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WELL WORTH THE WAIT?

The Sexual Offences Bill in 2006

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The Sexual Offences Bill finally seems to be winding its way to conclusion in parliament. It has taken three years to reach this point since its first introduction in 2003, raising serious questions about the government's sense of urgency in addressing sexual assault. This article looks at the Bill to establish what it really holds for victims of sexual assault.

After its initial tabling in parliament in 2003, the Sexual Offences Bill¹ was followed in relatively short succession by public hearings and vibrant deliberations in the portfolio committee on Justice and Constitutional Development. Towards the end of February 2004, the drafters of the Department of Justice and Constitutional Development produced a working document with some of the changes proposed by the committee. At this point, parliament adjourned for the national elections. And the Sexual Offences Bill vanished from sight... for almost two years, as we will see.

This silence soon elicited negative criticism from civil society organisations. A sense of impatience on their part was understandable, given that the parliamentary process had already been preceded by a lengthy investigation by the South African Law Reform Commission [SALRC]. This investigation began its life in 1996 as an inquiry into sexual offences committed against (and by) children. The scope of this investigation was eventually expanded in 1999 to include adults as well as children.²

The SALRC conducted an extensive and thorough inquiry, entailing the publication of several issue papers and discussion papers. The Commission

concluded the project in December 2002 with its final report, which also contained a draft Bill.³ It was this Bill that formed the basis of Bill B50-2003, introduced to parliament in 2003.

The hiatus

When parliament reconvened after the 2004 elections, women's organisations were hopeful that the Sexual Offences Bill would be high on the portfolio committee's list of priorities. However, time passed without any indications as to the fate of the 2003 Bill or the subsequent working document. This delay was difficult to understand, in the face of consistent public reassurances by the Ministry of Justice and Constitutional Development that the Bill would be 'fast-tracked' – without any apparent effect. It was also difficult to understand in the face of the 55,114 cases of rape reported for the year 2004 to 2005 in South Africa.⁴

It is significant to note that during this period, while the Bill was languishing in corners unknown, a regional magistrate preempted the legislation by finding that the common law definition of rape was too narrow and therefore discriminatory.⁵ The ambit of the offence therefore had to be extended to include anal penetration. The distinction between rape and indecent assault is important for a number

of reasons, but specifically for purposes of the mandatory minimum sentencing legislation, which treats indecent assault as a less serious offence than rape.⁶

The accused in this matter was originally charged with rape. However, the victim, a nine-year old girl, testified that he had penetrated her *per anum*. The magistrate, relying on an extended definition, found the accused guilty of rape instead of indecent assault. This finding was subsequently confirmed by the Pretoria High Court.⁷ In his original judgment, the regional court magistrate was specifically critical of parliament and the 'unreasonable delays' in the finalisation of the Bill.

The revival

During this period, some degree of public debate was sustained around the Sexual Offences Bill through the efforts of civil society organisations. However, at the beginning of 2006, sexual offence trials were starkly drawn back into the public domain by the highly publicised Zuma rape trial. In this matter, the former deputy president of South Africa was charged with raping a family friend. The trial proceedings, the evidence led by both sides and the eventual verdict of 'not guilty', were broadcast to saturation level.

Shortly before the conclusion of the Zuma trial, Cabinet approved a reworked version of the Bill,⁸ which was introduced in the Portfolio Committee for Justice and Constitutional Development on 19 June 2006.⁹ The committee was briefed¹⁰ by the drafters from the Department of Justice and Constitutional Development as well as the previous chairperson,¹¹ and commenced deliberations on the Bill during the course of August 2006.

Overview of the Bill

Introductory provisions

The Bill consists of seven chapters. The first chapter sets out the definitions and objects of the legislation. Significantly, these objects include affording complainants of sexual offences 'the maximum and least traumatizing protection that the law can provide'.¹² These statements of principle in Clause 2 should be seen as providing the basis for the implementation and interpretation of the Act as a whole.

Definitions of sexual offences

Chapters 2 to 4 set out to codify the law relating to sexual offences. (At present, certain of these offences are set out in the Sexual Offences Act,¹³ while others, such as rape and indecent assault, are so-called 'common law' offences.)

Clause 3 makes provision for an extended definition of **rape**. This is perhaps to date one of the most well-publicised aspects of the Bill. The new definition reads that:

any person (A), who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.

The expansion of the current definition of rape becomes clear when one looks at the definition clause,¹⁴ which describes 'sexual penetration' as any act that causes penetration (to any extent) of the genital organs of one person into the genital organs, anus or mouth of another person, or of any other body part or object into the genital organs or anus or another person.¹⁵

The definition therefore no longer makes any reference to the sex of the perpetrator or the victim, as does the current definition,¹⁶ nor does it prioritise certain forms of sexual penetration above others. (This was the dilemma that confronted the court in *S v Masiya*.) The interest to be protected here is that of sexual and physical autonomy and integrity, and from a policy perspective, the extension of the definition of rape is therefore to be welcomed.

This chapter further sets out the following offences:¹⁷ sexual assault, compelled rape, compelled sexual assault, compelled self-sexual assault, exposure or display of sexual acts or genital organs or pornography to persons 18 years or older, incest, bestiality and sexual acts with a corpse.

Sexual offences against children and against mentally disabled persons

Chapter 3 deals with sexual offences against children or young persons. The major controversy here has been the offence of so-called 'statutory rape', with the debate ranging over whether the 'age of consent'

should be 16 or 18.¹⁸ The Sexual Offences Bill proposes that an adult who performs a sexual act with a young person older than 12 but under the age of 16 with his or her consent will be guilty of an offence.

The chapter further deals with offences relating to the sexual exploitation and sexual 'grooming' of children, engaging in sexual acts in the presence of children and exposure or display of genital organs, pornography or sexual acts to children. Chapter 4, which sets out sexual offences against mentally disabled persons,¹⁹ mirrors the provisions of Chapter 3 on children, except for the omission of offences relating to 'consensual sexual activity'.²⁰

Post-exposure prophylaxis

Chapter 5 bears the ambitious heading of 'services for victims of sexual offences and compulsory HIV testing of sexual offenders'. Upon closer examination, it appears that services for victims, as set out in this chapter, consist of the following: A victim may receive PEP²¹ for HIV infection at a designated public health establishment at state expense, and be given free medical advice surrounding the administering of PEP. She may also be supplied with a prescribed list of public health establishments for purposes of providing PEP or carrying out compulsory HIV testing. She may apply to a magistrate for an order that the alleged offender be tested for HIV, at state expense.

However, a victim may only receive these services if she lays a charge with the South African Police Service (SAPS) in respect of an alleged sexual offence, or reports an incident of sexual assault at a designated health establishment within 72 hours after the incident took place.

The Bill provides that a victim or 'an interested person'²² must, when laying a charge or making a report, be informed of the importance of obtaining PEP for HIV infection within 72 hours after the assault took place and the need to obtain medical advice and assistance regarding the possibility of other sexual transmissible infections. In the case of an application for compulsory HIV testing of the offender, she must also be provided with information regarding this process.

Compulsory HIV testing of the alleged offender

Compulsory HIV testing has been one of the most contentious issues in the realm of sexual offences legislation. A separate Bill, entitled the Compulsory HIV Testing of Alleged Sexual Offenders Bill,²³ was introduced to parliament in 2003. The introduction of the reworked Sexual Offences Bill in 2006 saw, for the first time, the consolidation of the two Bills.

The proposed procedure for compulsory testing of an alleged sexual offender entails that the victim may apply to a magistrate within 60 days after the alleged commission of the offence for an order that the offender be tested for HIV. If the magistrate is satisfied that there is *prima facie* evidence that a sexual offence has been committed against the victim by the alleged offender, that the victim may have been exposed to the body fluids of the alleged offender, and that no more than 60 calendar days have lapsed from the date on which it is alleged that the offence in question took place, s/he must order the testing of the offender for HIV and the disclosure of the results to the victim and alleged offender.

Significantly, the Sexual Offences Bill now also allows for a SAPS investigating officer to apply for an order to have an alleged offender tested for HIV.²⁴ S/he may, for purposes of investigating a sexual offence, apply to a magistrate for an order for HIV testing of the alleged offender. If the court is satisfied that there is *prima facie* evidence that a sexual offence has been committed by the offender and that HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence, the magistrate must issue an order for such testing and for the test results to be disclosed to the investigating officer and to the alleged offender.

The Bill states, in clause 37, that the results of an HIV test may only be used to inform a victim whether the alleged offender is infected with HIV with the view to 'making informed personal decisions', or as evidence in ensuing civil proceedings arising from the sexual assault in question. The results may also be used to 'enable an investigating officer to gather information' with the view to using them as evidence in criminal proceedings.

National register for sex offenders

Chapter 6 contains a series of provisions relating to a national register for sex offenders. The purpose of this register is to ensure that no person who has been found guilty of the commission of a sexual offence against a child will be allowed to work with children. The register will be completely confidential: employers will be required to apply to the register to ascertain whether potential employees were listed. If they are, they may not be employed in that position. The Bill also imposes a duty on the convicted person to disclose that he has been convicted of a sexual offence against a child, and a failure to do so constitutes a further criminal offence.

General provisions

Chapter 7 contains certain sections relating to evidence and also makes provision for the implementation of the Act. The two evidence provisions relate to the question of so-called 'first report' evidence, and, more importantly, the negative inference that is often drawn when a victim does not report an incident of sexual assault at the first 'reasonable' opportunity. Clause 55 deals with this situation by stipulating that the court may not draw an adverse inference *only* from the length of any delay between the alleged commission of a sexual offence and the reporting thereof. Clause 54 provides that a court may not draw an adverse inference *only* from the absence of a previous consistent statement.

From an implementation perspective, Clauses 57 to 61 form the heart of the Bill. Clause 57 requires the Minister of Justice and Constitutional Development to adopt a national policy framework 'to ensure a uniform and coordinated approach by all Government departments and institutions in dealing with sexual offences'. The Bill also establishes an inter-sectoral Committee for the Management of Sexual Offences Matters, to consist of several highly placed members of government (but no representatives from civil society). This committee will be responsible for developing a draft national policy framework.

The Bill further contains extensive provisions relating to the issuing of national instructions and

directives, as well as the development of training courses. These sections are unusually specific: for example, clause 61(2)(a) sets out the subject matter to be covered by the directives issued by the National Director of Public Prosecutions. These include the circumstances in which the prosecution must apply to court for an order that a witness give evidence by means of closed circuit television, as provided for in section 158 of the Criminal Procedure Act, as well as the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court, as provided for in section 153 of the Criminal Procedure Act.

Chapter 7 further contains certain transitional provisions relating to trafficking in persons for sexual purposes. In addition, Schedule 1 sets out the provisions of legislation amended by the Bill. Noteworthy here are provisions relating to prescription, the appointment of an intermediary in terms of section 170A of the Criminal Procedure Act, the admissibility of a complainant's previous sexual history, and the mandatory minimum sentencing legislation.

A cautious verdict

When evaluating the Sexual Offences Bill, one should first and foremost be realistic. Unlike the Domestic Violence Act, this Bill is not aimed at crafting a unique legal mechanism such as a protection order. Instead, it sets out to address various areas of disadvantage experienced by sexual assault victims in the different components that make up the criminal justice process, including substantive criminal law and the law of evidence and procedure. The Bill is therefore by its very nature a multifaceted and in many ways an unwieldy and disparate piece of legislation.

The codification of sexual offences is generally to be welcomed, with specific reference to the expansion of the definition of rape. However, the classifications of the different offences set out in the Bill are complex, and one sincerely hopes that the central objective – the protection of the complainant's sexual and physical integrity – will not be lost in the miasma of body parts tumbling through the definition clause. (This is, to repeat a

familiar refrain, where training will have to play a central role.)

If one compares this version of the Bill with the two previous ones (i.e. the SALRC 2002 Bill and the 2003 Bill), it appears that one area where the legislation has become 'thinner' is that of *service provision*. This is not in itself a cause for despondency, since the national policy framework envisaged under Clause 57 allows for further development of policies relating to service provision. It would have been more satisfactory, from the perspective of victims' rights advocates, to have the Bill spell out that victims of sexual assault are entitled to certain services (at state expense).

