

South African CRIME QUARTERLY

No. 44 | June 2013



- > Violence, masculinity and legitimacy in the SAPS
- > Remand detention and pre-trial services
- > The diversion of young offenders
- > Case note: Automatic review of child offenders' sentences
- > Interview with Jenni Irish-Qhobosheane, Secretary of Police



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Police control the crowd as people protest against violence against children. Cape Town, South Africa.
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EDITORIAL

R209 million – that is what the South African Police Service has paid in civil claims in the past financial year, for wrongful arrests and a range of crimes, including rape, attempted rape, grievous bodily harm, corruption and assault committed by police officers.¹

The South African Police Service has suffered round after round of blows to its public image, so the news that millions of rands of public funds are required annually to pay off those whose rights are violated by the police is just another example of the multitude of problems the organisation faces. Solutions to these problems seem to remain elusive. If Andrew Faull's assessment of why the police resort to violence against civilians is correct, the trite assessment that more oversight, increased arrests of wrongdoers in the police, and more stringent recruitment criteria will solve the problem, falls far from the mark.

In this edition of SACQ Faull reflects on his recent experiences following the daily grind of police work in the Eastern and Western Cape. His conclusion – that the police use violence in an effort to gain respect and stamp their authority in communities, and that this is a reflection of deeply entrenched notions of masculinity – implies that the solution will be complex and requires a societal change. The violence used by police in the contexts of their work is merely an extension of violence used for these same reasons in other social contexts.

The extent to which the violence experienced at all levels of society is connected was also recently demonstrated through the findings of the Centre for Justice and Crime Prevention's school violence survey.² The survey showed that over the past five years there has been no change in the high levels of violence and aggression experienced by children in South African schools. It also found that corporal punishment remains the punishment of choice for many educators, despite the legal ban, reflecting how wedded we are to the notion that violence is the only way in which figures of authority – teachers, parents, police officers – can achieve 'control' and 'respect'. If we understand all expressions of societal violence as reflective of this basic belief system, and agree that it needs to change, the solutions will be quite different to those we have offered so far.

Also in this edition, we introduce a new feature titled 'Case Notes'. The first case note, contributed by Ann Skelton, considers the findings of courts in two provinces regarding the right to automatic repeal in cases involving child offenders. This feature is intended to offer readers accessible reflections on recent judgements and identify their policy relevance.

Staying with child justice, Hema Hargovan's article offers an assessment of a diversion programme offered by a non-governmental organisation and identifies the difficulties associated with assessing the impact of such programmes. Finally, Clare Ballard and Ram Subramanian look at efforts to reduce pre-trial detention in South Africa and ask whether the time is right for the implementation of measures that have been shown to work.

In preparing this edition of SACQ I have been assisted for the first time by a small team of sub-editors, who will be working with me and SACQ contributing authors to ensure that the articles you read here

remain of a high standard. The sub-editors are volunteers who offer their time and experience to the journal, and to the range of articles submitted for publication. I look forward to working with them and welcome them to the SACQ team.

Chandré Gould (Editor)

NOTES

1. SA News, SAPS pays over R200 million in civil claims, 11 June 2013, available at <http://www.sanews.gov.za/south-africa/saps-pays-over-r200m-civil-claims> (accessed 12 June 2013).
2. Patrick Burton and Lezanne Leoschut, School violence in South Africa: results of the 2012 national school violence survey, Cape Town: Centre for Justice and Crime Prevention, 2013.

FIGHTING FOR RESPECT

Violence, masculinity and legitimacy in the SAPS*

ANDREW FAULL**

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This paper presents preliminary reflections on station-level discourse and practice in relation to violence and authority in two police precincts. The data were gathered during the six months following the Marikana massacre. The response of police who were not present at the mine shooting was to instinctively defend criticism of their colleagues who were involved. The article presents information to suggest that many SAPS members believe the use of violent force in the performance of their duties is necessary to gain the respect of the communities they serve. The article considers this in relation to constructions of masculinity.

On 26 February 2013, Mido Macia, a 26-year-old Mozambican taxi driver, was handcuffed to the back of a South African Police Service (SAPS) van and dragged hundreds of meters through the streets to the Daveyton police station. Two hours later he was found dead in his holding cell. An autopsy would reveal that he died of hypoxia, a lack of oxygen to the brain, after suffering extensive internal bleeding.² Prosecutors interpreted this, and blood spatters on Macia's holding cell walls, as evidence of a beating at the hands of police at the station.³

Much of the incident was captured on the cell phones of bystanders at the crowded taxi rank at which it began. Footage shows police officials attempting to restrain Macia in order to affect an arrest, apparently because his taxi was illegally parked. Macia resisted and police handcuffed him to the inside of the van, presumably in the hope that he would submit and climb into the van. He

didn't, and as he hung awkwardly from it, with only his wrists cuffed to the inside, the driver of the police van pulled away.

At the 8 March bail hearing for the nine SAPS officials charged with Macia's murder, one of the accused, Warrant Officer Ncema, told the court that Macia had insulted him as a useless policeman when he had tried to arrest him.⁴ Importantly, this alleged insult and the resisting of arrest, unfolded in front of dozens of bystanders.

Hopefully the investigation into Macia's death, and the trial of the accused, will make clear what happened that day. But one narrative appears quite likely: A member of the public challenged the authority of SAPS officials; he *disrespected* the SAPS. He was not rich or middle-class; he was not a South African. His challenge was made in a crowded public space, in daylight. The SAPS officials involved felt humiliated. Once they had secured him in the privacy of the police station, they punished him for publicly embarrassing them. They beat him and he died.

Of course this is only one possible hypothesis explaining what happened that day. But this article presents data gathered through participatory

* The author would like to thank Elona Toska, Chandré Gould, Bill Dixon, Anthony Collins and an anonymous reviewer for their very helpful comments on earlier draft of this paper.

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observation that suggest that violence is seen by some police as a means of gaining the respect of citizens, even if this means using lethal force.

From mid-August 2012 to the end of February 2013, I spent over 600 hours with detectives, patrol officials and station staff at two SAPS stations in the Cape Town metropolitan area. The research was ethnographic in nature and involved shadowing station staff as they went about their daily routines. The first station where I worked serves a number of Cape Town's older and most violent townships.

I began work at this station in mid-August 2012, shortly before the 16 August killing of 34 striking mineworkers by police at Marikana in the North-West. In the months following the incident, I regularly raised the topic of Marikana with the police I shadowed at the two stations. Although some expressed sadness at the killing of the workers, almost without exception they tried to convince me that the police officials who had pulled their triggers that day had done so legitimately, lawfully, and correctly; that they had done nothing wrong.

These responses were not surprising, as solidarity and peer protection are long established characteristics of police organisations.⁵ But I believe there is another reason SAPS officials so quickly defended the slaughter of 34 men at the hands of their colleagues: they abhorred the idea of being disrespected. It was clear within my first weeks at the station that the majority of officials working there did not believe the communities they served respected them, and did not believe South Africans in general respected them.

Station mythology abounded with stories of police attending complaints and returning to their vehicles to find the tyres slashed or wheels stolen. I was told foot patrol was not possible in the area because the community would stone patrollers.⁶ Many police refused to walk the 50 meters to a shop next to the station for fear of being attacked for their firearms, while others told me that when they were off duty they would not admit to strangers that they were police officials because

this would put them in danger. They saw these (imagined) violent attacks as signs of disrespect.

