 1999,² and the number of sentenced children is fairly stable, with a slight drop recorded between 2007-2008.³

Nevertheless, it is the highly publicised cases of violent crime committed by children that drives tough-on-crime responses in child justice. Advocates for child justice policy reform complain that there is an enormous disconnection between research and data about crimes committed by children and the setting of public policy in this area. A major reason for this is that media coverage of crime, particularly crime committed by children, obscures people's understanding of what is happening and what the solutions are. Schiraldi and Ziedenberg⁴ describe the problem thus:

Coverage of juvenile crime is badly skewed toward hyper-violent, idiosyncratic acts, presented out of context with social forces that foster delinquency. This non-contextual, exaggerated coverage negatively affects both public opinion and policy making in the field of juvenile justice.

South Africa has not been entirely immune to this phenomenon. In August 2008 an 18 year old boy⁵ took a sword to school, donned a mask and killed one boy and then

¹ The Report of the Inspecting Judge of Prisons for 2006-2007 revealed that people below the age of 18 years make up 1.28% of the inmates (sentenced and unsentenced) in prison. The total number of children was recorded as 2077 (912 sentenced, 1165 unsentenced) compared with the total number of prisoners which was 161674 (113213 sentenced, 48461 unsentenced). Of the 2077, 950 were charged with aggressive crimes, 714 with economic crimes, 291 sexual offences, and 91 were classified as 'other crimes'.

² Dissel, A (2006) Children in Detention Pending Trial and Sentence. In Gallinetti, J et al *Child Justice in South Africa: Children's Rights under Construction*. Cape Town: Open Society Foundation and the Child Justice Alliance, 111. Dissel demonstrates that the numbers have dropped from a high of 2943 in 1999 to 1238 in 2005. This does not, of course indicate a drop in the crime rate, but children in prison are those charged with the most serious offences.

³ Figures provided by the Office of the Inspecting Judge of Prisons indicate that there on 31 July 2007 there were 875 children below the age of 18 years serving sentences, and on 31 July 2008 there were 867. The Report for 2007/2008 does not include specific statistics regarding children.

⁴ Schiraldi, V & Ziedenberg, J (2001) How Distorted Coverage of Juvenile Crime Affects Public Policy. In Ayers W, Dohrn B, & Ayers, B (eds) *Zero Tolerance: Resisting the Drive for Punishment in Our Schools*. New York: The New Press, 114.

⁵ As an 18 year old, this young offender would not be included in the Child Justice system, which caters only for children below the age of 18 years at the time of the commission of the offence.

went on to injure others. The media frenzy that followed was intense, ranging from efforts to place the blame somewhere (anywhere from Satan to metal band Slipknot) to wildly exaggerated claims of an explosion in violent crimes being committed by children, entirely unfounded by statistical evidence.

Child justice is a barometer for society's broader concerns about safety and stability. Adults feel that children should be manageable, and when they seem to be out of control, this gives adults a feeling that they are losing control of everything. The world seems unpredictable when children act in ways that are untypical of adults' expectations of them. At the same time, people generally understand, at least in relation to their own children, that childhood and adolescence is a time of experimentation. Awkward behaviour during the teenage years is part of the journey from childhood to adulthood and does not necessarily spell a negative future. This is the tension that society experiences in relation to children who commit crimes. It is the reason why it is possible that contemporary child justice systems are at times 'schizophrenic',⁶ pulling in the opposite directions of the tough-on-crime agenda and increased use of restorative justice at the same time.

The reality facing criminal justice systems for children today is that all persons below the age of eighteen years cannot be treated as one homogenous group.⁷ Whilst all lack maturity, and all should be considered less culpable due to their youthfulness, there is within that understanding a graduated response from the public that allows for more societal understanding and tolerance for some children and certain crimes than others. Where very young children commit crimes, their lack of capacity is an enormously important feature, below a certain age it excludes them from criminal prosecution completely.⁸ Societal tolerance towards older adolescents is less durable, particularly if the crime committed is violent.

It is this reality that presents the danger of a 'bifurcated' approach, characterised by the system being permissive towards first offenders and those committing less serious crimes and on the other hand being highly punitive on repeat offenders or those committing serious crimes. To some extent, differentiation is inevitable. However, this differentiation is much less 'schizophrenic' if there is one, unifying theory of justice as the departure point for the child justice system, and preferably for the criminal justice system as a whole. Restorative justice is a theory that can underpin the way that justice is done, it can be applied as an approach at different stages of the system, even when, for the safety of the community, an offender must be deprived of his or her liberty.⁹

⁶ Stafford, M & Kyckelhahn, T (2002) Delinquency and juvenile justice in the United States. In Winterdyk J (ed) *Juvenile justice systems: International perspectives*. Toronto: Canadian Scholars' Press Inc 552.

⁷ Although this editorial focuses on people below the age of 18 years, there is a growing body of information that indicates that the cut off age of 18 years to denote the end of childhood does not match recent brain science findings, which demonstrate that those areas of the brain dealing with impulse control, risk assessment and moral reasoning continue to develop into the early 20s. See Amicus brief of the American medical society et al, *Roper v Simmons* 542 US 551 1255 S. Ct 1183 (2005).

⁸ Feld, B (1999) Rehabilitation, retribution and restorative Justice: Alternative conceptions of juvenile justice. In Bazemore, G & Walgrave, L (eds) *Restorative justice for juveniles: Repairing the harm of youth crime*. Monsey: Criminal Justice Press 31-35.