However, the fact that the Bill does not expressly refer to such services does not preclude the introduction or improvement of policies relating to service provision. Indeed, the provisions of the Bill, and especially Clause 2, may now provide a stronger basis to argue for the introduction of such policies than before. The Bill should therefore not be seen as the final word on the services provided to sexual assault victims.

In this respect, it is important to note that Clause 61 requires the national instructions and directives for police officials, public prosecutors and health care practitioners to be published in the Gazette. From the viewpoint of civil society organisations providing services to sexual assault victims, this is an important mechanism to ensure accountability and compliance with the legislation. Because organisations will have access to the directives and will therefore know what the expected standards of service provision are, they will be able to respond far more swiftly on behalf of their clients when deviations from these standards occur.

There are aspects of the Bill that appear to be problematic, for example, the question of compulsory HIV testing of alleged sexual offenders. On the one hand, the aim of judicially directed HIV testing is to facilitate the task of the SAPS in investigating instances of intentional transmission of HIV.²⁵ This in itself cannot be faulted, and it should be noted that irrespective of the final decision on whether a 'new' offence of intentional transmission

of HIV is introduced,²⁶ (or the status quo of prosecuting such conduct under the existing common law offences of attempted murder or assault is maintained), the proposed measures could assist the investigation and prosecution of such offences.

On the other hand, it has been stated that the aim of the provision allowing the *victim* to apply for an order for testing of the alleged offender is to 'lessen the secondary trauma on the victim'.²⁷ The potential utility of this measure is questionable, and it remains to be seen whether it will prove to be of any practical benefit to sexual assault victims.

It should be remembered that the Bill is still 'a work in progress'. At the time of writing, the committee is still busy formulating certain clauses that have not yet been included in the reworked version of the Bill. The cautionary rule relating to complainants in sexual offence cases is a case in point.²⁸

A question posed by many commentators after the Zuma trial was whether the course, and indeed the outcome, of the case would have been different if the Sexual Offences Bill had been in operation at the time. It is clear from the above that the simple answer would have to be 'no'.

The reason for this is that the Sexual Offences Bill does not create a separate legal universe for the adjudication of sexual offences – nor was it ever intended to do so, in spite of the high expectations that the Bill has raised over the past years. Rape law reform in other jurisdictions has shown that legislative interventions are circumscribed by the inherent limitations of an adversarial criminal justice system,²⁹ as well as by the closely held personal perceptions of those responsible for the administration of this system.

The Deputy Minister of Justice and Constitutional Development explained this difficulty quite succinctly during the recent briefing of the portfolio committee on the Bill by stating that we find ourselves in a patriarchal society with a certain mindset, and that this is difficult to change. The problem is thus systemic, with every judicial officer interpreting cases in terms of their own world view:

"it is not possible to legislate how they look at the world".³⁰

However, one should not descend into legal nihilism and under-estimate the symbolic value of legal reforms. By enacting the Sexual Offences Bill, the legislature will be sending an important message about sexual assault and the treatment of sexual assault victims – which may in the long run be as important as any of the 'instrumental' changes brought about by the legislation.³¹

Endnotes

- 1 Full title: Criminal Law (Sexual Offences and Related Matters) Amendment Bill B50-2003.
- 2 The topic of sexual offences committed by children was subsumed into the broader investigation on juvenile justice.
- 3 One aspect of this investigation which remains incomplete is the issue of adult commercial sex work, which the SALRC has elected to deal with by means of a separate process.
- 4 <http://www.saps.gov.za/statistics/reports/crimestats/2005/_pdf/crimes/rape.pdf>
- 5 *S v Masiya* (Unreported judgment dated 11 July 2005, Graskop Regional Court, Case Number SHG 94/04.)
- 6 Act 105 of 1997.
- 7 Judgment was given in the Pretoria High Court on 25 July 2006. The matter must now be referred to the Constitutional Court due to the finding that the common law offence of rape is unconstitutional.
- 8 Cabinet approved the Bill on 3 May 2006. The Zuma judgment was handed down on 8 May 2006.
- 9 The Bill is still officially entitled B50-2003, although it is now referred to as 'as introduced on 19 June 2006' in order to distinguish it from the previous version. All references to 'the Bill' from this point are to the 2006 version, unless specifically indicated otherwise.
- 10 Minutes of these briefings are available on www.pmg.org.za.
- 11 Adv JH de Lange, now the Deputy Minister of Justice and Constitutional Development. The minutes of this briefing, which took place on 7 August 2006, are available on www.pmg.org.za.
- 12 Clause 2.
- 13 Act 23 of 1957.
- 14 Clause 1.
- 15 Subclause (c) also lists the penetration of the genital organs of an animal into the mouth of another person.
- 16 The current definition of rape requires a male perpetrator having sexual intercourse with a female victim without her consent.
- 17 The scope of this article does not allow a comprehensive discussion of these offences.
- 18 Political parties such as the ACDP have called for the age limit to be increased to 18 years.

- 19 See Clause 1 for the definition of a 'mentally disabled person'.
- 20 The motivation provided for this distinction is that disabled persons are unable to 'provide valid consent to those acts' - briefing by Adv JH de Lange on 7 August 2006 (minutes available on www.pmg.org.za). We suggest that this reasoning may be incorrect.
- 21 Post-Exposure Prophylaxis.
- 22 Defined in Clause 30 as 'any person who has a material interest in the well-being of a victim, including a spouse, same sex or hetero-sexual permanent life partner, family member, care giver, counselor, medical practitioner, health service provider, social worker or teacher of such victim'.
- 23 B10-2003.
- 24 This provision was not contained in Bill B10-2003.
- 25 The current legal position appears to be that section 37 of the Criminal Procedure Act 51 of 1977, which allows for the drawing of blood for purposes of criminal investigation, is inadequate to cover these situations.
- 26 The portfolio committee decided in 2004 that a new statutory offence of intentional transmission of HIV should be created. However, this provision was removed from the reworked Bill at the request of Cabinet, where it was decided that the matter needed further research and discussion.
- 27 Briefing by Adv JH de Lange on 7 August 2006.
- 28 Briefing by Adv JH de Lange on 7 August 2006.
- 29 See e.g. C Spohn & J Horney *Rape Law Reform* (1992) at 174.
- 30 Briefing by Adv JH de Lange on 7 August.
- 31 Spohn & Horney *Rape Law Reform* 175.

WHAT HAPPENED TO THE CHILD JUSTICE BILL?

The process of law reform relating to child offenders

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Children who are accused of crimes in South Africa are governed by the same legislation as adults. The urgent need to develop a separate child justice system culminated in the release of the draft Child Justice Bill in 2000 by the South African Law Reform Commission (SALRC). A product of thorough research and consultation, the revised Bill was introduced to parliament in August 2002. The changes made after public hearings and debates in parliament in 2003 saw the whittling away of the overall child rights nature of the Bill. To add insult to injury, the legislation has, since that year, not been debated again before the portfolio committee and the legislature has provided no explanation for this state of affairs.

Children who are accused of crimes in South Africa are governed by the same legislation as adults who enter the criminal justice system. The Criminal Procedure Act 51 of 1977 sets out the procedural system that governs the prosecution of all persons who come into conflict with the law. There are only minimal provisions that take the status of being a child into account. These include:

- requiring court proceedings to be held in camera when a person under 18 years of age appears in court;
- allowing children to be assisted by their parents or guardians in court proceedings;
- provision for children to be placed under the supervision of a probation officer; and
- the possibility of being sentenced to a reform school (now known as youth centres) upon conviction.

In 1995, South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC), thereby binding itself to realise the rights contained therein for the children of South Africa. Included in the UNCRC are extensive provisions relating to children who come into conflict with the law, essentially requiring ratifying States Parties to create a separate child justice system for children.

In 1996, South Africa adopted its final Constitution, which in section 28 sets out certain principles applicable to children in trouble with the law. For instance, section 28(2) requires that the best interests of the child be of paramount importance in every decision taken in relation to a child and section 28(1)(g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and for the shortest appropriate period of time.

In addition, South Africa has ratified the African Charter on the Rights and Welfare of the Child and Article 17 thereof requires ratifying states to take measures to protect children in the criminal justice system. These are the three main sources that have informed the development of a separate child justice system for South Africa. There are other international documents that have particular relevance, such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Riyadh Rules)¹ and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).² The advent of the Child Justice Bill goes a long way to provide for a criminal justice process specific to the needs and situation of children who are in conflict with the law so as to avoid their being treated and dealt with in a manner inappropriate to their age.

The Bill, while retaining most features of our present criminal justice process, introduces a number of new concepts and procedures, some of which are used presently in practice but are not provided for in legislation. On account of the fact that present practice in the child justice system is not mirrored by legislation, uncertainty and inconsistency are constant dangers that need to be addressed by clear legislative norms.

The law reform process

The Report on Juvenile Justice and the draft Child Justice Bill, released by the South African Law Reform Commission (SALRC) on 8 August 2000,³ heralded a significant and definitive moment in the process of reforming laws that apply to children who have come into conflict with the law. This date also marked the end of a structured process of consultation that took place over the period 1996–2000.

The consultation process started with an Issue Paper released by the SALRC in May 1997 to which respondents were invited to make comment. This was followed by workshops, briefings, a video and a questionnaire.

The Discussion Paper on Juvenile Justice was released by the Commission in December 1998, and thereafter subjected to intensive public consultation in the form of specific focus group

workshops with state departments, NGOs, legal aid providers and members of various parliamentary portfolio committees.⁴ A conference examining social, political and anthropological factors influencing the setting of a minimum age of criminal capacity was also held.⁵

Importantly, a consultation process with children (mainly children who had had some contact with the criminal justice system) was commissioned to elicit children's views on the proposals contained in the Discussion Paper.⁶ Finally, a large number of written comments on the Discussion Paper was received from various academics, practitioners and institutions.⁷

All these responses and views were taken into account in the preparation of the final report, which provides detailed argument concerning the content of the law reform proposals, and also contains the fully developed Child Justice Bill. The Commission's handing over of the report to the Minister of Justice marked the end of its formal involvement in the law reform process.

Another important and unique aspect of the drafting process was a study undertaken to analyse the financial feasibility of the proposed legislation. The Applied Fiscal Research Centre (AFReC) of the University of Cape Town published a research monograph detailing the cost implications of the implementation of the draft Child Justice Bill. This research has played an important role in ensuring that the legislative proposals are workable within the existing resource allocation.

It can therefore be argued that the draft Child Justice Bill released by the SALRC in 2000 was well researched, extensively consulted on, and focused on implementation as well as ensuring that South Africa's international and constitutional obligations were met.

The SALRC version of the Child Justice Bill

Objectives of the Bill

The stated objectives of the Bill serve an important function in that they provide the context in which the Bill as a whole must be read and interpreted. A balance is created between protecting the accused child's rights as a child and as an individual on the

one hand, and, on the other, ensuring that the human rights and fundamental freedoms of the community are respected by children who are in trouble with the law.

It must be borne in mind that the Bill does not merely confer rights on accused and convicted children, but it also aims to hold them accountable for their actions to the victims, the families of the child and victims, and the community as a whole. Consequently, the concept of restorative justice is explicitly included as an objective.

Of particular importance is the reference to co-operation between all government departments and other organisations and agencies. It is submitted that, until now, there has been little inter-departmental co-operation around issues of child justice. The various role-players perform their tasks and functions in isolation and also without much interaction with outside organisations and agencies. It is necessary that a holistic approach is fostered and that officials from the various departments and outside organisations start to regard all participants in the child justice process as colleagues, and not just those in their own field or sphere of operation.

Provisions of the Bill

The general principles of the Bill include the important concepts of non-discrimination, participation and proportionality. In addition, the constitutional guarantees contained in section 28(1)(g) are given prominence and are concretised into guidelines to ensure that children are only detained as a measure of last resort – the first step is to see if the child can be released. If not, bail must be considered, and if the child is to be detained it has to be as a measure of last resort and in the least restrictive form of detention appropriate to the child and the nature of the offence.