It became clear during my research that many officials believed respect was earned through force. For example, one night I was on patrol with two crime prevention members,⁷ both young male constables. It was shortly after 1am and the streets of the township were empty. Members of the Tactical Response Team (TRT) drove past us in the street. While not belonging to any station, they were deployed in the area as a 'force multiplier' to perform 'crime prevention' duties. I asked the constables what they thought of the TRT, referring to a popular investigative journalism television programme, which had recently portrayed them as abusive.⁸ The driver responded, 'They are good but we don't have a backbone in the police. They don't appreciate what the TRT are doing and so they are demotivated.'⁹ The 'we' he was referring to was the SAPS at large, and the 'they', the TRT. He went on, 'Since they have been deployed here there has been a big decrease in crime. People respect them.' I asked why he thought people respected them and he said, 'Because they beat people [...]. If they have suspects they torture them and the person gives up everything. It's good.' I asked whether he knew what kind of techniques they used and he said, 'They use that one with a bag over the head of the old days.'

Of course this is only hearsay. The constable might never have seen such acts taking place, nor was he able to provide me evidence of a post-TRT crime decline. And yet even if it was without basis, it is important that the constable presented the story in this manner, suggesting that torture and violence reduce crime. In the police organisational context, stories that are rich with symbolic power lay a foundation of strategies and knowledge, which guide police action.¹⁰ The selection of some themes, like torture, over others, lends them credence. It gives them power in informing organisational identity and culture.¹¹ The chosen theme in this case is that violence earns respect.

Noting this, let's consider another story told at the same station. During the Monday morning detective branch meeting, an officer announced

that 'we almost lost detective X yesterday'. The story that followed went something like this:

Police were called to the area following information that a man was in possession of an illegal firearm. After apprehending the man a shootout broke out and the suspect was hit eleven times. Detective X was passing by on the way back from his own crime scene. Caught in the line of fire, a bullet from the shootout passed through the back window of his unmarked state vehicle, missing his head by a couple of centimetres, and exiting through the windscreen. When the standby officer from the detective branch arrived on the scene to support his traumatised colleague, the police who had fired the shots were found picking up their bullet casings, covering their tracks.

A few days later, following a reconstruction of the crime scene by senior detectives in the branch, a new version of the story emerged, shared with me during a private conversation. It went something like this:

Plainclothes police were called to the area following information that a man was in possession of an illegal firearm. They took the man into the street and started beating him. The man tried to flee the beating and the plainclothes police opened fire, hitting him eleven times. Detective X was passing by on the way back from his own scene. Hearing the gunshots and seeing the commotion in his rear view mirror, he stopped his unmarked state vehicle. The police involved in the shooting saw what they thought was an interfering passer-by stopping to watch them. Wanting to send a message to him that he should stay out of their business, that they didn't want witnesses to their crime, they fired a shot directly at the driver's seat. The bullet passed through the back window, missing the driver's headrest by a couple of centimetres, and exiting through the windscreen. The bullet was intended for Detective X. When the standby officer from the detective branch arrived on the scene to support his traumatised colleague, the police who had fired the shots were found picking up bullet casings, covering their tracks.

Although the shooting is not in doubt, some details of these narratives remain conjecture. Yet they are important. That this latter narrative emerged within the detective branch of a SAPS station is particularly telling. It indicates that the narrative is plausible to those within the SAPS. It suggests that some police officials expect such behaviour from their colleagues, that it makes sense to them in their experience of the organisation. They accept the fact that SAPS officials might go as far as using lethal force against strangers if they deem those strangers to be interfering and disrespectful of their occupational choices, even if those choices are illegal and involve murder.

My second research station was near the inner city and served busy commercial and residential spaces. Many of those who populated the space of this precinct had more social and economic capital than the police working there. And yet it was at this station that I realised what might be a golden rule for those not wanting to unleash the violence of the state: don't challenge a police official.

I came to this conclusion based on two observations:

- 1) Police at the station used the charge of 'riotous behaviour' to arrest anyone whom they wanted to punish or teach a lesson, including those who disrespected them;
- 2) Persons who continued to challenge police once they had reached the confines of the police cell holding area had a good chance of being physically slapped into silence, despite the holding area's CCTV camera recording the abuse for station and cluster management.

Contempt for a disrespecting public is not unique to the SAPS. Loftus writes of English police putting civilians through the 'attitude test', stopping people for casual questioning with little intention to arrest. Civilians pass the test by 'being polite, apologising or admitting guilt, essentially by feigning respect for the police'.¹² The act serves as a reminder of police authority.

At the township station a version of the 'attitude test' played itself out in a frenzy of stop and searches. Young men in their teens or early twenties were routinely stopped and patted down as police searched for weapons and drugs. The young men invariably consented by throwing their hands in the air or leaning against the police car. Knives and other stabbing tools were routinely collected but the men were never taken into custody. It seemed that this exchange was so routine that each knew his or her part and none were in danger of failing the test.

But it was in the holding cells of the city station, the space in which detainees are 'processed' before being allocated a cell, that I witnessed a more violent version of the test. People were slapped and punched, sworn at, laughed at and ignored, often only because they dared to ask a man in uniform why they had been brought into police custody.¹³ In addition to the CCTV camera recording the scenes playing out in the room, these abuses took place in front of other police, none of whom ever intervened in the business of their violent colleagues. Indeed, removed from the public gaze, it might be said that this violence was for the most part a performance by (*male*) police for (*male*) police, an intra-group enactment of how violence earns respect. The performance of, and silence around, violence in this private space served to remind police of their occupation's unique allowance for use of force. And while this force was illegal, the silence around it made it organisationally acceptable.

On a number of occasions police officials told me how effective it was that otherwise non-compliant civilians suddenly obeyed their instructions after a slap to the side of the head. The information was shared with me as though it were a confidential trick of the trade, the magic slap that brings respect. In less violent jurisdictions police command such respect by issuing a fine. But in South Africa, where SAPS officials see fines as belonging to the lesser realm of traffic and metro police, it seems the *klap*, or the threat of one, is still considered the currency of the day.

WHY VIOLENCE EARNS RESPECT

There are a number of interrelated interpretations of why many police believe the use of force earns them respect.

In addition to enforcing the occupational culture's view of the law, police officials in any jurisdiction in part enforce their personal conception of order on those they police.¹⁴ Many of these conceptions are formed outside of the police organisation, drawn from personal upbringing, primary socialisation at home, at school and in society more broadly. Drawing on a range of research, Anthony Collins suggests that many forms of violence have been normalised in South African society at large; that in many contexts it is 'socially accepted [...] commonly understood as benign, necessary, justifiable'.¹⁵

The Centre for the Study of Violence and Reconciliation's (CSVR) study on the nature of violent crime in South Africa also identified 'perceptions and values related to violence and crime' as one of the factors behind the high levels of violence in the country. The summary states that:

[The widespread tolerance of violence] reflects widely held norms and beliefs which see violence as a necessary and justified means of resolving conflict or other difficulties.... [including] the perception by young men that they need to be able to use violence to protect themselves and to obtain the respect of others.¹⁶

So, while the acceptance of violence is widespread in South Africa, it is most accepted by young men. It has been convincingly suggested that constructions of masculinity in South Africa contribute to young men suffering grossly disproportionate levels of violence and victimisation.¹⁷ This is in part a result of their inability to live up to popular expectation that men should earn good money, be virile, show leadership and be physically and mentally tough.¹⁸ Ratele and Letsela have suggested that twelve per cent of premature male deaths in South Africa are the result of 'masculine beliefs' characterised by

sexual dominance and risk taking, and that such traits are amplified in male-heavy environments.¹⁹ Police stations have historically been populated by men and saturated by cultures of machismo.²⁰ Although the SAPS has made massive strides, with its workforce now consisting of 34% women, a disproportionate number of police working on the streets are still male. This may in part be because women are considered a risk to themselves and their partners when working on the streets, while men are expected to bravely face danger and risk.

In light of the above, SAPS officials, particularly men, should be viewed as members of communities and families where violence, particularly violence by men, against men, has been normalised as a tool for earning respect. It is therefore unsurprising that many members of the SAPS embrace the view that violence teaches lessons and solves problems, and that it builds respect.