⁹ Walgrave, L (2005) Towards restorative as mainstream in youth justice. In Elliot, E & Gordon, R (eds) *New directions in restorative justice: Issues, practice and evaluation* 3-25.

Bazemore and Schiff¹⁰ observe as follows: ‘The international popularity of restorative justice is due largely to the potential suggested by the restorative justice vision for a more holistic, more effective response to youth crime.’

The journey of the Child Justice Bill has been a long one.¹¹ Following sustained pressure from civil society about the need to create a separate child justice system, in 1996 the Minister of Justice asked the South African Law Reform Commission to include an investigation into juvenile justice into its programme. That process culminated in the Child Justice Bill, which was handed to the Minister in 2000. The report accompanying the Bill was honest about the pressures that public panic about crime had brought to bear on the investigation.¹²

The realisation has grown, as the investigation has unfolded against a backdrop of rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labelled and treated as criminals, this Bill would need to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crimes.

The Child Justice Bill, when it was submitted to Parliament and debated by the Justice Parliamentary Portfolio Committee in 2003, underwent changes which led to certain children (charged with more serious offences) being completely excluded from services and options which the Bill originally intended to apply to all children coming into the system, leading to criticisms that this would result in a law that was ‘bipolar’.¹³ When the re-written Bill was finally re-introduced to Parliament (after an inexplicably long delay) late in 2007, the result was a bifurcated system. Children of 14 years or older charged with serious crimes would not be assessed by a probation officer, would bypass the preliminary inquiry and would be ineligible for consideration of diversion. In short, they would be ‘fast-tracked’ to trial and prison.

Child Justice advocates made forceful submissions at the public hearings on the Bill in early 2008, deriding the bifurcated approach. The Parliamentary Portfolio Committee heeded their calls and many of these features of the Bill were changed, resulting in a final version of the Child Justice Bill that is more holistic, and which offers the same services such as assessment, preliminary inquiry and the possibility of diversion to all offenders and offences.¹⁴ The sentencing provisions of the Bill remain tough. The maximum sentence for a child of 14 years or older (at the time of sentence) is 25 years in prison. Minimum sentences for 16 and 17 year olds remain applicable, according to the provisions of the Criminal Law (Sentencing) Amendment Act 38 of 2007.¹⁵ However, the setting of the sentence has to be done in line with the

¹⁰ Bazemore, G & Schiff, M (2005) *Juvenile justice reform and restorative justice: Building theory and policy from practice* 5.

¹¹ Skelton, A & Gallinetti, J (2008) 25 A long and winding road: The Child Justice Bill, civil society and advocacy *Crime Quarterly*.

¹² SALRC (2000) *Report on Juvenile Justice* 9.

¹³ Skelton, A (2005) *The influence of the theory and practice of restorative justice in South Africa with specific reference to child justice*. Unpublished LLD thesis, University of Pretoria: 472.

¹⁴ Diversion of very serious offences such as murder, rape and armed robbery, though not entirely excluded from the possibility of diversion, will rarely be diverted due to a number of intricate steps that will have to be followed by any prosecutor who considers diversion in such matters.

¹⁵ At the time of writing, these provisions are subject to a Constitutional challenge which was

objectives of sentencing set out in the Bill. When considering a sentence of imprisonment, the court must take the following factors into account: (a) the seriousness of the offence, which due regard to the amount of harm done or risked through the offence, and the culpability of the child in causing or risking the harm, (b) the protection of the community, (c) the severity of the impact on the victim, (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and (e) the desirability of keeping the child out of prison.

Members of the public are not sure if they have a fear **of** children, or a fear **for** children. Media responses to crime and misbehaviour often descend into fearful debates about a future (or even a present) where wider society is held to ransom by ungovernable young thugs. However, there is also public sympathy for the immature young person who makes ‘mistakes’, there is support for the idea of a second chance, and there is a belief that young people may stray off the path in adolescence but have the potential to grow up to become law abiding (possibly even creative and successful) adults. There is a fear that if children are exposed to tough measures in a harsh criminal justice system they will be hardened and brutalised, thus more likely to become career criminals. The Child Justice Bill straddles this ‘fear of’ / ‘fear for’ divide. It operates from a basic understanding of the diminished culpability of children, and the need to have a separate system that responds to them as individuals. The proposed system allows for tailor-made plans and solutions (such as diversion programmes or sentences) that focus on their reintegration and the enhancement of their prospects of a crime-free life for the future. It is a system that focuses on holding children responsible,¹⁶ using restorative justice as one of its main engines for such accountability. When it comes to young people who have committed very serious crimes, the options are available to detain them during the pre-trial period and to sentence them, if necessary, to long terms of imprisonment. Thus the Bill achieves a balance that reflects societal concerns,¹⁷ that responds reflectively and proportionately to children in the criminal justice system.

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successful in the North Gauteng High Court, Pretoria. The matter was heard in the Constitutional Court in March 2009, and the decision of the Court is awaited.

¹⁶ Children will not be held responsible for offences committed whilst they were below the age of 10 years, and children between 10 and 14 are presumed to lack criminal capacity until the contrary is proved by the State.

¹⁷ See Stout, B & Wood, C (2004) Child justice and diversion: Will children’s rights outlast the transition? In Dixon, B & Van der Spuy, E *Justice gained? Crime and control in South Africa’s transition* 115. The authors describe the societal concerns relating to children in the criminal justice system prior to and during South Africa’s political transition. For a historical perspective see Van der Spuy, E, Scharf, W & Lever, J (2004) *The Politics of Youth Crime and Justice in South Africa*. In Sumner, C (ed) *The Blackwell Companion to Criminology*: 172.