Generally, the proposed legislation contained in the SALRC version deals with issues such as police powers and duties, and arrest and court procedures. It also creates a child justice court, which is a court at district court level that will deal with all matters pertaining to children in conflict with the law. No longer will children appear in courts ordinarily designated for adults; instead they will have a court staffed by a magistrate and prosecutor trained in

child justice. This was seen as not involving more resources, but rather the reallocation of staff and premises.

Furthermore the Bill regulates the detention and release of children, providing definite guidelines for the exercise of judicial discretion in detaining children in prison while awaiting trial.

More importantly, there are a number of provisions in the SALRC version of the Child Justice Bill that will significantly change the present state of our child justice law. These relate to, *inter alia*, the minimum age of criminal capacity, the proposed preliminary inquiry, assessment, diversion and sentencing.

The age of criminal capacity is presently regulated by our common law. A child below the age of seven years is irrefutably presumed to be *doli incapax*, a child between the ages of seven and 14 years is refutably presumed to be *doli incapax* and a child older than 14 years is regarded as having full criminal capacity.

In terms of the Child Justice Bill, a child who is below the age of ten years at the time of the alleged commission of the offence cannot be prosecuted. The Bill also stipulates that a child between the ages of ten and 14 years at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at that time. Children older than 14 years continue to have full criminal capacity.

Essentially, this means that the *doli capax/doli incapax* presumptions are retained while just the minimum age has changed. The rationale for this can be found in the Report on the Child Justice Bill by the SALRC (par. 3.10-3.11), where it is reasoned that the presumptions create a 'protective mantle' to immediately cover children of specified ages, as each child's level of maturity and development differs.

Preliminary inquiry

The Child Justice Bill also creates a wholly new procedure to facilitate the management of children

in conflict with the law, namely, the preliminary inquiry, which uses current resources and personnel. This inquiry has a number of objectives, which include establishing whether a child can be diverted and, if so, identifying a suitable diversion option; determining the release or detention of a child; and establishing whether the child should be referred to the Children's Court to be dealt with in terms of the Child Care Act 74 of 1983 (or in future the Children's Act 38 of 2005).

The Bill also requires that any child who is to appear at a preliminary inquiry must be assessed prior to that appearance, although an assessment can be dispensed with in certain circumstances. An assessment is conducted by a probation officer and it is intended to serve a number of purposes: estimating the age of a child, establishing the prospects for diversion, establishing whether a child is in need of care, making recommendations relating to the release or detention of a child, and determining steps to be taken in relation to children below ten years of age. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate, pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity.

At present there is no legal requirement for the assessment of children who are arrested, although assessments are usually done by probation officers. However, assessments in the present system are not uniformly applied or regulated and delays often occur.

Diversion

As is the case with assessment, diversion does not feature in our criminal justice legislation at present. Despite this, diversion practices have been implemented in some of our courts since the early 1990s. Diversion involves the referral of children away from the criminal courts where appropriate, in order to serve a number of purposes. These include encouraging the child to accept responsibility for his or her actions; allowing the victim to express his or her views on the harm caused; promoting reconciliation between the offender and the victim(s)

and community; avoiding stigmatising the child; and preventing him or her having a criminal record.

The Child Justice Bill proposes various forms of diversion. These options range from receiving a formal caution, or compulsory school attendance order, to the attendance of a specified programme, or referral to a programme with a residential element. As diversion will be used as a means of referring children away from the formal criminal justice system it is of great importance that diversion is properly regulated. Consequently, the Bill sets out certain criteria and minimum standards applicable to diversion programmes to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well as ensuring that the child understands the impact of his or her behaviour on others.

Rethinking sentencing options

While the Criminal Procedure Act contains a wide range of sentencing options to be used in matters pertaining to children, the South African Law Reform Commission decided, for a number of reasons, to re-appraise the sentencing of child offenders. This includes the impact of the concept of restorative justice on the criminal justice system; the effect of our Constitution on the traditional aims of punishment; and the shift in the international approach to sentencing from rehabilitation to reintegration into society. Therefore the Child Justice Bill was constructed in such a way as to encourage the use of alternative sentences and allow for the imprisonment of children only as a last resort and for the shortest period of time.

The above brief summary illustrates the innovative and child-centred approach that the SALRC took, adhering to South Africa's international and constitutional imperatives to create a procedural system within which children could be appropriately dealt with.

Developments after the release of the SALRC version of the Child Justice Bill

The tabled version of the Bill

The Child Justice Bill was introduced to Parliament in August 2002 as Bill 49 of 2002. However, it is

important to note that the Bill was no longer in the form that was originally released by the South African Law Reform Commission – although the substance essentially remained the same.

While the Department of Justice had effected various amendments, the core elements of the Bill remained: assessment, diversion, the preliminary enquiry, and alternative sentences. Unfortunately, the contents of the chapter on monitoring were removed, and the Bill now stated that monitoring would be included in the regulations to the Bill, once passed.

Ultimately, the changes to the Bill made the reading thereof somewhat difficult and laborious, while some of the definitions and explanations that the SALRC had included in the original Bill had been removed or altered. Even though most of the changes were cosmetic and not substantive, it is still unsettling that the Bill as a whole is now possibly more difficult to read.

The original draft Bill of the SALRC was user friendly and allowed for a clear understanding of the proposed new system. The Commission recognised that the legislation had to be readily accessible to criminal justice practitioners who are not legally trained, and accordingly attempted to make the Bill as straightforward as possible. An example of the removal of an explanation made by the SALRC can be found in the definition of detention. The SALRC's draft defined detention as follows:

...means the deprivation of liberty of a child including confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility.

The tabled version removed the explanation regarding deprivation of liberty and defined detention as follows:

...includes confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility.

Other changes include:

- The principles relating to the detention of children that were listed in the chapter headed "Detention of Children and Release from

Detention" are now listed under Chapter One – general principles, section 3(2).

- The remaining provisions relating to age assessment and age estimation that the Law Commission had included in the chapter dealing with age and criminal capacity, have now been placed in section 56 in the chapter dealing with child justice courts and section 82 in the chapter dealing with general provisions. It is arguable that these issues would be better placed in their position in the original draft, as they would have to be determined early on in criminal proceedings against a child.
- Section 38 of the Law Commission's draft dealing with assessment clearly set out the purposes of the assessment procedure. These have been removed from the new version and are to be implied from recommendations that a probation officer must make in the chapter dealing with the preliminary inquiry.

So while the essence of the original Bill remained, the tabled version became far more legalistic. The consequences for those who lack legal training will be that the Bill becomes more difficult to navigate and possibly apply.

It must be stressed that viewing the 2002 Bill as being 'soft on crime', is misplaced. Combating crime is an obvious necessity in South Africa today, but it must be directed and co-ordinated in such a way that, especially in the case of children, the rights of the accused are protected. The state must manage offenders in a way that will impact on, and change behaviour patterns to prevent reoffending. It is argued that an overall punitive approach, especially towards child offenders, is not desirable, except when absolutely necessary, and that restorative justice and the systems that will facilitate this should be prioritised.

The parliamentary debates

In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and was briefed by government departments and civil society on Bill 49 of 2002. During these debates the Bill appeared to undergo certain changes. Although the ethos of the Bill remained the same in that the processes of assessment,

diversion, the preliminary inquiry and alternative sentencing remained intact, the overall child rights nature of the Bill that focused on the individual child offender, was whittled away by the portfolio committee.

The result was that at the end of 2003, the Bill was not yet finalised, but was far more punitive in nature and did not allow for many of its provisions to apply to children charged with serious scheduled offences. One example of the new nature of the Bill is that it would appear that the benefits of diversion, which were potentially available to all children charged with any crime under Bill 49 of 2002, are now only available to children charged with less serious and petty crimes. Likewise, children charged with serious offences will not be assessed by a probation officer and will not appear before a preliminary inquiry – processes that were put in place in order to manage a range of issues from age determination to placement of the child, in order to ensure the child is detained as a matter of last resort and for the shortest possible period of time.⁸

In addition, allowing children under the age of 14 to be held in prison awaiting trial if charged with serious scheduled offences, as per changes to the Bill, can be seen as retrogressive and punitive. Section 29 of the Correctional Services Act (1959) provides that only children above the age of 14 years may be kept in prison awaiting trial, irrespective of the offence for which they are charged.

Should the portfolio committee persist in its proposed amendments, the Bill will bring our new and emerging child justice system perilously close to treating serious child offenders in the same manner as adults. However, it must be stressed that the above discussion reflects the parliamentary debates and that no final decision has been made on the content of the Bill. There is, therefore, still the opportunity for advocacy efforts to lobby for the tabled version of the Bill to remain.

However, it is a matter of concern that, after the debates in 2003, parliament recessed for the elections in 2004 and since that time, the Bill has not been debated again before the portfolio

committee. Its 'non-appearance' has been the subject of many debates and theories, but there have been no answers forthcoming from the legislature as to where it is and why the portfolio committee has not proceeded with it.

Conclusion

The Bill has sought to address the problems encountered in the field of child justice within the framework of current legislation. If the Bill is adopted as legislation it will revolutionise the criminal justice system in South Africa, particularly in relation to children in conflict with the law. While ensuring that a child's sense of dignity and self-worth are recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others.

In this respect, the formal introduction of diversion and the underlying principles of restorative justice into our child justice system will be very exciting. It encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of recognising their actions, making amends for them and reducing the possibility of re-offending.

Endnotes

- 1 General Assembly Resolution 45/113 of 14 December 1990.
- 2 U.N. Doc. A/40/53
- 3 The Report proposed that the new legislation refer to 'child justice' rather than 'juvenile justice', as the term 'juvenile' can be pejorative and stigmatising, and the reference to a child is more congruent with a children's rights approach.
- 4 Report par 1.5.
- 5 Report par 1.5.
- 6 Subsequently published in book form as *What The Children Said...*, Community Law Centre (1999).
- 7 A list of respondents is provided in Annexure B to the Report.
- 8 While no new official version of the Bill exists, the author was present at all of the Portfolio Committee debates and kept personal notes of the changes to the Bill.

A MEASURE OF LAST RESORT?

Child offenders and life imprisonment

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The main principle when sentencing children is that imprisonment should be a measure of last resort and only for the shortest appropriate period of time. However, contrary to international and foreign law in this regard, South Africa continues to sentence children to life imprisonment. The aim of this article is to contrast our current sentencing practices with regard to life imprisonment for children, with the sentencing principles set out in South African common law and in international law. Furthermore, the article sets out the negative effects of a mandatory life sentence in terms of the minimum sentences legislation.

One of the main focus areas of the Centre for Child Law is the promotion of the principle that the imprisonment of child offenders must always be a measure of last resort. To this end the Centre started an investigation to determine how many children who were under the age of 18 when they committed the crime, are serving a sentence of life imprisonment. Persons who may have been below the age of 18 at the time of the offence were interviewed, and records of those court proceedings examined.

It was found that 32 such prisoners are currently serving life sentences.¹ Of the 32 prisoners, 17 are in KwaZulu Natal, three in the Free State, three in the Eastern Cape, four in Mpumalanga, one in North West and four in Gauteng. Some of them were as young as 14 and 15 when they committed their crimes.

Sentencing children to a term of life imprisonment is in contradiction with the constitutional principle of imprisonment as a measure of last resort and only for the shortest appropriate period of time.² The Constitution also places an obligation on courts to

interpret our common law in accordance with international law.³ Furthermore, South Africa has a long history of case law in which the principle is firmly established that youth is always a mitigating factor and that children cannot be measured against the same standards as adults.

When looking at the number of children sentenced to life imprisonment one has to question why this is happening. Are their crimes extraordinary to such an extent that it justifies a deviation from established common law and from our obligations in terms of international law?

International law

The principle of imprisonment as a measure of last resort and only for the shortest appropriate period of time is included in various international documents and treaties. This constitutional imperative is reinforced by the principles of proportionality and rehabilitation with regard to child offenders and replaces more retributive principles.

The most important treaty is the Convention on the Rights of the Child of 1989 (hereafter the CRC).

Article 37 of the CRC states that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment, nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) ...The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time.

The UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules) stress that the principle of proportionality and the wellbeing of the juvenile should be the guiding factors during sentencing. Imprisonment should only be imposed when there is "no other appropriate response" and "shall be limited to the possible minimum".⁴

The principle of imprisonment as a measure of last resort is reiterated in guideline 46 of the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Furthermore, the best interests of the young person should always be of paramount importance.

The UN Rules for the Protection of Juveniles Deprived of their Liberty makes it clear from the outset in rule 2 of its Fundamental Perspectives that deprivation of liberty must be limited to exceptional cases and early release must be a possibility.

The African Charter on the Rights and Welfare of the Child (hereafter the ACRWC) does not expressly include the principle of imprisonment as a measure of last resort nor does it have a section prohibiting life imprisonment for children. It does, however, state that the 'essential aim' of juvenile justice shall be the reformation, reintegration into family and social rehabilitation of the child.⁵ This implies that life imprisonment is not appropriate since it is not consistent with the main objective of release and reintegration of the child into the community.

Practice in other countries

Canada

In 2002 Canada enacted the Youth Criminal Justice Act which states very strongly that children may only be sent to prison if there are no other appropriate alternatives, and that imprisonment may only be imposed for violent offences, in exceptional cases when there are aggravating circumstances, or when there is a pattern of convictions against the child. Judges must consider alternatives such as a combination of imprisonment and correctional supervision before direct imprisonment.

If direct imprisonment is the only appropriate sentence, the maximum period of imprisonment is seven to ten years, depending on whether it was first or second-degree murder. The period to be served continuously before becoming eligible for parole is six and four years respectively.⁶ The Act therefore removes the possibility of a life sentence for children.

England and Wales

In England and Wales, it used to be the case that children who were convicted of serious violent offences for which adults would be sentenced to life imprisonment, were sentenced to be detained 'during Her Majesty's pleasure'. Such a child would be eligible for release when it was recommended by the parole board in consultation with the trial judge and the Lord Chief Justice, but the final power to release the child was vested in the Secretary of State.

In practice, the trial judge would recommend a minimum period to be served, which was confirmed or varied by the Lord Chief Justice before being relayed to the Secretary of State. However, there was no statutory provision mandating or requiring the trial judge to set a minimum period of imprisonment and it was at the discretion of the Secretary of State whether the child should be released, even if the parole board recommended release.

This practice resulted in a situation where children imprisoned 'during Her Majesty's pleasure' were being treated the same as persons serving a mandatory life sentence.⁷

The European Court of Human Rights found that this practice violated the European Convention on Human Rights.⁸ In particular, it was found that it was cruel and inhuman punishment to detain children without any certainty about when they might be released. The situation was exacerbated by the possibility that the Secretary of State might veto a recommendation for early release from the parole board.

The legislation was amended and the trial judge must now set the minimum period of time that must be served, after which the child must be considered for parole and early release. If the parole board recommends release, the Secretary of State must release the child.⁹

Germany

German legislation relating to the imprisonment of children is specifically based on the Beijing Rules and states that the administration of child justice is based on the principles of 'minimum intervention' and prison as a sanction of last resort. For very serious crimes such as murder and rape, children between the ages of 14 and 17 may be sentenced to a maximum of ten years. Furthermore, sentences must always run concurrently and may never run cumulatively.¹⁰

Australia

In Australia each state has its own criminal and sentencing legislation but in general, Australia is one of very few countries that still holds the possibility of life imprisonment for children in its current legislation.¹¹ Legislation in New South Wales states that mandatory life sentences do not apply to persons below the age of 18;¹² however, trial judges still have the power to impose a discretionary life sentence.

The Young Offenders Act of 1997, in the same state, created a very intricate system of sentencing for serious violent offences, allowing a judge to sentence a child to imprisonment for a period to end within six months of the child turning 21. In a recent shocking and particularly vicious case of racially motivated murder and assault, a 17 year-old offender was sentenced in this way to three and a half years' imprisonment.¹³ This seems to indicate

that the Young Offenders Act will act as a guideline for sentencing instead of having a discretionary life sentence imposed.

Africa

In Uganda a child may not receive a sentence of detention for a period exceeding three years when convicted of a crime that for adults is punishable by death. This is according to the Children's Statute of 1996, which also incorporates the principle of imprisonment as a measure of last resort.¹⁴

One of the basic children's rights enshrined in the Children's Act 8 of 2001 of Kenya states that no child may be subjected to life imprisonment.¹⁵ When reading the chapter on child justice it becomes clear that Kenya does not allow imprisonment of children at all. At worst, children are sentenced to reform or borstal schools.¹⁶

In Lesotho, no person below the age of 18 may be imprisoned unless there are substantial and compelling reasons and imprisonment may never be longer than 15 years. Furthermore, the Children's Protection Act of 1980 also states that imprisonment is a measure of last resort and for the shortest appropriate period of time.

According to the Namibian Constitution no person under the age of 16 may be imprisoned.¹⁷ However, they have indicated in a report to the UN Committee on the Rights of the Child that they do allow life imprisonment for children.¹⁸

The South African experience

Historically both the courts and legislature always made a distinction between adults and children when it came to the sentencing of very violent and serious crimes. According to the Criminal Procedure and Evidence Act of 1917, a judge could use his discretion to impose any other sentence than the death penalty when sentencing a person below the age of 16 who had been convicted of murder.¹⁹

In 1955 the phrasing was amended to give the judge the discretion to impose any sentence other than the death penalty when it was found that there were extenuating circumstances.²⁰ In 1959 the

minimum age of 16 was raised to 18 by the Criminal Law Amendment Act 16 of 1959. This continued to be the position in South Africa until the Criminal Law Amendment Act 107 of 1990 removed the death penalty for persons below the age of 18.²¹

As far back as 1908 in *R v Jantjies*,²² the court found that a fitting sentence for a 12 year-old boy who had murdered his friend, was a sentence of two years in reform school. In *S v Whitehead*²³ the court found that a sentence of 22 years amounts to life imprisonment and that a more appropriate sentence for a 17 year-old would be 15 years. The court opined that any term of imprisonment of almost 25 years should only be imposed in the most exceptional circumstances, and was very unusual in our law.

In *S v Maimela*²⁴ the trial court convicted a 16 year-old boy of murder, and found that there were no extenuating circumstances that would justify imposing any other sentence than the death penalty. On appeal the court found that, even though age may not always be a mitigating factor when the offender is under the age of 18, it must always be taken into account when the court is exercising its discretion with regard to the death penalty. The court has to examine to what extent the youthfulness of an offender under the age of 18 makes the death penalty inappropriate.

In the famous 'scissors' murder case, *S v Lehnberg*,²⁵ the judge found that being young means being immature, lacking life experience, being reckless, and is a mental state in which one is very easily influenced. Furthermore, you cannot measure children against the same standard used for adults. Although *Lehnberg* was also about when it would be appropriate to impose the death penalty, it has become the *locus classicus* on youth as a mitigating factor and has been followed consistently in subsequent judgements.²⁶

Even when there were severe aggravating circumstances did the court exercise leniency due to youthfulness. In *S v Willemse*,²⁷ an 84 year-old woman was repeatedly raped, stabbed and eventually thrown into a well on her farm. One of

the offenders was 14 at the time and the court of appeal found that the sentence of ten years' imprisonment was shockingly inappropriate and that he should instead be sent to reform school.

Impact of the minimum sentences legislation

Minimum sentences were introduced in 1997 through section 51 of the Criminal Law Amendment Act 105 of 1997. The Act created a sentence of mandatory life imprisonment, to be imposed when a person is convicted of a crime listed in Part I of Schedule 2 of the Act, unless there were substantial and compelling reasons to justify deviating from the minimum sentence.²⁸ Minimum sentences do not apply to persons below the age of 16, but if a presiding officer wants to impose a minimum sentence on a 16 or 17 year-old s/he may do so, provided that the reasons for doing so are recorded.²⁹

This section led to widespread confusion about whether minimum sentences automatically apply to children who were 16 or 17 when they committed the crime, in the same way that they apply to adults. Before the death penalty was abolished there was a clear legal distinction between adults and children, but when the death penalty fell away and minimum sentences were introduced, it appeared that children and adults were in an equal position before the law. This may explain why children were receiving as harsh a sentence as life imprisonment.

The basic rule is that imprisonment should be a measure of last resort for child offenders. Minimum sentences are not a measure of last resort, they are a measure of first resort, and do not allow an individualised approach to sentencing as required by international law.

The question was resolved in 2004 in the case of *S v B*³⁰ in the Supreme Court of Appeal, where it was held that minimum sentences and specifically life imprisonment do not automatically apply to children of 16 or 17. The court emphasised that the traditional aims of punishment must be re-evaluated in light of the Constitution and international law relating to child offenders, including the principles of rehabilitation, proportionality and the best interest of the child.

According to the trial transcripts, most of the children serving life were sentenced between the time that minimum sentences were introduced, and 2004. It is therefore conceivable that the incidence of children being sentenced to life imprisonment may decrease now that the Supreme Court of Appeal has clarified the law.

It is however discouraging that records were found of children who were 14 or 15 when they committed a crime, and were sentenced to life imprisonment in terms of the court's common law jurisdiction.

Impact of the Correctional Supervision Act 111 of 1998

A further problem is that there is no mechanism that provides for the early release of children who were sentenced to life imprisonment. Article 37 of the Convention on the Rights of the Child only prohibits life imprisonment without the possibility of release. Life imprisonment without the possibility of release does not exist in South Africa, but a person serving life must serve 25 years before he or she may be considered for parole.³¹

The legislation in this regard makes no distinction between adults and persons who were below the age of 18 when they committed the offence. Although it is not without the possibility of release, it is clearly not for the shortest appropriate period of time and it also neglects to take the principles of rehabilitation, individualised sentencing and best interests of the child into account.

Conclusion

The Child Justice Bill, which was introduced to parliament in 2002, prohibits life imprisonment for any person under 18 and focuses on diversion, non-custodial sentences and restorative justice (see the previous article on the Bill in this issue). Another possible solution to limit the imposition of life imprisonment on child offenders, is to amend the minimum sentences legislation to completely exclude all persons below 18, or at least create a mechanism whereby persons who were below the age of 18 when they committed the crime may become eligible for early release.

Life imprisonment should only be imposed when a person poses a threat to society and cannot be rehabilitated. Sentencing a child to life imprisonment means that we no longer recognise that their youthfulness contributed to reckless and immature behaviour and that such behaviour can be corrected through rehabilitation. This flies in the face of constitutional values and international law.