On a number of occasions during my research in Cape Town, managers would compare their subordinates to children, suggesting they were ill-disciplined. They threatened them with organisational sanctions in the belief that this would 'correct' them. At other times police told me they were doing the work of parents while on patrol, teaching errant school children what was right and wrong by taking them into custody and lecturing them, but also slapping and kicking them. Some officials told me that they beat their own children because it was how they had been taught discipline when they were children. Yet many social observers accept that South Africa's colonial and apartheid history, particularly its entrenchment of migrant labour, tore many families apart. In its wake it left children raised without parents, nurture or nutrition, often replaced by violence and neglect.²¹

The individual, familial and community normalisation of violence is at times bolstered by public figures in leadership positions, who believe that a threat of violence delivered by the state will reduce crime and build respect. This view is supported by aggressive rhetoric that has come

from politicians over the past decade.²² In March 2013 President Zuma stated, against all other evidence, that South Africa is not a violent country.²³ His comments were delivered in defence of the country in the weeks following para-Olympian Oscar Pistorius's shooting of his girlfriend in February 2013, and the litany of negative international media coverage that followed. And yet in 2006 Zuma was reported as saying that as a young man he would 'knock out' a gay man if one had stood in front of him (inferring his presence would be taboo and violence would be corrective).²⁴ Furthermore, it was reported in 2011 that Zuma had appointed Bheki Cele as national police commissioner to build a 'mature, visible police force that brought back its fear factor...[and portrayed an image to the public] that says the police must be feared and respected.'²⁵

Other leaders have also romanticised violence. In March 2013 it was reported that the MEC for Education in the Eastern Cape, Mandla Makupula, told a gathering of school learners that they didn't have any rights. Referring to a learner who had taken his father to court because he didn't want to go to initiation school, he told learners, 'I wish he could have been my child, I would have hit him on the head with a knobkerrie and he would have gone to that initiation school crying.'²⁶ The department defended his comments, saying 'the MEC recognised that this was an engagement with young people with a limited attention span, it was important that his remarks were interspersed with a high level of humour and reference to day-to-day experiences.'²⁷ This defence is equally emblematic of the problem, unintentionally confirming that violence is a daily experience in the lives of youth, but presenting it as being funny.

In a country where the threat of violence is literally and rhetorically used to teach respect, and where violent crime threatens the populace's respect for government,²⁸ it makes sense that some power structures, particularly those deployed within the SAPS, would tolerate, even encourage, the use of violence and force to 'beat' a respect for the state into the population.

Hornberger offers one compelling explanation for the prevalence of the use of violence by SAPS officials. Exploring attempts to introduce human rights policing into the SAPS, and having observed the normalisation of violence in daily policing, she suggests police resort to violence because they lack the personal reference point required to position themselves in the middle-class, human rights-oriented front stage of policing.²⁹ She suggests that instead

most police officers [invest] in the backstage [which allows] them to get respect from colleagues... The image of potency allowed by the backstage has helped police officers to remain motivated and avoid feelings of humiliation and inadequacy... [which arise] where formal education standards are missing, where promotions have come to a halt, where challenges to masculine identity are seen as threatening, where the difference between middle-class values and police officers' bias towards lower and working-class values becomes insurmountable.³⁰

In both my most recent experiences with police, and in past conversations and interviews with others, there have been individuals who have bought into a discourse of mutual respect, believing that if they treat people with respect, they will be respected. Indeed, focus groups and social attitude surveys both suggest this is what South Africans want from police,³¹ an approach known as 'procedural justice'.³² But my recent experience suggests that the organisational script in which violence earns respect, remains stronger than that of human rights and mutual respect, and is growing.

Then there is the fact that most pro-active police work (stop and search, roadblocks, etc.) is focused on men. In such contexts, a playing out of archetypal roles emerges: hero and villain, cop and crook, but always man and man. Whitehead suggests that in contexts like these, where a man's sense of being a man comes into conflict with another man *as a man*:

[v]iolence by [either man] may be regarded as functional in maintaining an idealised and internalised sense of manhood in the face of external realities that point to his inability to do so.³³

I am not suggesting that every male SAPS official is inherently violent, nor that those who are violent necessarily represent a 'hegemonic masculinity' against which all other male SAPS officials measure themselves.³⁴ As Morrell *et al* point out, violence in South Africa is commonly practised by many men, but this does not automatically make it an element of a national hegemonic masculinity.³⁵ Rather, it is the realm in which violence is practised – in this case the police organisational context – that can establish violence as a legitimate part of hegemonic masculinity, while outside of the organisational realm the violence might remain viewed as illegitimate. Is this what was reflected by my subjects' defence of the Marikana shootings?

Another explanation for the acceptance of violence is the mythology that exists around apartheid policing, the idea that because police could previously shoot at almost anyone, crime levels were low and police were respected. This belief results in statements like this one from a warrant officer interviewed in 2009:

Crime is out of control. If they manage to change Section 49 [so that police can shoot more easily], we will be back where we were before. The reason we are where we are is that the criminals have no respect for us. They have far too much leeway; they have far too many rights in this country. Our hands are literally tied behind our backs. I'm not saying we should go out and shoot and kill everyone running around, but they need to give us back our respect. When they give us back our respect, the crime rate will come down.³⁶

It is easy to idealise the past. Despite most officials acknowledging the abuses of the apartheid police, both black and white, police still imagine that organisation as one that was characterised by meritocracy, justice and respect.

And while the past is continually re-idealised, many SAPS officials have only negative things to say about the present, both about the government of the day, and about the managers who steer the organisation. Many disrespect the people they share offices with. One might say that some police officials are dangerously close to losing respect for themselves.

Consider, for example, that none of the officials I asked wanted their children to become police officials when they were older. Instead they stressed the importance of education and study as keys to 'better' occupations. Steinberg found the same emphasis on education in his work in Gauteng.³⁷ In that, and in subsequent work, he has suggested that some South Africans, in some contexts, do not consent to being policed by the SAPS; do not recognise their authority.³⁸ In effect they disrespect them.

As mentioned above, when off duty, some police in my recent study would not tell strangers that they were police officials. They framed this as if the revelation would put them in danger. But might there also be an element of shame to their concealed occupation? Consider the view of a senior officer interviewed in 2009:

It's becoming embarrassing for me when I am at a private place, for instance at church, and they ask me, 'What do you do?' and I say, 'I am a police officer.' You can immediately see for yourself – these people, if you don't know them well, they will immediately withdraw a bit and think you are corrupt, or illiterate, or a poor performer. It's sad that that's the association with the police.³⁹

Many people who joined the police in the past decade did so because the illusion of a meritocratic society in which they could be whoever they wanted to be, had failed to materialise. Joining the SAPS provided the best job security and income they could find. In 2009 I interviewed a young constable who told me 'I can't provide for my family [...]. The sad part of it all is that I live in a shack. It is hard for me [...]. I stay in the police because the family has got to

eat.' At the time I suspected he was looking for sympathy, bending the truth. But during this research I visited the homes of enough police officials to know that many do live in backyard shacks and former RDP houses – and it was my turn to feel shame. While a new constable earns twice the average household income of a male-headed black African family in South Africa,⁴⁰ that income falls far short of what is needed by a sole breadwinner who supports unemployed parents, siblings, and children, often split between two provinces. This is particularly true if a constable hopes to enjoy the more luxurious fruits of this young and grossly unequal capitalist democracy.