The reasons why we have to make exceptions for young offenders were well summarised by a Canadian criminal court judge:

Their degree of responsibility and blameworthiness is less because of their immaturity, their susceptibility to negative influence, and their natural tendency to impulsive ill-considered behaviour. Further, youthful offenders possess greater potential for rehabilitation because their character is not well formed and there is a greater chance that deficiencies can be corrected. These factors lead to the accepted conclusion that youth sentencing should be less severe than for adults and that the emphasis should be placed on rehabilitation.³²

Endnotes

- 1 Findings according to information sent by the office of the Inspecting Judge of Prisons in 2005.
- 2 Section 28(1)(g) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter "the Constitution").
- 3 Section 39 op cit.
- 4 Rule 17.1(b). Notably the commentary to rule 17.1(b) explains that retributive sanctions may have some merit in cases of severe offences by children but "should always be outweighed by the interest of safeguarding the well-being and future of the young person".
- 5 Article 17(3) of the ACRWC.
- 6 Section 42 Youth Sentences of the Youth and Criminal Justice Act of 2002.
- 7 D A Thomas, Sentencing: Detention during Her Majesty's pleasure – Offender convicted of murder committed when under 18, *Criminal Law Review*, 2001, p 839.
- 8 *Hussain v The United Kingdom* (1996) EHRR 1. A subsequent amendment to the Crime (Sentence) Act 1996 stated that the Secretary of State must set the minimum period to be served. If the parole board recommended release after this period had been

- served the Secretary had no discretion in the matter and was obliged to release the child. This section was also found to be against the European Convention on Human Rights. *T v The United Kingdom* (2000) 30 EHRR 121. The Secretary of State is part of the executive branch of government and the exercise of a judicial function was found to violate the principle of separation of powers.
- 9 Parliament enacted section 61 of the Criminal Justice and Court Services Act 2000 which inserted section 82A into the Powers of Criminal Courts (Sentencing) Act 2000. Section 53 of the Children and Young Persons Act 1933 was consolidated as section 90 of the Powers of Criminal Courts (Sentencing) Act 2000.
 - 10 German Juvenile Justice Act of 1990.
 - 11 Human Rights Watch, The death penalty and life imprisonment without the possibility of release for child offenders who were less than 18 years of age at the time of their offence, and juvenile justice models of rehabilitation, *Commission on Human Rights*, 62nd Session.
 - 12 Section 61 of the Crimes (Sentencing Procedure) Act of 1999.
 - 13 *R v MD* [2005] NSWCCA p 342.
 - 14 Section 94(1)(g) and 94(4) of the Children's Statute of 1996.
 - 15 Section 18 of the Children's Act 8 of 2001.
 - 16 Op cit Section 190 and 191.
 - 17 Section 15(5) of the Constitution of Namibia.
 - 18 Initial Report of the State Parties due in 1992: Namibia 22/01/93 CRC/C/3/Add.12.
 - 19 Section 338 of the Criminal Procedure and Evidence Act 31 of 1917.
 - 20 Criminal Law Amendment Act 56 of 1955.
 - 21 The death penalty was declared unconstitutional in *S v Makwanyane* 1995 3 SA 391 (CC) and subsequently abolished by the Criminal Law Amendment Act 105 of 1997.
 - 22 1908 22 EDC 382.
 - 23 1970 4 SA 424 (A).
 - 24 1976 2 SA 587 (A).
 - 25 1975 4 SA 553 (A).
 - 26 Followed in *S v Tshisa en 'n ander* 2003 1 SACR 171 (O) *S v Willemse* 1988 3 SA 836 (A).
 - 27 1988 3 SA 836 (A).
 - 28 Schedule 2 of Part I lists the crimes for which a person convicted of such a crime must receive a sentence of life imprisonment. Crimes include murder which was planned or premeditated, rape of a girl under 16 or when the accused raped the victim repeatedly or when the victim was raped by more than one accused in the furtherance of a common purpose.
 - 29 Section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997.
 - 30 *S v B* 2006 1 SACR 311 (SCA).
 - 31 Section 73 of the Correctional Supervision Act 111 of 1998.
 - 32 *R v L (D)* 2005 ONCJ 386 at para 20.

CO-ORDINATED SERVICE DELIVERY

Local government's efforts to make Cato Manor safer

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Safety and security policy suggests that local government should play a central role in creating safer environments. This article describes how the Cato Manor Area Based Management (ABM), part of the eThekweni Municipality, has embraced this suggestion by striving to develop a sustainable co-ordinated approach to crime and safety in Durban's Cato Manor area.

The 1998 White Paper on Safety and Security and the White Paper on Local Government (1996) encourage local government to play an important role in creating a safer and more secure environment. The Safety and Security White Paper states that city and town government is the level at which planning can take the needs of local communities and their particular crime problems into account:

Many of the functions of local government relate, in any event, to issues of local governance. Thus, notwithstanding any specific interventions, local government has a key role to play in ensuring an environment less conducive to crime... Crime and crime prevention should be seen as central to the planning and functions of all municipal department line functions.¹

In October 2005 the Independent Projects Trust (IPT) was asked by the Cato Manor Area Based Management (ABM) of the eThekweni Municipality to conduct an extensive consultation with role-players in Cato Manor, in order to investigate and recommend a sustainable co-ordinated approach to

crime and safety in the Cato Manor area. One of the ABM's key objectives is the co-ordination of service delivery and it is hoped that a co-ordinated approach to safety and security will improve the situation in Cato Manor.

As part of the process IPT was required to investigate best practices with regard to community safety forums in the Western Cape and other practices elsewhere. In addition, the organisation was tasked with identifying and consulting internal and external stakeholders in an effort to understand key issues relating to safety and security in Cato Manor. IPT was also asked to facilitate the development of a safety plan.

Project process and methodology

IPT conducted a field visit to the Western Cape to meet with representatives from community safety forum initiatives, and conducted a document review of information available about community safety forums and other initiatives.

Workshops, face-to-face interviews and small focus group discussions were conducted as part of the consultation process. IPT also developed a

questionnaire that was filled in by 144 members of the Cato Manor community in an effort to gauge attitudes towards safety and security in the area. The consultation process provided information as to the crimes that people felt should be most urgently addressed and what could be done to deal with crime in Cato Manor.

After much consultation with the Cato Manor ABM, IPT developed guidelines for the establishment of the Cato Manor Co-ordinated Safety Initiative (CSI). The purpose of this forum is to address the need for a multi-agency response to crime prevention, and to prevent the duplication of efforts and wasteful expenditure.

The Cato Manor environment

Cato Manor covers a geographical area of about 1,800 hectares about 10 km from Durban's city centre. It is home to about 93,000 people who mostly settled in the area through mass invasions in the late 1980s and early 1990s. This area had been vacant since the forced removal of about 150,000 people in the 1950s and 1960s. The eThekweni Municipality website states:

Cato Manor residents include some of the poorest of the urban poor... The area remains characterised by a high unemployment rate and social fragmentation.²

Cato Manor, besides being one of the most fiercely contested urban localities in the history of South Africa, is an internationally acclaimed example of urban reconstruction that was conferred the status of International Best Practice by the United Nations' Commission on Human Settlements.³

Describing the environment in Cato Manor, Paulus Zulu wrote in 2004 that:

The majority of Cato Manor residents today comprise communities relocated from shanty townships, present residents of shanty towns, overflows from formal townships and communities displaced by political violence in rural areas. Cato Manor is not isolated from Durban, either geographically or

experientially. An examination of the state of poverty or wealth in Cato Manor is an examination of that state in the fringes of Durban, including such townships as Chesterville, Lamontville, Umlazi and KwaMashu.⁴

Using the 1996 census Zulu provides the following information about Cato Manor:

- There is a large number of youth in Cato Manor, 95% of them younger than 50 years. He attributes this to possibly being the result of migration from rural areas and of young individuals escaping from overcrowded family homes in the townships, a fact supported by the uniquely small sizes of households.
- Education levels in Cato Manor are low with 12% of residents illiterate, 12% barely functionally literate and 20% educated between grades five and seven. Only 2% of the population has a post-matric qualification.
- With regard to employment, 44% of the economically active population is employed, while 29% is unemployed.
- A total of 6% more women than men are employed.
- A total of 76% of residents live in informal houses (such as traditional houses, shacks or tents).⁵

Crime in Cato Manor

According to the SAPS, and corroborated by community reports, armed robbery, housebreaking, rape and assault were the four priority crimes in Cato Manor in the first quarter of 2006. Domestic violence is regarded as a major problem that accounts for most assault cases; however, many cases are withdrawn by the victims, while in other instances victims are too scared of their partners to report them to the police. Stakeholders say that domestic violence often occurs during the weekends after a drinking spree.

The survey conducted by IPT found that 32% of respondents felt Cato Manor was safe or very safe, while 45% said the area was either unsafe or very unsafe. A total of 40% of the participants stated that safety and security in Cato Manor had decreased or greatly decreased over the past five years.

The areas in Cato Manor that consist largely of informal settlements or low cost housing, such as Cato Crest, Fast Track and Dunbar, are most affected by crime. Street lighting in these areas is non-existent and the terrain makes the area difficult to patrol by vehicle and foot. Shacks located in informal settlements are situated in clusters that have no drive-in access, making them an ideal place for perpetrators to take cover and avoid detection and arrest.

Focus groups, meetings and discussions with individuals revealed that alcohol is a factor in criminal activity, with suspects and often also victims being under the influence of liquor. In the IPT survey respondents identified public drunkenness as one of the top three factors that impacted negatively on feelings of safety and security in Cato Manor.

Stakeholders say that most perpetrators are under the age of 18 and that tavern and shebeen owners should contribute to safety and security by not serving alcohol to children under the age of 18 years.

Assaults and murders are committed using knives and firearms, and the SAPS and the community argue that illegal firearms are a major problem in Cato Manor. Community members say that gangs often use illegal firearms, while delinquent youth steal legal weapons from their parents or other people. Stakeholders say that the armed robberies in which firearms were used were mostly perpetrated by youth who are unemployed, use drugs and are part of gangs.

The high rates of unemployment and poverty were raised as key factors that are likely to cause crime in Cato Manor. Drug addiction was ranked third, but quite significantly lower than both unemployment and poverty.

Participants attending the IPT workshop recommended that the Cato Manor ABM co-ordinate a process to take forward the issue of safety and security in Cato Manor. They also called for a multi-agency approach to crime prevention that would include local government role-players as

well as provincial and national government, representatives of schools and crèches, taxi associations, faith-based organisations, the business sector and NGOs.

According to the findings of the IPT survey, specific interventions that could be carried out by the eThekweni Municipality to make Cato Manor more secure include facilitating job creation for the unemployed and youth, running crime awareness programmes in schools, and improved street lighting.

The survey also asked what residents of Cato Manor could do to make the community safer. Interestingly, only a few respondents suggested carrying a gun or other weapon, while many believed that residents should report crime and join CPFs.

Policing in Cato Manor

There were 66 SAPS members stationed at Cato Manor police station in February 2006, supported by ten administrative personnel. The police claim that their crime combating and crime prevention efforts are hampered by a lack of vehicles and manpower. To illustrate their point they refer to a national intervention in 2005 that boosted the number of police members stationed at Cato Manor – but only lasted for three months. According to the police and the community this brief increased police presence resulted in a higher number of arrests, improved levels of visible policing and an improvement in community confidence.

In the IPT survey, 40% of the community members surveyed stated that the job done by the Cato Manor police was acceptable. However, it is worrying to note that 44% of respondents stated that the job done by the police in Cato Manor was bad, or very bad.

The relationship between the police and the community has for years been a troubled one. At the IPT workshops community members said that they received little or no assistance from the SAPS, and that police response to reported crimes was slow.

Community Safety Forums

The Western Cape-based NGO, U Managing Conflict (UMAC), which established CSFs in the Western and Eastern Cape, states on its website that community policing forums (CPFs) have linked the police and the community, but that other service providers have not been part of the forum:

A CSF, however, is a single forum within a municipality that brings together all the service providers from government (police, social services, health, education, justice and local government) around the table with NGOs and communities.⁶

The objectives of the CSF, according to UMAC, are:

- to share information on crime, safety and security issues in that particular municipality;
- to develop a common vision around social crime prevention and around fighting crime and violent community conflicts effectively;
- to identify gaps in service provision and obstacles in the criminal justice system and devise ways of addressing these at a local level;
- to co-ordinate an interdisciplinary approach to crime prevention and crisis management; and
- to facilitate increased co-operation and interaction of the criminal justice system.

At a provincial consultative conference on CSFs held in Durban in March 2006, the KwaZulu-Natal Department of Community Safety and Liaison committed itself to establish CSFs throughout the province. The department has indicated that it will put together a plan for implementing this resolution.

Lessons learned from the CSF experience

In a presentation to the Cato Manor ABM, crime prevention consultant Dr Richard Griggs said that the strengths of CSFs include:

- addressing the strategic need for a multi-agency response to crime prevention; and
- offering an opportunity for partners to meet and locate ways to co-operate.⁷

However, his research on the CSFs identified six weaknesses:

- CSFs have no mandated powers because they are a non-statutory body, and implementation occurs per agreement of participating departments and bodies.
- CSFs rarely reach the stage of managing projects because they have no budget for this purpose.
- There is no champion to drive the CSF process.
- The CSF is not focused. As a result the process is delayed and politicised by regularly scheduled meetings between a large set of role-players to discuss every kind of crime problem.
- CSFs fail to disaggregate crime into various types and to establish appropriate strategies to address each.
- The 'changing faces syndrome' results in junior people sometimes being sent to meetings rather than senior people who have a mandate.

Guidelines for the Cato Manor Co-ordinated Safety Initiative (CSI)

IPT developed guidelines for the multi-agency forum to be established in Cato Manor. After much discussion with the Cato Manor ABM this body was named the Cato Manor Co-ordinated Safety Initiative (CSI). The guidelines were intended to address some of the issues raised by Griggs, as detailed above. They mention aspects such as the formal status of the CSI, the functioning of the initiative and the entities that could participate in the CSI.

The purpose of the CSI is to:

- address the need for a multi-agency response to crime prevention; and
- prevent the duplication of efforts and wasteful expenditure.

The functions of the CSI are to:

- co-ordinate crime prevention activities at local government level (this involves identifying and integrating existing roles and programmes);
- facilitate co-operation around service delivery, particularly at local level; and
- initiate and implement new projects (after at least one year of operation).

IPT emphasised the need for regular CSI meetings, a strong chairperson to facilitate these meetings, and for meetings to follow standard procedures. In

addition, task teams were to be set up on a needs basis to focus on specific projects.

Although the CSI is a non-statutory body with no mandated powers, it would be 'owned' by a senior official in the eThekweni Municipality and co-ordinated by the Cato Manor ABM.

The first members of the CSI would be senior officials from departments within the eThekweni Municipality, as this project is being driven at local government level. Other suggested participants include the Cato Manor SAPS, ward committee representatives, CPF representatives, NGOs, youth organisations, business leaders, provincial government departments involved in Cato Manor, and relevant national departments.

Lessons learned and way forward

The CSI has been well received by senior officials from the eThekweni Municipality, and the Cato Manor ABM is taking the process forward. IPT recommends that strong leadership and strict adherence to standard procedures for meetings are essential for ensuring a successful multi-agency partnership. The administrative arm of the CSI is vital because participants continually need to be provided with minutes, agendas, reminders of activities they are required to complete, and dates of future meetings.

IPT found the consultation process required as part of this study challenging, as participants often needed to be convinced that their involvement is worthwhile. This was the case not only with officials from all levels of government, but also community role-players. People often failed to see what role they play in creating a safe and secure environment. This presents a challenge for the Cato Manor ABM as the process is taken forward.

It cannot be stressed enough that the critical learning from the Western Cape is that the key participants in the first year are local government departments who have the mandate and budget to make a difference at local level. Focus should be on the success of current activities, rather than starting new projects as the CSI. It is evident that one of the biggest challenges in ensuring the

sustainability of structures such as community safety forums is that participants become disillusioned when plans that are too ambitious and high-flying fail. It is critical that individuals are invited to meetings because they have something to contribute, and that key people attend.

Acknowledgements

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Endnotes

- 1 Department of Safety and Security, White Paper on Safety and Security: *In Service of Safety*, 1998.
- 2 www.durban.gov.za
- 3 P Robinson, J McCarthy and C Forster, *Urban Reconstruction in the Developing World: Learning through an international best practice*, Heinemann, Sandown, 2004.
- 4 Robinson et al, op cit.
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- 7 Griggs wrote a chapter on CSFs in *Lessons from local crime prevention* published by the Open Society Foundation for South Africa, Newlands, 2003.

WILL THE SCORPION STILL STING?

The future of the Directorate of Special Operations

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Following the politico-legal row that has engulfed the National Prosecuting Authority's Directorate of Special Operations (otherwise known as the Scorpions), President Mbeki appointed Judge Sisi Khampepe on 1 April 2005 to head a commission of enquiry (known as the Khampepe Commission) to review the mandate and location of the DSO and make recommendations. On receipt of the Commission's recommendations, the President, in consultation with Cabinet, has made a decision on the future of the Scorpions. This article analyses the implications of the decision and raises critical questions related to the past and the future.

Responding to the key challenge of organised crime, President Thabo Mbeki in 1999 launched the Directorate of Special Operations (DSO), otherwise known as the Scorpions. Given that prosecutors are central to the Scorpions' prosecution-led approach, the DSO was located in the National Prosecuting Authority (NPA). The DSO began its work in 2001 after almost three years of setting up the institutional architecture of what, in the eyes of the public, soon became South Africa's exemplary crime-busting agency.

Despite positive public perception, the Scorpions have had a turbulent life since they started operating. The overlap of their work and that of the South African Police Service (SAPS), as well as problems arising from their mandate, has led to boiling tensions between political principals and senior bureaucrats responsible for security agencies. The investigation of high-profile politicians by the Scorpions, the DSO's aggressive media strategy and what some perceived to be an abuse of power, provoked negative reactions from a range of

political actors. It is against this background that President Mbeki appointed Judge Sisi Khampepe on 1 April 2005 to head a commission of enquiry (known as the Khampepe Commission) to review the mandate and location of the DSO and make recommendations.

The Khampepe Commission has come and gone; it has made recommendations and submitted its report to the President. After consulting the National Security Council (NSC) and Cabinet, the President made a decision in June 2006, and the wheels of implementation are currently turning. Yet, there is little public understanding of the meaning and implications of the decision for the agencies concerned and on the future effectiveness of the Scorpions. This article is an attempt to shed light on the decision.

Reporting to two political principals – will it work?

That the Scorpions had become a political hot potato became clear long before the Khampepe Commission was appointed. Senior politicians

within the ruling African National Congress (ANC) made conflicting statements in relation to the DSO, with some accusing it of employing 'Hollywood tactics' in its handling of cases. In an attempt to make sense of the divergent positions presented to the Commission by government bureaucrats and ministers, the political divide with regard to the Scorpions has been summed up as follows:

... because the bureaucrats and Ministers involved were all senior members of the ANC, it could be suggested that they mirrored a schism within the ruling party regarding the future of the Scorpions. Other observers may construe it to suggest that those from within the ANC who were for the relocation of the Scorpions saw the DSO as a loose dog in need of taming, while those who favoured the status quo viewed the Scorpions as an important instrument through which to weed out corrupt comrades.¹

Indeed, the division within the ANC also extended to the general South African public; some wanting the Scorpions to be relocated to the SAPS, and others preferring the DSO to remain within the NPA. This presented a daunting political challenge to President Mbeki: how to accommodate the wishes of two diametrically opposed camps within his own party and outside. Here is the president's decision:

Cabinet has endorsed the NSC's decision to accept in principle the recommendations of the Commission, including the matter of retaining the DSO with the NPA and that its law enforcement responsibilities shall be subject to political oversight by the Minister of Safety and Security.²

This decision should not be misconstrued to mean a complete relocation of political responsibility to the Ministry of Safety and Security (MSS). The retention of the Scorpions within the NPA means that they will continue to report to the Ministry of Justice and Constitutional Development (MJ&CD) on matters outside the law enforcement work of the DSO. Politically, the decision splits the Scorpions; the law

enforcement function becomes the responsibility of the MSS while prosecutions remain within the ambit of the MJ&CD.

Located within the context of the political divisions in the ANC, the decision is a crafty political tactic by the President to quieten both camps. Those who are for the status quo have reason to celebrate that the Scorpions remain in the NPA, even though they also have to report to the MSS. But the fact that they have to report to the MSS provides solace to those who called for the entire relocation of the DSO. The political content of this decision could therefore be interpreted as a win-win situation.

Furthermore, President Mbeki deserves credit for passing the Khampepe Commission report through the NSC and Cabinet before making a decision. This has, at least for now, silenced potential deviant voices from within. It would appear as though the President borrowed a leaf from Lord Melbourne's book of political philosophy: "I do not care what the members of the Cabinet say as long as they all say the same thing outside."³

However, only time can tell how long President Mbeki's colleagues in Cabinet will say the same thing regarding the decision on the Scorpions. Perhaps the more difficult question is: If they start saying different things in public, as they did before and during the Khampepe Commission, are stakeholders again going to be invited to make presentations before another commission of inquiry on how to get out of the political quagmire?

Politics versus operational efficiency?

The recommendations made by Judge Khampepe and endorsed by the President state, among others, that:

prosecutors who work for the DSO ... [are to] continue to receive instructions and be accountable to the National Director of Public Prosecutions (NDPP). The NDPP, in turn, ... [will] remain accountable to the Minister of Justice and Constitutional Development as currently provided for in law.⁴

It is important to read this decision bearing in mind that “Cabinet reaffirmed the architecture and practice of the DSO” that relates to the prosecution-led approach. The key question is whether, on a practical level, it is that easy to separate the law enforcement work of the DSO (which relates to investigators) from its prosecutorial responsibilities (which relates to prosecutors).

It is useful to understand how the prosecution-led approach works in practice. When a specific case is under consideration, an investigator(s), analyst(s) and prosecutor(s) (all from within the DSO) sit around the table to collectively deal with it, with the prosecutor leading the process. The investigator places pieces of evidence with the analysts, who then consider crime intelligence or other implications arising from existing evidence. As the leader of the process, the prosecutor advises both the investigator and the analyst on aspects of the case needing revalidation or further investigation, in order to build a formidable legal case that can stand the test of law in court.

What subsequently goes to court is the culmination of the investigative and analytical work of the team, satisfying the legal requirements as determined by the prosecutor. So, if any person expects a comprehensive report on how a specific case was built, the prosecutor is the person to contact since s/he leads the process with the view to ensuring conviction in court. It would, therefore, be a mistake to expect the investigator or the analyst to give a complete picture of a case since these two only deal with certain aspects of DSO cases.

Regarding political reporting, the head of the Scorpions reports to the National Director of Public Prosecutions (head of the NPA), who in turn reports to the minister concerned. With the new arrangements, the NPA head will be expected to report to the MJ&CD and MSS. The complexity of the Cabinet decision is that it is based on the assumption that drawing a line between the investigative and prosecutorial aspects of the work of the DSO is a clear-cut exercise.

But as shown above, cases are not always that straightforward, especially when a prosecution-led

approach is followed. Investigative and prosecutorial issues often interweave. The NPA head, preparing a political briefing for the Minister of Justice or for the Minister of Safety and Security, may in some cases merely need to reproduce a single report for both ministers.

The bigger political question is: What exactly is the role of the Minister of Safety and Security in relation to the DSO? The Minister does not decide which SAPS cases to investigate or not. Such decisions are made at an operational level. Fears that the Minister would in this regard dictate terms to the DSO are without precedent. It should also be remembered that, even when cases are initiated and handled by the SAPS, the NPA has the final word as to whether there is a case to be made in court or not. At best, the Minister may seek an explanation on the specifics of a case if he has an interest in it. He cannot even determine the budget for the ‘law enforcement aspects’ of the DSO’s work, since operationally the DSO remains in the NPA. The DSO’s budget will continue to come from the Ministry of Justice and Constitutional Development through the NPA.

Also related to the role of the Minister of Safety and Security is the decision that:

the capacity of relevant entities within the SAPS should be enhanced, for example, by investing them with the same legal powers as the DSO and co-locating prosecutors with its investigators and analysts.⁵

Here the Minister has some leverage, since he can bargain for more financial resources from Treasury. However, the question is whether the SAPS can accommodate prosecutors in this way. The problem is not money, but whether the SAPS can be a home for prosecutors. In its submission to the Khampepe Commission, the Institute for Security Studies advised:

Police agencies, the world over, find it difficult to accommodate civilians because ‘cop culture’ (as often called), like all organisational cultures, is exclusive.⁶

The words of the SAPS National Commissioner may hold a clue to the position of police leadership on

this issue: "The South African Police Service is not at all in favour of a prosecution-led approach". Given this, one may well ask whether the Cabinet decision is going to be implemented.

Improving coordination: will we learn from the past?

While the wisdom and spirit of the decision on improving coordination is welcome, questions arise on how the measures decided on will work in practice.

It has been decided that a "coordinating committee of officials"⁷ will be established to handle operational issues and advise the Ministerial Coordinating Committee (MCC).⁸ However, there has always been a need for interdepartmental dialogue involving senior officials from security agencies. More importantly, the Scorpions cannot be effective without the cooperation of the police and other relevant government agencies. The value of the decision to create a committee of officials perhaps lies in imposing an obligation on the officials concerned to work together in dealing with matters relating to the DSO.