Bruce has suggested that many South Africans suffer low self-esteem and insecurity about their status among peers, and that this feeds the country's high levels of inter-personal violence, particularly violence perpetrated by men. Citing research that correlates low self-esteem and an inflated concept of self-worth as drivers of aggression, he suggests that the most disadvantaged citizens would not necessarily be the most violent.⁴¹ Extending this hypothesis, is it not plausible that some members of the SAPS experience a form of emasculation as they move from their home to their work lives? If true, this effect is likely most pronounced among black African officials, many of whom are drawn from the margins of the working class and are most likely to be the sole breadwinners responsible for the upkeep of extended social networks. Black African males currently represent over 50% of all SAPS personnel.⁴²

Of course constructions of masculinity in South Africa are not neatly delineated by race. Reflecting on, and generalising, the violence of a white police official, Schiff suggests in her doctoral thesis that:

the need to conform to strong cultural standards of masculinity within the context of the police can lead to a severely restricted coping repertoire that is unable to conceive of solutions to problems other than within a narrow range of behaviours that are mostly rooted in violence.⁴³

These male officials, who as South African men are often expected to provide for their families⁴⁴ (often extended families: grandparents, nieces/nephews included), find they are unable to. They have failed in the *most intimate* of spheres, because they cannot provide for themselves or their family the life that society imagines they should. Moreover, they feel disrespected in the *most public* of spheres, because they wear the blue of the SAPS. This compounded emasculation echoes that experienced by black African men in the colonial and apartheid-era labour systems. Emasculated by slave-like power structures and removal from family life, many asserted their masculinity in part through violence.⁴⁵ Might there be some truth in the suggestion that some men within the SAPS seek their respect through violence at work because of the manner in which South Africa's gross inequality, past and present, leads to unmet expectations and emasculation? Does the workplace provide the stage for the acting out of a script that in part informs masculinity for many in the SAPS? These are questions that require further reflection, with profound implications for the SAPS.

CONCLUSION

I spent the week of 26 February with detectives at the city police station. When, on the morning of the 27th, I asked three of them if they had heard the news about Macia's death, they expressed disgust at the actions of their colleagues. Two of them literally dropped their heads in shame, preferring not to make eye contact as they wondered out loud how police officials could do such things. But just the previous day these same detectives had tried to convince me that it was normal to assault young men if they were found walking the streets of Cape Town's townships at night, asking rhetorically 'Why are they there, if not to commit crime?'

So while there are limits to what many police consider a necessity for violence in their work – dragging a man behind a police van, resulting in his death, perhaps representing that limit – many embrace an underlying logic that says the state allows police the use of force because force and

violence prevent crime. This logic suggests that if police are forceful enough, civilians will, out of fear, respect the state and South Africa will be at peace. Of course there are many police who abhor violence of any form. But they tend to turn a blind eye to the violence of their colleagues. And so the message too often communicated by police is that it's okay to use violence to solve problems. Their violence serves to remind South Africans that the agents of the state can be as threatening to their safety as any 'criminal', and begs the question: Does a police organisation and its members, in embracing such violence, deserve the respect of the population? Probably not, but considering the context in which they live and work, might police officials be forgiven for thinking they do?

When, at his bail hearing for Macia's murder, Warrant Officer Ncema told the court Macia had insulted him, it is likely he was looking for sympathy from his audience. When presidents threaten violence against gay men and MEC's threaten violence against learners, one might spare some sympathy for a police official, humiliated in public, possibly humiliated daily, for thinking that violence is the logical tool with which to teach lessons and earn respect.



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NOTES

1. I consider these early reflections and hope to develop them in detail over the coming year. As such, comment and criticism is welcome and can be directed to andrew.faulk@crim.ox.ac.uk.
2. Sapa, Mido Macia died from hypoxia – autopsy, *City Press*, 11 March 2013, available at: <http://www.citypress.co.za/news/mido-macia-died-from-hypoxia-autopsy/> (Accessed 14 March 2013).
3. BBC, Mido Macia: South Africa police accused denied bail, 12 March 2013, *BBC News Africa*, available at: <http://www.bbc.co.uk/news/world-africa-21761515> (Accessed 14 March 2013).
4. Noni Mokati, Murder-accused cops' urgent bail bid, *IOL News*, 9 March 2013, available at <http://www.iol.co.za/news/south-africa/murder-accused-cops-urgent-bail-bid-1.1483589>.... (Accessed 9 March 2013).
5. Robert Reiner, *The Politics of the Police*, 4th edition, Oxford: Oxford University Press, 2010, 122-131.
6. Once, while on patrol in a street lined with busy shebeens, the van I was driving in was hit by a stone

- hurled by a reveller. On another occasion we were called to assist a patrol van in our group after a stone was thrown at, and smashed, the passenger window near a dark railway crossing. So there appeared to be some truth to the stories at the station. However, there were far more times that we did leave police cars unattended, or walked through communities to hand out leaflets, when cars were not vandalised and there appeared to be little threat to our personal safety.
7. 'Crime Prevention' units at the station work eight-hour shifts based on an analysis of crime trends. They are not expected to attend to complaints regarding crimes that have already taken place ('bravo crimes'), but rather stop and search young men, respond to crimes in progress, and increase the visible presence of police in key locations.
 8. 3rd Degree, *amaBerete Terrorise Townships*, 23 August 2012, available at: <http://www.youtube.com/watch?v=rBehRHqQiy4> and www.youtube.com/watch?v=L8gvUm9dGOA and www.youtube.com/watch?v=EpJs985DfpA (Accessed 14 March 2013).
 9. All quotes provided are extracts from my fieldwork diary. I have done my best to record the exact wording of the police officials.
 10. Clifford Shearing & Richard Ericson, Culture as figurative action, *British Journal of Sociology*, 42 (1991), 481-506.
 11. Simon Holdaway, *Inside the British police: A force at work*, Oxford: Basil Blackwell Publishers, 1983, 62.
 12. Bethan Loftus, Police occupational culture: classic themes, altered times, *Policing and Society*, 20:1, (2010), 1-20, 10.
 13. I have never known any police official to formally state the reason for arrest when forcing someone into the back of a van, and this remained true during these six months.
 14. Peter K. Manning, The police: mandate, strategies and appearances, reprinted in Tim Newburn (ed), *Policing: key readings*, Cullompton: Willian Publishing, 2005, 199.
 15. Anthony Collins, Violence is not a crime: a broader view of interventions for social safety, *South African Crime Quarterly* 43 (2013), 30.
 16. *Why South Africa is so violent and what should be done about it: statement by the Centre for the Study of Violence and Reconciliation*, Tuesday 9 November 2010, 4.
 17. Mohamed Seedat, Ashley Van Niekerk, Rachel Jewkes, Shahnaaz Suffla, Kopano Ratele, Violence and injuries in South Africa: prioritising an agenda for prevention, *The Lancet* 374, 19 September 2009, 1011-1022.
 18. Kopano Ratele, Masculinity and male mortality in South Africa, *African Safety Promotion: A journal of inquiry* 6(22) (2008), 35.
 19. Lebohang Letsela and Kopano Ratele, *Masculinity and perceptions of risk: factors to premature male mortality in South Africa*, 2009, available at: http://www.brothersforlife.org/sites/default/files/docs/Men_and_their_perceptions_of_Risks.pdf (accessed 21 March 2013).
 20. Reiner, *The Politics of the Police*, 127-128.
 21. See for example Barbara Holtmann, *What it looks like when it's fixed: A case study in developing a systemic model to transform a fragile social system*, Barbara Holtmann: Johannesburg, 2011, 28-43.
 22. See for example Mixed Messages in Andrew Faull & Brian Rose, *Professionalism and the Police Occupation in South Africa: what is it and how can it help build safer communities?* Institute for Security Studies Occasional Paper No. 240, 2012, 8-11 available at: <http://www.issafrica.org/pgcontent.php?UID=31861%267> (accessed 14 March 2013).
 23. Sapa, South Africa is not violent – says Zuma, *Mail & Guardian*, 7 March 2013, available at: <http://mg.co.za/article/2013-03-07-south-africa-not-a-violent-country-says-zuma> (accessed 14 March 2013).
 24. Sapa, Zuma invokes gay wrath, *News24*, available at: <http://www.news24.com/SouthAfrica/News/Zuma-invokes-gay-wrath-20060926> (accessed 14 March 2013).
 25. Staff Reporter, Don't hold your breath for action on Cele findings, *Mail & Guardian*, 11 March 2011, available at: <http://mg.co.za/article/2011-03-11-dont-hold-your-breath-for-action-on-cele-findings> (accessed 14 March 2013).
 26. Asanda Nini, You're not entitled to any rights, MEC tells pupils, *DispatchOnline*, 12 March 2013, available at: <http://www.dispatch.co.za/youre-not-entitled-to-any-rights-mec-tells-pupils/> (accessed 16 March 2013).
 27. Adrienne Carlisle, Rights groups take on education MEC, *Dispatch Online*, 14 March 2013, available at: <http://www.dispatch.co.za/rights-groups-take-on-education-mec/> (accessed 17 March 2013).
 28. The Afrobarometer's 2012 results suggest South Africans think crime is the second most pressing concern facing the country, and which government should address, superseded only by unemployment. Julia Hornberger (below) has suggested that the ability to control crime has become a barometer by which the effectiveness of South Africa's government is measured.
 29. Julia Hornberger, *Human Rights and Policing: the meaning of violence and justice in the everyday policing of Johannesburg*, Abingdon, Routledge, 2011.
 30. Hornberger, *Human Rights and Policing*, 126
 31. Ben Bradford, Aziz Huq, Jonathan Jackson and Benjamin Roberts, What price fairness when security is at stake? *Antecedents of Police Legitimacy in South Africa*, forthcoming in 2013, available in draft form at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132609 (accessed 19 March 2013); Andrew Faull, *Corruption in the South African Police Service: civilian perceptions and experiences*, ISS Paper 226, Pretoria: Institute for Security Studies, October 2011.
 32. For an overview of the procedural justice literature see Anthony Bottoms & Justice Tankebe, Criminology beyond procedural justice: a dialogic approach to legitimacy in criminal justice, *The Journal of Criminal Law & Criminology*, 10 (1) (2012), pp. 119-170; Andrew Faull & Brian Rose, *Professionalism and the South African Police Service: what is it and how can it help build safer communities?* ISS Occasional Paper 240, 2011, (accessed 10 June 2013).
 33. Antony Whitehead, Man to Man Violence: How Masculinity May Work as a Dynamic Risk Factor, *The Howard Journal*, 44 (4) (2005), 415.
 34. RW Connell and James W Messerschmidt, Hegemonic Masculinity: Rethinking the Concept, *Gender & Society* 19 (2005), 832.
 35. Robert Morrell, Rachel Jewkes, Graham Lindegger, Vijay Hamlall, Hegemonic Masculinity: Reviewing the Gendered Analysis of Men's Power in South Africa, *South African Review of Sociology* 44(1) (2013), 5.

36. Andrew Faull, *Behind the badge: the untold stories of South Africa's Police Service Members*, Cape Town, Zebra Press, 2010, 117-118.
37. Jonny Steinberg, *Thin Blue: the unwritten rules of policing South Africa*, Jeppestown: Jonathan Ball Publishers, 2008.
38. Jonny Steinberg, Establishing police authority and civilian compliance in post-apartheid Johannesburg: an argument from the work of Egon Bittner, *Policing and Society: an international journal of research and policy* (2011), 1-15.
39. Faull, *Behind the Badge*, 177-178.
40. South African Census 2011 data suggest the average annual income for a black African male-headed household is R60 000, while the average across all male-headed households is R103 204. The starting salary of a SAPS constable, the majority of whom are now black African, is roughly R120 000 per year. See: Statistics South Africa, Statistical Release (revised) Census 2011, available at: <http://www.statssa.gov.za/Publications/P03014/P030142011.pdf> (accessed 16 March 2013).
41. David Bruce, Racism, self-esteem and violence in SA: Gaps in the NCPs' explanation?, *SA Crime Quarterly*, 17 (2006), 34-35.
42. South African Police Service, 2012. *Annual Report, 2011/12*, available at: http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/index.htm (accessed 21 March 2013).
43. Kerry-Gaye Schiff, *Discourse of workplace violence: painting a picture of the South African Police Service*, unpublished doctoral thesis, Unisa, 2010, 370.
44. For an overview of literature on masculinity and violence see Lukas Muntingh and Chandré Gould, *Towards an understanding of repeat violent offending: A review of the literature*, ISS Paper 213, 2010, available at: <http://www.issafrica.org/uploads/213.pdf> (accessed 21 March 2013).
45. Robert Morrell, Of boys and men: masculinity and gender, *Journal of Southern African Studies*, 24(4) (1998), 605-630; Keith Breckenridge, The allure of violence: men, race and masculinity on the South African goldmines, 1900-1950, *Journal of Southern African Studies*, 24(4) (1998), 669-693.

LESSONS FROM THE PAST

Remand detention and pre-trial services

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A 1997 project established by the Vera Institute of Justice, a New York-based non-government organisation, aimed to alleviate overcrowding in South African prisons by assisting magistrates in bail proceedings and thereby decreasing the number of admissions into awaiting trial facilities. Understanding the context in which the project operated leads to the important observation that efforts to launch and sustain discrete experiments in justice innovation will necessarily come under strain when faced with aggressively adverse macro circumstances, like the ones that faced Vera's pre-trial project. However, the legal and social milieu has changed over the last twelve years. It is perhaps time to once again explore how innovations in criminal justice administration (a much-needed initiative) might best work in the various criminal justice management areas, given the discrete circumstances of each.

In 1997, in response to the problem of overcrowding in South African prisons, the Vera Institute of Justice (Vera), a New York-based NGO, established a demonstration pre-trial services project aimed to reduce the number of admissions into remand detention. The project, based at various court centres in the country, sought to provide magistrates with independently verified information about defendants at arraignment, which, it was hoped, would make the bail process more efficient, equitable and informed.¹ Although portions of the pilot project did survive, discretely, in a spinoff court project in Port Elizabeth,² Vera's pre-trial services project was not adopted nationally. In this article we firstly discuss Vera's pre-trial project, its purpose and its results. Secondly, we sketch the social and politico-legal context in which the project operated, for it is clear

that public concern about crime and public safety in general, and the subsequent legislative and judicial responses in particular, played some role in the project's ultimate demise. We suggest, finally, that what might not have worked a decade ago, is possibly worth revisiting today, in South Africa's current social and political climate. Incremental shifts in the legislative terrain and policy indicate a growing concern around the excessive use of remand detention and the conditions to which remand detainees are exposed. Coupled with such shifts are more recent efforts on the part of government to deal with the problems in the criminal justice system, in particular the backlogs in South Africa's criminal courts.

THE VERA PRE-TRIAL PROJECT

During the late 1990s South African prisons experienced an unprecedented growth in the remand detainee population.³ Unsurprisingly, this period of South African history is characterised as one in which public anxiety about crime and public safety

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issues was at an all-time high.⁴ Part of this anxiety stemmed from a prevailing misconception amongst the public that the right to bail was to blame for the high levels of violent crime, and it was partly fuelled⁵ by a number of highly publicised cases in which crimes were committed by offenders who had been released on bail.⁶ Public outrage put pressure on government to ensure judicial accountability in matters of bail, particularly in high stake cases.

In 1997, Vera, at the invitation by the then South African Minister of Justice, Dullah Omar, established the Bureau of Justice Assistance (BJA) in Cape Town, South Africa. It was envisioned that the BJA – a joint venture between Vera and the South African Department of Justice and Constitutional Development (DJCD) – would spearhead the design and implementation of various projects aimed at improving local capacities for innovations in justice administration and justice delivery in South Africa.⁷ The first such project was the Pre-Trial Services project (PTS), whose purpose was to assist magistrates in making more equitable bail decisions by providing them with independently verified information about defendants at their first appearance.⁸ The provision of such a report firstly aimed to ensure that serious or repeat offenders were not released on bail, and secondly that petty offenders were released on affordable bail or on non-financial supervisory conditions.⁹ The report was also meant to provide a fuller picture of a defendant's overall financial means so as to mitigate the chance of bail amounts being set too high, and to prevent the economic injustice of remanding defendants who pose no threat to public safety into custody simply for not being able to afford bail thresholds.