But a policy-driven responsibility does not automatically guarantee compliance. It remains to be seen how the creation of a subcommittee will resolve personal differences that have hindered cooperation among the same officials in the past.

While it makes sense for officials to deal with operational issues, it should be remembered that operational problems were among the issues that pushed the Scorpions into the centre of political turbulence that led to the institution of the Khampepe Commission. Consider, for example, how the raids by the Scorpions on Jacob Zuma's house became a serious political affair.

When operational issues induce political interest, politics and operations become blurred, as do the responsibilities between ministers and officials. It is against this background that the proposals of the NSC directors general, as mandated by Cabinet, should be awaited with keen interest.⁹

Realistically, to assume that politics would not creep into a committee of officials is to ignore

history. The case of the former NIA director general differing with his political principal before the Khampepe Commission, and that of the current head of the NPA differing with his minister at the same Commission, tell a story of officials embroiled in politics. That the officials have in the past locked horns on similar issues is also common knowledge.

Bearing in mind that Justice Minister Bridget Mabandla described differences among her MCC colleagues as irreconcilable, it will be interesting to see how the ministers sitting on the MCC develop new relationships. In this regard, her exact words are worth citing:

My view is that it is highly unlikely that the situation will improve, notwithstanding possible suggested remedies that can be considered.¹⁰

The fact that the same ministers who had irreconcilable differences in the past are now expected to work together better, is indeed intriguing. 'What did not work in the past will work in future' seems to be the guiding formula in this instance – but with no measure of success as yet.

The impact on the fight against crime

What does this decision mean for the fight against crime? Cabinet's reaffirmation that "the DSO deal with high level priority crimes and that it should deal with cases referred to it by the police" is likely to generate confusion between the SAPS and the Scorpions. On the one hand, the DSO will sometimes feel justified to initiate and handle cases they deem serious and of high priority. On the other hand, the SAPS may at times feel that a specific case should not be handled by the Scorpions or should have been referred to the DSO by the SAPS.

One can only hope that the proposals by the NSC DGs will also provide guidance on who shall be the final arbiter and on what arbitration would be based in a scenario like the above. If these issues are not clarified, criminals will be the victors while the Scorpions and the SAPS are in a tug of war over cases.

The reality is that before the President's decision is implemented no degree of certainty can be

attached to any prognosis regarding the impact of the decision on the general fight against crime. Many variables exist to influence the situation.

How firm the Scorpions will be in their future handling of high profile cases is another question to which only time will provide the answer. And to what extent will the SAPS curtail the work of the Scorpions by evoking Cabinet's decision that the Scorpions should deal with cases referred to them by the SAPS? And, importantly, will the Ministry of Safety and Security's new partial political responsibility be exercised in a manner that hampers the effectiveness of the DSO?

What about the "concern expressed with regard to the manner in which the DSO publicised the subject matter of some of its investigations"?¹¹ Does this not imply a 'media gag' on the DSO, and will it not have a negative impact on public perception? It is indeed true that the apparent positive public perceptions of the Scorpions to a large extent derive from the over-publicising of the DSO's work through the media. In this regard, it is problematic for the Scorpions to involve the media when raids and arrests are made, before a conviction is secured. The impression created by this process is that the suspect involved is guilty even before a court of law so pronounces.

Conclusion

While the decision to split political responsibility for the Scorpions seems to have generated less controversy than some would have expected, it remains to be seen whether the decision can stand the force of a political turbulence such as the one that led to the institution of the Khampepe Commission. The assumption that the DSO's work can neatly be divided into law enforcement and prosecutions, calls for further clarification. Such clarity would provide important guidance on how the Scorpions will in future report to two political principals.

The fact that the measures decided on to improve coordination between the DSO, the SAPS and other security agencies include those that did not work in the past raises more questions than answers. Further questions also arise as to the full impact of the

President's decision on both the effectiveness of the Scorpions and the general fight against crime, particularly organised crime. What is clear, though, is that the question arising from the decision can only be answered in the course of implementing the decision. It would therefore not be surprising that the issues that currently seem clear will in the future have to be revisited.

Endnotes

- 1 P Mashele, The Khampepe Commission: The future of the Scorpions at Stake, *ISS Paper*, No. 126, June 2006, p 7.
- 2 Presidency, Media statement on the report of the Khampepe Commission of inquiry, 29 June 2006, p 3.
- 3 Lord Morrison of Lambeth, P.C., C.H. (1962) *British Parliamentary Democracy*, London: Asia Publishing House, p 13.
- 4 Presidency, *Ibid*, p 2.
- 5 *Op cit*.
- 6 Institute for Security Studies, Oral submission to the Khampepe Commission, undated, p 5.
- 7 Presidency, *op cit*. The decision states that it should be officials with the requisite level of authority to make decisions, implying Directors General or their representatives.
- 8 The MCC was established on the basis of Section 31 of the National Prosecutions Authority Act, as amended.
- 9 Cabinet "charged the Directors General (DGs) of the NSC ... to develop proposals that will specifically enable the government to implement" its decisions on the future of the Scorpions. See Press statement by the Presidency, *op cit*.
- 10 B S Mabandla, response to the request for further particulars by Khampepe Commission, 10 October 2006.
- 11 Presidency, *Ibid*. p 1.

RACISM, SELF-ESTEEM AND VIOLENCE IN SA:

Gaps in the NCPS' explanation?

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Ten years after the launch of the National Crime Prevention Strategy (NCPS), South Africa is still bedevilled by high levels of violence. Given this situation, it is worth reflecting on the NCPS' analysis of the causes of crime and violence. In particular it seems the Strategy may have failed to recognise the important role that internalised racism, and related low self-esteem and concerns about status, would play in contributing to violence. These issues are discussed here in relation to the high level of interpersonal assaults in South Africa.

Ten years after it was accepted by Cabinet, the National Crime Prevention Strategy (NCPS) remains the only policy of its kind to have been developed for the country.¹ Launched in May 1996, the NCPS intended to shift the approach to crime in South Africa that focused on crime control, to one that emphasised prevention. The NCPS also promoted partnerships as a mechanism for preventing crime, along with a shared responsibility among a range of government departments rather than just the police and courts as had previously been the case.

The nature and impact of the Strategy has been analysed elsewhere.² This article is concerned with the detailed discussion of 'factors giving rise to crime in South Africa' provided in the NCPS. As articulated in the Strategy, these can be divided into those associated with the legacy of apartheid and those related to the transition to democracy.

NCPS on the legacy of apartheid

The NCPS says that the violence and intolerance which had dominated apartheid political culture

was now 'spilling over' into the social and domestic arenas.³ Criminalisation of political activity under apartheid had blurred the dividing line between political and criminal activity, and criminals used this to rationalise crime. Law enforcement and criminal justice agencies had been discredited which undermined popular discouragement – and contributed to popular approval – of illegal activities.

The NCPS also emphasised apartheid's socio-economic legacy of "poverty, unemployment, and relative deprivation" as well as "youth marginalisation". Stark disparities in wealth, the NCPS said, operate as an incentive for criminal activity. With political rationalisations, these are also used as a justification for crime.

Marginalisation, it was argued, was also not only economic. Young people had been marginalised socially and in other ways, and felt rejected by the dominant culture, contributing to a crisis of identity. This was occurring within the context of the destruction of the family, the school and other vehicles of social cohesion.

NCPS on the impact of the transition

Breakdown of social controls

The NCPS emphasised that increased violence and crime conformed with a pattern of heightened instability and violence during political transitions in other countries. In South Africa the transition involved the "dismantling" of illegitimate apartheid era state institutions. The NCPS also refers to the "unshackling of democratic political process" – implying that there was a breakdown of the social control function performed by popular mass based organisations. Together with the fact that the negotiation process had been slow to transform the state institutions, this contributed to a vacuum of legitimate social authority.

Culture of violence

Related to the culture of violence, the NCPS argued, was the continued tendency for violence to be used as an instrument of political rivalry during the transition. This tendency contributed to the further growth of paramilitary structures which had become a law unto themselves. Violence which was ostensibly political was also a vehicle for competing claims over economic resources – a trend that further blurred the line between political and criminal violence.

Now that South Africa was undergoing a process of transition, the culture of violence and legitimisation of criminality were also reinforced by a "culture of entitlement" and expectations which had been generated by the process of political change. Due to the slow pace of change this was translated into frustration contributing to "escalating social conflict as well as violent and acquisitive crime".

The NCPS also argued that the shift from resistance to the politics of negotiation had resulted in the youth losing their role at the centre stage of political life. Ironically this also compounded their crisis of identity, propelling them into criminal gangs as a source of identity and social cohesion.

Impact of economic development

The NCPS acknowledged that economic development was necessary to address the causes of crime. But the Strategy suggested that development also contributed to crime. Sophisticated banking, telecommunications and transport systems, combined with weak mechanisms of regulation (including poorly regulated

borders) and corruptible officials, all facilitated criminal activity and attracted crime syndicates to South Africa.

The injection of resources into communities as part of development might promote competition, conflict, crime and violence within these communities. Economic development, it was pointed out, would also not address the economic crimes perpetrated by the affluent, or the problem of crime syndicates or gender-specific violent crime.

Social change

Finally, dramatic social change generates stress and insecurity, and feelings of powerlessness and helplessness. Because of widespread crime and violence, everyone is forced to think of themselves as potential victims. These factors, the NCPS argued, would feed into the growth of paramilitary structures as well as vigilantism and the demand for guns. Another consequence of these "social psychological" stresses may be the resort to alcohol and drug abuse which itself feeds into crime.

According to the NCPS, the feelings of powerlessness – experienced by men as emasculation – are displaced into the domestic arena as a means of reasserting their authority "within those relationships in which they still hold sway", resulting in increased violence against women and children. Exposure of children to high levels of violence within the family in turn has a damaging and long lasting impact on the youth, according to the NCPS.⁴

Violence in South Africa

In reflecting on whether the framework for understanding crime provided in the NCPS is sufficient to account for violence in South Africa today, it is necessary to consider what form violence takes. A number of different types of violent crime can be identified:

- assaults related to arguments and domestic violence;
- robbery;
- rape and sexual assault;
- conflict between groups over territory, markets and power such as gang warfare, taxi violence and political violence;
- violence against state and economic institutions including protest violence and terrorism;

- violence to resist law enforcement interventions;
- excessive force by public and private policing agencies and vigilantism;
- violent child abuse;⁵
- culpable homicide which can be regarded as negligent fatal violence (often involving motor vehicles);
- other forms of violence including serial killings, muti killings and other premeditated murders not covered by the above categories, and violence related to kidnappings.

Murder can be linked to any of these forms of violence, as any of them can be fatal. It should also be noted that acts of violence falling into many of the above categories often involve actions which seem to be sadistic or gratuitous.

When an act of violence is reported to the police it is classified as murder, attempted murder, rape, indecent assault, assault common, assault with intent to inflict grievous bodily harm (assault GBH), common robbery, robbery with aggravating circumstances, kidnappings, or public violence. Thus, without additional information about the circumstances in which these offences happen, it is difficult to estimate the prevalence of many of the types of violence listed above.

However it appears that violent crime in South Africa primarily fits into the first three categories – interpersonal assaults, robbery and rape – and that these account for as much as 80–90% of all violence (Table 1).

<i>Table 1: Recorded violent crime in South Africa, 2005/06</i>		
Crime category	Number of cases	% of total violent crime
Assault GBH	226,942	30.1
Common assault	227,553	30.2
Aggravated robbery	119,726	15.9
Common robbery	74,723	9.9
Rape	54,926	7.3
Attempted murder	20,553	2.7
Murder	18,545	2.5
Indecent assault	9,805	1.3
Total	752,773	
<i>Source: SAPS 2005/06 Annual Report</i>		

But the vast majority of violent offences (60%) in official statistics are recorded either as assault GBH or common assault. While these incidents could be related to several forms of violence referred to above, it appears that most are linked to arguments generally between two men. They also include incidents of domestic violence. Given that assault makes up the largest portion of recorded violence in the country, these are considered in the more detail below.