The PTS project – piloted in three of the country's busiest magistrate's courts – produced mixed results. For example, whilst there was some success in increasing bail, and in reducing bail amounts in Mitchell's Plain, Durban and Johannesburg, bail amounts remained stubbornly high, and, interestingly, there was a *significant increase in bail being denied* at those courts. Furthermore, at the end of the pilot phase, despite the median bail amount having decreased in Mitchell's Plain from

R500 to R300, 63% of accused persons in Mitchell's Plain could still not afford to pay the R300, and were duly sent back to Pollsmoor Prison to await trial.¹⁰

In the end, the project itself had little effect on the size of the remand detainee population still languishing in prison; and despite its initial intentions to do so, the PTS project was not rolled out nationally by the DJCD after the pilot phase. What happened? For a number of reasons, the PTS project suffered from a few key practical shortcomings that partially explain why the project never moved beyond the pilot phase.¹¹ For instance, interdepartmental communication and collaboration was weak and resulted in the project being promoted and perceived as primarily a DJCD initiative, despite the necessity of sustained cooperation and coordination with other agencies such as the police and the Departments of Safety and Security and Correctional Services. Also, much of the project's funding relied on donor funds raising doubts about the project's long-term sustainability and posing serious questions regarding the extent to which the national budget could be truly said to address policy commitments made regarding criminal justice. Once BJA handed over the project, full funding from the national government became uncertain, and although some money was allocated to the project in the national budget, none evidently trickled down to the provinces. Existing sites could draw from core provincial budgets in order to continue delivering pre-trial services, or to roll it out to other court centres. Given an operational environment characterised by widespread resource scarcity it is unsurprising that there was a gradual administrative abandonment of the PTS project across the country.¹²

Tellingly, after BJA handed over the project to the DJCD, no structures or supporting guidelines were put into place to ensure the continued support and participation of partner agencies critical to implementation.¹³ Indeed, a key criticism suggested that the project's success depended too much on its one high profile champion, Minister Dullah Omar, and others within agency leadership, while not enough had been done to recruit the support,

cooperation and trust of key operational staff within the various partner organisations to ensure successful roll out.¹⁴

It should also be noted that the project's primary currency – the pre-trial report – was not properly incorporated into the new Integrated Justice System (IJS) technology subsequently rolled out by the IJS board. The IJS board did, however, include some of the key departments and agencies that had been involved in the PTS project, including the DJCD, the Department of Correctional Services, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS). This was indicative, perhaps, of the crippling misalignment of strategic objectives *within and between* erstwhile partner agencies, pointing to a weakness in intersectoral relationships and the transient nature of policy commitments made across government departments at the time.¹⁵

But technical and logistical considerations do not fully answer why the project faltered as it did. To continue answering the question 'why', it may be useful to take an analytical step backwards. An appreciation for the political and social climate in South Africa during this time, particularly in relation to crime and associated public perceptions, fears and reactions, is particularly helpful both in understanding the context in which the PTS project was conceived and implemented and the external challenges it faced, and why remand detention in general remains a problem in South Africa.

THE SOCIAL AND LEGAL MILIEU

Crime statistics and the fear of crime

Throughout the 1990s there was a persistent upward trend in overall levels of crime throughout the country. By the late 1990s, crime had become a serious concern for South Africans. In 1998, for example, the SAPS reported crime figures included 88 319 instances of aggravated robbery, 24 875 murders, 49 754 rapes, 256 434 assaults with intent to inflict grievous bodily harm, and 360 919 burglaries.¹⁶ Faced with these numbers, it is

unsurprising that public anxiety regarding crime and public safety during this time was high.

The country's criminal justice system did little to alleviate the public perception that government was not doing enough to combat rising levels of crime. In 2000, of the 2,6 million crimes recorded by the SAPS, only 610 000 cases had been referred to the courts.¹⁷ The NPA only took on 271 000 cases, resulting in approximately 210 000 convictions. Whilst the NPA were able to get convictions for most of the cases they prosecuted, only eight per cent of recorded crimes resulted in convictions.¹⁸

Because of the pervasive belief that the state could no longer be considered a capable guardian of public safety and security, there was a concomitant rise in 'community policing' (vigilante or otherwise) among poorer communities and a wholesale movement towards a reliance on the private security sector amongst the middle classes.¹⁹ As communities turned inwards for solutions to remedy the problem of crime, government's ineffective handling of crime became the object of people's scepticism and derision. Interestingly, according to the Independent Complaints Directorate, an independent police oversight body, there was a 'growing, popular perception that constitutional rights for criminals [were] being protected above those of their victims'.²⁰

As the tempo of criticism against government grew over its (mis)handling of the crime issue, a concerted effort was made to reassert the presence (and relevance) of the state by broad moves to bring itself in line with public opinion. For one, there was a sudden militarisation of crime control discourse emanating from government circles. A speech delivered in 1999 by the then Minister of Safety and Security, Steve Tshwete, is an example of such rhetoric:

The criminals have obviously declared war against the South African public. What is required now is ruthless implementation of the NCPS [National Crime Prevention Strategy] as a matter of urgency. We are ready more than ever before, not just to send the message to the

criminals out there about our intentions, but more importantly to make them feel that the *tyd vir speletjies is nou verby* [the time for games is over]. We are posed to rise with vigour proportional to the enormity and vastness of the aim to be achieved. We dare not disappoint our people in this regard.²¹

And indeed, government spoke of ‘hitting the criminals where it hurts’ and warned that ‘there will be no place to hide.’²² Battle cries for law and order, the war against crime,²³ and zero tolerance²⁴ gave inspiration to clampdowns, as well as saturation policing in which areas were sealed off, people and property were searched and hundreds of people detained.²⁵ In one such operation dubbed ‘Sword and Shield,’ more than 300 000 suspects were arrested during 1996 and 1997.²⁶ Unfortunately, efforts to equip the courts and remand facilities were glaringly absent in the face of the inevitable rise in the number of people arrested and detained. The consequence, of course, was the flooding of an already over-burdened court system and poorly equipped prisons.

The gloves were clearly off. But the tough talk and increasingly aggressive police tactics were not merely symbolic, nor were they tin-pot public spectacles aimed at regaining political legitimacy. Public concerns about safety can, and do, exert considerable influence on the making of legislative policy, and as a result, alongside the tough-on-crime rhetoric and policing tactics, a raft of new legislation was speedily introduced.

The legal and judicial response

Bail laws in South Africa changed radically in the latter part of the 1990s. As suggested above, the rise in incidents of violent crime and the resultant public fear during this time were, without controversy, a significant driving force behind the enactment of increasingly harsher bail provisions.²⁷

Historically, South African courts, recognising that bail is an expression of the presumption of innocence, tended to lean ‘in favour of the liberty of the accused.’²⁸ In 1995, the Criminal Procedure Act²⁹ was amended and a controversial ‘reverse

onus’ provision was introduced. Section 60(11) stipulated that, when charged with certain offences,³⁰ the accused was required to satisfy the court that the ‘interests of justice’ did *not* require his or her remand detention.³¹

Despite the 1995 overhaul of the bail regime, it was, and remains, widely accepted that ‘members of the South African public remained convinced that the right to bail was to blame for the perceived increase in crime’³² in the years that followed. The response from government was to once again amend the Act in 1997. The 1997 amendments created an even more burdensome onus on the accused.³³ Persons suspected of having committed schedule six offences³⁴ were to be denied bail unless ‘exceptional circumstances,’ which satisfied the court that it was in the interests of justice to release them, existed.³⁵ Soon thereafter, a number of the bail provisions were challenged before the Constitutional Court in the *Dlamini*³⁶ case as being infringements of the right to be released from detention if the interests of justice permit. The more controversial provisions up for challenge included the ‘reverse onus’ provisions. The Court found that ‘to the extent... that the test for bail established [by the Act] is more rigorous than that contemplated by section 35(1)(f)...it limits the constitutional right.’³⁷ Despite this, it held, curiously, that such limitations were nevertheless justified.³⁸ In doing so, the Court placed much emphasis on the ‘grim reality’ of crime.³⁹

The *Dlamini* judgment sparked much criticism for having surrendered to the general ‘panic and hysteria’ that existed about crime in South Africa⁴⁰ and failing to protect the fundamental right to liberty. This ‘surrender’ is all the more interesting when comparing *Dlamini* to the Court’s previous decision in *S v Makwanyane*.⁴¹ There, too, the Court was faced with the purported ‘effectiveness’ of the death penalty in the face of overwhelming concerns about violent crime and a large retentionist movement.⁴² The *Dlamini* judgment remains a stand-out example of apologist sentiment from the Constitutional Court that has since become renowned for having adopted an ‘official position’ of interpretation, in which public opinion would be of ‘little relevance in matters pertaining to the interpretation of the Bill of Rights.’⁴³ The *Dlamini* judgment did not, however, change the

text of the legislation, and thus, as Axam makes clear, the significant legislative discretion enjoyed by bail courts remains intact.⁴⁴ Bail courts should therefore apply the reverse onus provision in a flexible manner that seeks to avoid the arbitrary detention of suspected offenders.

Remand detention today

Although crime in general has decreased over the last decade, the question whether South Africans are more or less fearful of crime has become, to some extent, a less critical factor today than it was in the late 1990s. This may be because enough time has elapsed for the public to 'evaluate' government efforts to date. What is clear, however, is that government's responses in the late 1990s made little headway in substantially reducing crime levels, and this has, ironically, made people more receptive to new ideas. Moreover, there are good reasons to believe that the current legal and political climate has become more encouraging of efforts to improve the situation of remand detainees. This does not mean that 'tough on crime' rhetoric or actions are necessarily on the decline.⁴⁵ Nor does it mean that a more encouraging climate has been translated into tangible efforts to alleviate the problems associated with remand detention on the part of the state. Rather, incremental changes to certain legislation and policy indicate a general shift (prompted by the enactment of the final Constitution) towards the protection of prisoners' rights⁴⁶ and an awareness of conditions of detention.

Legislative and policy shifts

The Correctional Services Act 8 of 1959 was amended in 1997 and again in 1998. The Correctional Services Act of 1998 is a 'complete departure from its predecessor' in how it details the rights of prisoners and places the duty of their protection and fulfilment firmly on the state. Put differently, the new legislation, taking its cue from the Constitution's requirement that conditions of detention be 'consistent with human dignity',⁴⁸ created a legal framework mindful of the minimum degree of care and protection to which detainees were entitled.

Another (perhaps overlooked) feature of the 1998 amendment to the Act was the establishment of the Office of the Judicial Inspectorate for Correctional Services (JICS), the object of which is to 'facilitate the inspection of correctional centres . . . [and] report on the treatment of inmates in correctional centres and on conditions in correctional centres'.⁴⁹ The yearly reporting and critical evaluation by the JICS of issues such as prison population trends and prison conditions in general, means that important information about remand detention has entered the public domain. In fact, a standard feature of every annual report to date has been the cautioning that remand numbers are simply too high and should be reduced.⁵⁰

Recent amendments⁵¹ to the 1998 Act incorporate an additional objective into the current legislative framework, namely, 'the management of remand detainees'.⁵² This particular inclusion has important symbolic value, given that South African legislation has never formally acknowledged the care and administration of remand detainees as a 'purpose' of the 'correctional system'.⁵³ Another notable inclusion is the maximum incarceration period, which cannot exceed two years 'from the initial date of admission...without such matter having been brought to the attention of the court'.⁵⁴ In addition, the amending legislation also requires that the head of the prison report to the National Prosecuting Authority at six-monthly intervals on cases involving remand detainees who have been held for successive six-month periods.⁵⁵ If such detention continues, the head of centre must take such cases to court on an annual basis.⁵⁶

It is worth mentioning at this stage, that although a mechanism such as a custody time limit is certainly a step in the right direction, especially in light of the excessive periods of detention that South Africa's remand detainees are frequently forced to suffer, there is the risk that it will be used, simply, as a benchmark for the maximum time it should take to conclude a case. And two years is a very long time to wait, especially if the case is a relatively simple one. This brings to light the point that, without tangible efforts, provisions like these do not make much headway in solving the actual problems behind high remand numbers.⁵⁷ They

remain, simply, indicators of a greater awareness of the problem of remand detention. Recently, during April 2013, the White Paper on Remand Detention, destined to fill the 'policy gap' between the provisions on remand detainees in the amending legislation and their implementation, was published by DCS. The White Paper successfully contextualises remand detention in domestic statutes and international law, and outlines the rights and various oversight instruments applicable to remand detainees. In relation to backlog and overcrowding, the White Paper simply refers to the ATD Guidelines and lists a 'strategy' through which to manage overcrowding. Curiously, it emphasises the use of non-custodial and rehabilitative-type initiatives in the sentencing phase. Perhaps this is, in part, understandable, since DCS has little control over the number of remand detainees denied bail by the courts. Nevertheless, the White Paper is an important policy document indicative of the purported commitment of DCS to the problem of remand detention.

There have, however, been some noticeable state efforts to reduce delays in the processing of cases in the courts⁵⁸ over the years, an indication that 'the long held concerns around the conditions of those awaiting trial [have] finally started to make it onto the government's radar.'⁵⁹ In 2005 the NPA published a set of guidelines (ATD Guidelines) intended to 'sensitise prosecutors as to the various options available to try to reduce the number of awaiting-trial detainees.'⁶⁰ The ATD Guidelines are, for the most part, a condensed version of the statutory bail provisions. They do, however, offer a couple of meaningful recommendations to prosecutors, such as reconsidering bail if an accused has been in custody for longer than six months, and making sure that the investigations and presentation of the state's evidence are fast-tracked in such matters.⁶¹ But even as early as 1999 to 2000 the NPA was making a concerted effort to combat case backlogs. Such efforts included the institution of Saturday courts and the deployment of more experienced magistrates and court officials to the busier court centres in the country.⁶²

In fact, in the seven-year period between 2001 and 2008, 'the reduction of backlogs was a major focus

of the criminal justice system' and received a significant amount of funding.⁶³ The Justice, Crime Prevention and Security Cluster (JCPS), comprised of a number of relevant governmental sub-committees, established the Case Backlog Reduction Project in 2006 with the objective of assisting court centres in identifying priority areas 'that require...additional capacity.' This has resulted in the overall expansion of court capacity at approximately 84 regional 'backlog courts' through the appointment of acting magistrates as well as additional interpreters, clerks, prosecutors and legal aid defence lawyers, so as to ensure that cases are disposed of more speedily.⁶⁴ Furthermore, the JCPS Cluster has established a Remand Detainees Task Team that now requests the DCS to provide it, on a monthly basis, with lists of long outstanding cases regarding persons still in detention. The intention is that, once identified, such cases can be independently investigated, and where possible, fast-tracked to a speedier solution.⁶⁵