Interpersonal assaults

Incidents in this category generally involve people who know each other relatively well. The 2003 National Victims of Crime Survey indicates that in 30% of assault cases, assailants were "community members known to the victim", and 17% were friends or acquaintances.⁶ In 12% of cases, the assailant was a spouse or lover. While it is likely that women were reluctant to report domestic violence to interviewers conducting the victim survey, especially because the interview was conducted in their home, the data suggest that domestic violence incidents do not make up the majority of cases in this category.

The Victims of Crime Survey data therefore probably don't indicate the extent to which women are victims of these types of assaults. Information on the sex of assault victims provided by the SAPS for the 2005/06 financial year indicates that 53% of victims of common assault, 38% of victims of assault GBH, 18% of victims of attempted murder, and 14% of victims of murder, were female.⁷

This suggests that assaults tend to be more serious when both parties are male. It is also possible that reporting behaviour varies between men and women, with women tending to report less serious assaults more often than men. Roughly the same number of common assaults and incidents of assault GBH are reported to the SAPS, even though common assaults are presumably far more frequent.

While the majority of these incidents involve people who are known to each other, some do involve strangers. The Victims of Crime Survey indicates that in 11% of assaults, the assailant was completely unknown "with 20% of respondents being confident that the perpetrator was from the community though personally unknown to them".⁸

Particularly when both the parties involved are male, it is also not always easy to ascribe the roles of victim and perpetrator. Both parties may be involved in contributing to the escalation of the argument – though not always with equal enthusiasm. In relation to the substance of these arguments, the National Victims of Crime Survey indicated that 20% of victims of assault thought that the assault was due to long term personal anger towards the victim, 15% sudden personal anger, 13% money disputes, 12% jealousy or other romantic motives, and 12% anger towards the friends or family of the victim.⁹

Though these may seem to be mundane disagreements, this does not moderate the violence which ensues. Evidence indicates that most murders are linked to this type of argument. According to the SAPS 2002/03 Annual Report, "the majority of murders started as an argument which degenerated into a fight and then an assault".¹⁰

Low self-esteem and status insecurity

Violence remains a serious problem in South Africa, notwithstanding declines in most categories reported in the 2005/06 SAPS statistics. Is South Africa still in a process of transition or are there other factors, perhaps not recognised by the NCPS, which contribute to violence? Would these factors help to explain why everyday disagreements provoke such extreme and pervasive violence?

One concept which is not discussed in the NCPS is that of self-esteem. International literature consistently links violence to low self-esteem and "fragile self-concepts".¹¹ Although at one stage analysts believed aggression may be linked to high self-esteem, this has since been refuted by research which finds that aggression is associated with a type of insecure and easily threatened inflated self-image which is underpinned by anxiety about one's worth or status: in effect a disguised low self-esteem.¹² Any disagreement or criticism, or even a perceived lack of consideration, may be experienced as undermining and threatening to one's self-image, thus provoking aggression.

Low self-esteem on its own then is not a predictor of violence. But the roots of violence are often found in mental-emotional states which serve as a psychological defence or compensation for low self-

esteem. Perhaps the most important of these for understanding why people react very aggressively to minor insults (whether real or perceived), is a state of mind, underpinned by low self-esteem, which is associated with an inflated idea of one's own worth or status.

Research on homicide in Canada and the USA indicates that levels of violence, as measured by homicide, correlate strongly with levels of inequality.¹³ While the authors see violence as being linked to "status competition", it is possibly more accurate to define this violence as linked to insecurity about status which is accentuated by high inequality.

The relevance of these findings is twofold:

- the importance given by individuals to their status, sometimes reflected in a pre-occupation with machismo, or consumer status symbols, but also associated with a disposition to over-react in relation to minor arguments, can be related to low self-esteem;
- these findings also indicate that self-esteem and personal feelings of worth are affected by social and economic factors.

Heightened levels of inequality may feed feelings of inferiority and insecurity among people relating to their status. 'Status' here is used in the subjective sense of beliefs or feelings about one's ability to achieve standing, acceptance or respect among members of one's family, peer group or community.

In so far as they increase insecurity about status, social and economic factors increase the psychological motivation to compensate for this inferiority through inflated ideas about one's own worth. This in turn may increase the disposition to feel threatened by minor acts which are interpreted as challenging one's status. As discussed in the next section, in addition to inequality, other social factors which inspire feelings of inferiority, powerlessness, isolation or marginalisation may heighten these effects.

Low self-esteem and status insecurity in SA

According to the NCPS, the main features of apartheid which were relevant to understanding violence in South Africa were:

- the violent nature of the apartheid system;

- the related tendency to rationalise crime as political; and
- structural deprivation and marginalisation.

The NCPS emphasised that marginalisation "is only in part economic". But the Policy ignored racism as the core ideology in terms of which exclusion was justified, and did not consider the enduring impact of apartheid racism, and how this was internalised by many South Africans.

Perhaps the key to understanding the uneven impact of apartheid on self-concepts lies in the differential impact of apartheid on the family. The legacy of apartheid is partly reflected in single parent families (characterised by an absent father), the absence of consistent primary caregivers, and families which are plagued by problems such as alcoholism and violence.

The impact of the past on the family as a socialising institution was not uniform. The family has also been resilient, in many cases serving as a nurturing environment for young children despite the many challenges which they face. Nevertheless, the level of damage to the family is linked to a pervasive problem of people not developing the integrated personalities which come from growing up in an emotionally nurturing environment. Many of those who might be prone to internalised racism, low self-esteem and status insecurity – and thus potentially prone to violence – might come from these damaged families.

While the NCPS did not broach the issue of the enduring impact of apartheid's racist ideology, it emphasised that there would be a range of factors fuelling insecurity. The insecurity which fed the growth of vigilantism and the demand for guns, for example, did not simply originate in anxieties about safety, according to the NCPS. It also fed off the broader social uncertainty and instability generated by change. In turn, this would contribute to other social problems as well, such as alcohol and drug abuse.

The NCPS also detailed various factors detrimental to social cohesion such as apartheid, and violence both during apartheid and the transition process. But given that it was written in 1996 when the framework for development and growth was still the Reconstruction

and Development Programme (RDP), the NCPS could not have anticipated the form that economic growth over the next decade would take, and the degree to which this would undermine social cohesion in South Africa.

As opposed to the apartheid period when inequality mirrored the division between black and white, the post apartheid period has seen rising inequality within the black community. The breakdown of communal solidarity linked to the dissolution of apartheid and the increased social mobility of sections of society, not only undermines cohesion but reinforces insecurity about personal worth. While people are now included culturally, for instance through mass television, and politically through the democratic system, they continue to be excluded structurally through poverty and economic insecurity. The phenomenon of 'conspicuous consumption' further reinforces this type of insecurity.

One of the legacies of apartheid is therefore likely to be underlying low self-esteem among many South Africans. Though internalised negative racial stereotypes might contribute to this, this would not be the only factor. Emerging from low self-esteem, as well as from the broader sources of insecurity, are likely to be pervasive insecurities about status.

In so far as the combination of low self-esteem and an inflated concept of one's worth are the volatile mix that leads to certain forms of aggression, it would not necessarily be the most disadvantaged who would be the most violent. In the same way that efforts to enhance gender equality might fuel feelings of insecurity on the part of men who are invested in ideas about male superiority, racial equality may also feed into insecurity among those with an investment in apartheid ideas of themselves as superior. These insecurities could contribute to gender and racial violence, as well as aggression against other men from their own social group.

For example, low self-esteem and status insecurity might take certain forms in the coloured community, and might help to explain the high levels of violence in this community.¹⁴ Linked partly to the continuing internalisation of racist concepts, members of the coloured community might be

prone to see themselves, in racist terms, as lacking worth because of their colour. But, on the same basis, their 'part white' identity, which in the past served to elevate them above Africans, might be related to a tendency to an inflated, but fragile, sense of self-worth.

Accentuated by alcohol and drug taking, and aggravated by widespread firearm ownership, low self-esteem and status insecurity can plausibly be seen as key factors driving high levels of interpersonal assaults in South Africa.

Conclusion

This article has focused on the link between self-esteem and interpersonal assaults in South Africa. It is clear that violence in this country reflects the interaction of many factors, and the intention is not to suggest that self-esteem is the only, or even the main one, that should be considered.

Despite the passing of time, the framework provided in the NCPS continues to be relevant today. But a key shortcoming may be its failure to consider dynamics related to low self-esteem, in part a product of racism, and how these might feed into violence.

Finally, it is important to note that none of the frameworks discussed here explain why – although women would also be affected by low self-esteem and status insecurity – the perpetration of violence remains overwhelmingly the terrain of men. Part of the answer may lie in the fact that, while men may tend to deal with status insecurity through violence, women may resort to other behaviours and means of expression.

Endnotes

- 1 In discussing the NCPS, this article is referring to the strategy document launched in May 1996. The NCPS document is now available at <<http://www.cjcp.org.za/otherresources.htm>>.
- 2 See: G Simpson and J Rauch, Reflections on the National Crime Prevention Strategy, in G Maharaj (ed), *Between Unity and Diversity: Essays on Nation Building in Post Apartheid South Africa*, David Philip Publishers, Cape Town, 1999, pp 295-314; B Naude, The South African National Crime Prevention Strategy: A Critique, *Acta Criminologica*, 13(2), 2000, pp 1-11; J Rauch, Changing Step: Crime Prevention Policy in

South Africa, and E Pelser and A Louw, Lessons from practice, in E Pelser (ed) *Crime Prevention Partnerships: Lessons from practice*, Institute for Security Studies, Pretoria, 2002; B Dixon, Cosmetic Crime Prevention, in B Dixon and E van der Spuy (eds), *Justice Gained – Crime and Crime Control in South Africa's Transition*, UCT Press, Cape Town, 2004, pp 163-192.

- 3 For a critique of this type of historical account of violence in South Africa see G Kynoch, Urban violence in colonial Africa: A case for South African exceptionalism, Paper presented at Wits Institute for Social and Economic Research, 15 May 2006.
- 4 The NCPS also highlighted other factors such as the absence of a national political consensus, inadequate support to victims of crime, access to firearms, and other factors highlighted by international research as causes of crime.
- 5 Some may argue that violence related to bullying and corporal punishment should also be added to this list but it is rare for these types of violence to be treated as criminal.
- 6 P Burton, A du Plessis, T Leggett, A Louw, D Mistry and H van Vuuren, *National Victims of Crime Survey: South Africa 2003*, Mono No 101, Institute for Security Studies, Pretoria, July 2004.
- 7 South African Police Service, *Annual Report of the South African Police Service for 2005/2006*, SAPS Head Office, Pretoria, 2006.
- 8 P Burton et al, op cit.
- 9 Ibid, p 130. In some cases (17%) victims also thought the assault was an attempted robbery.
- 10 South African Police Service, *Annual Report of the South African Police Service for 2002/2003*, SAPS Head Office, Pretoria, 2003.
- 11 M Levi, Violent Crime, in M Maguire, R Morgan and Reiner (eds), *The Oxford Handbook of Criminology*, Oxford University Press, Oxford, 2002.
- 12 B Bushman and R Baumeister, Threatened Egotism, Narcissism, Self-Esteem, and Direct and Displaced Aggression: Does Self-Love or Self-Hate Lead to Violence? *Journal of Personality and Social Psychology*, 75(1), 1998, pp 219-229.
- 13 M Daly, M Wilson and S Vasdev, Income inequality and homicide rates in Canada and the United States, *Canadian Journal of Criminology*, April 2001, pp 219-236.
- 14 See for instance A Altbeker, Murder and robbery in SA: A tale of two trends, chapter in forthcoming book to be published by Medical Research Council; T Leggett, Still marginal: Crime in the Coloured community' in SA *Crime Quarterly* No 7, Institute for Security Studies, Pretoria, 2004; S Mathews, N Abrahams, LJ Martin, L Vetten, L van der Merwe and R Jewkes, "Every six hours a woman is killed by her intimate partner": A national study of female homicide in South Africa, South African Medical Research Council, Cape Town, 2005.

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Cover photograph

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Abraham (17 years), a teenager living in the streets of Hillbrow for the last five years. Hillbrow is a high crime inner city slum of Johannesburg.

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