Moving forward

Despite government's efforts and purported 'success-es,' remand detainee numbers remain alarmingly high,⁶⁶ an indication that, perhaps, government efforts are simply insufficient, or, are the wrong *type* of efforts. This begs the question, what is it that government is failing to do, or, what is it that government is doing wrong? This question is extraordinarily difficult to answer given that there has been little independent evaluation of the above-mentioned initiatives. It may be that, like the PTS project, which sought to remedy the problem of remand detention through a discrete experiment that targeted bail hearings at first appearance, government's efforts to date have failed to establish a broader and more coordinated strategy of reforms that engage the *whole* criminal justice continuum and, concurrently, at each criminal justice entry or exit point. Perhaps part of the answer lies in the Public Service Commission's 2011 findings, that it is the 'lack of coordination and cooperation of the wide array of institutional role players involved in the delivery of judicial services' that creates systemic challenges which are major contributors to the backlog cases.⁶⁷

With this in mind, there are perhaps a few lessons that can be drawn from the success of the Port Elizabeth IJS Court Centre Project (IJSCCP). As mentioned above, portions of the PTS pilot project were adopted and amended in Port Elizabeth through the IJSCCP. The IJSCCP, like the PTS Project, aimed to reduce the amount of time spent in prison by prisoners awaiting trial; but unlike the PTS project, the pre-trial element was, and remains, one of many components. For example, court processing and persistent court backlogs were immediately identified as a contributing factor to lengthy remand detention in Port Elizabeth's court system. Thus, to streamline court processing, the IJSCCP established a channelisation court as well as a periodical court at St Albans Prison – the main feeder of prisoners to the Port Elizabeth Magistrates Court – to deal exclusively with non-trial matters, such as remands, bail applications, and pleas. In addition, the Port Elizabeth Court Centre prioritises cases involving remand detainees. These cases are identified and reviewed, and through this process, frivolous charges, or cases with insufficient evidence, are withdrawn and the detainee is released.⁶⁸ The project is therefore notable for its integrated approach and remaining responsive to the localised needs of the particular criminal justice system and community in Port Elizabeth.

The IJSCCP, in a broad sense, sought to identify and resolve blockages throughout the various points in the criminal justice system. This required a coordinated strategy to tackling the problem, making close collaboration between the DJCD, the DCS, and SAPS critically important. Based on admittedly not so recent data, the project yielded 'promising results':⁶⁹ a reduction in the time taken to prepare a docket for trial, facilitated bail applications and improved docket quality, all of which resulted in a reduction in the number of remand detainees.⁷⁰ Furthermore, support for a localised and integrated approach can also be assumed from 2007 research data where it is clear that the reasons behind court backlogs vary significantly between court centres. For example, it was found that reasons driving postponements in Durban were trial-related,⁷¹ while postponements in Mitchell's Plain were due to delays in

investigations.⁷² This kind of information suggests that *meaningful* reforms aimed at reducing the length of time that suspects remain in remand detention in Durban would necessarily include a court processing component. By contrast, in Mitchell's Plain, such reforms would need to include efficiencies within SAPS investigatory strategies, and perhaps an integrated investigatory approach that involved prosecutors to a greater degree.

Certainly, it seems, the political will to improve remand detention is no longer lacking. This is a key factor when it comes to the sustainability of any pre-trial services endeavour. And given what we know about the Port Elizabeth project, an important part of its success has been its longevity. This is where the extent to which the project was *localised* becomes so important. A blanket national policy cannot be effective unless it is responsive to the needs of each particular court centre, which may entail additional resources to services not traditionally ascribed to 'courts' as such. For example, the problem of backlogs caused by 'the accused not appearing in court' (indicated in the 2007 findings on reasons for postponements in the Durban courts) could be alleviated by a very simple transport service from various points in the community to court, or to a police station.

What we don't know about the current government Court Backlog Project is to what extent it is responding to the needs of each court centre. This would entail, of course, a certain amount of research into how each court functions. But given the extent to which it has been shown that court centres operate differently from one another, such research would be invaluable.

CONCLUSION

Seventeen years into our constitutional democracy, the political and legislative playing field in South Africa is very different to what it was in the late 1990s. A justiciable Bill of Rights has influenced not only the content of new legislation, but also an awareness of the rights of vulnerable and marginalised groups. When it comes to remand detainees, however, the problems that existed back

then, remain, albeit to a slightly lesser degree. And, as is the case with many human rights concerns, the poor, who cannot afford bail or the services of a lawyer, suffer the worst of the effects of remand detention.⁷⁴ The excessive reliance on remand detention also comes at a great cost to the citizenry: the government spends approximately R2,2 million per day incarcerating people who have been granted bail but are unable to afford it.⁷⁵

The problem of remand detention seems even more urgent when one considers that most remand detainees *should not be in detention*.⁷⁶ As Berry describes, '[t]hey pose no threat to society and are not at risk of absconding.' Why then, when South Africa has an environment so conducive to change, is the remand detainee population still as high as it is? The answer, of course, is not contained as a single solution, but it is not very difficult. The entire criminal justice sector, which, in this context, includes the DJCD, SAPS, the NPA and perhaps even the Departments of Transport and Social Development, is over-burdened, under-resourced and, perhaps, disorganised. And a national blanket policy designed to alleviate this burden that fails to take into account the particular processes of each court centre, will not be nearly as efficient as a policy that does.

While we can only speculate about the specifics of the current Court Backlog Project, we *do* know, based on the Vera PTS project and 2007 research data, that the particularities of each court centre vary considerably. This has obvious implications when it comes to designing a backlog reduction model for court centres, and energy is perhaps better spent on investigating these differences before attempting to address the problem head on. The seemingly simple task of designing a model based on the actualities of a court centre that is sufficiently flexible so as to respond to the changing demands of a particular community, may well be the tangible bridging between the somewhat abstract notions of the Bill of Rights and the reality experienced by remand detainees in South Africa.



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NOTES

1. R Paschke, Process and Impact Assessment of the Pre-Trial Services Demonstration Project, *Bureau of Justice Assistance Report*, 3, March 1999.
2. See generally, M Schönteich, Making Courts Work: A Review of the IJS Court Centre Project in Port Elizabeth, *Institute of Security Studies Monograph*, 75, October 2002.
3. Between 1995 and 2000 the remand detainee increased by 64%, from 24 265 in January 1995 to 63 964 in April 2000. Since then, the population has remained somewhat stable, though still high, at 49 695 as of 28 February 2011. Currently, remand detainees constitute 30% of the total inmate population. Statistics are drawn from the Annual Reports of the Judicial Inspectorate of Correctional Services. All Annual Reports are available on the Office of the Judicial Inspectorate's website: <http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp>. See also the Department of Correctional Services Management Information System (MIS) available at <http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx>. See also C Ballard, A Statute of Liberty, *South African Journal of Criminal Justice*, 25(1) (2012), 24.
4. Idasa, Is Crime Dividing the Rainbow Nation? Afro-barometer Briefing Paper No. 96: November 2010; See also I Matthews, Government Responses in South Africa: Policy and Implementation and E van der Spuy, Crime and its Discontent: Recent South African Responses and Policies, *Crime and Policing in Transitional Societies*, 30 August – 1 September 2000, Jan Smuts House, Wits, Johannesburg: http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf?4865_2.pdf
5. L Ehlers, Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa, *Justice Initiatives: Pretrial Detention*, Open Society Justice Initiative, 2006, 123.
6. T Amupadhi, Mamokgethi: and justice for all? *Weekly Mail & Guardian*, 31 July 1998.
7. The other demonstration projects included the Thuthuzela Care Centres, as part of a prosecution-led anti-rape strategy, a prosecution task-force on carjacking, and a project that aimed to help two justice centres implement plea-bargaining legislation.
8. A 1998 survey indicated that more than 60% of respondents felt unsafe walking alone in their own area after dark. Similarly, in 1997, 80% of whites and Indians, 60% of coloureds and 40% of blacks were concerned for their own personal safety. See Benjamin Roberts, Fear Factor: Perceptions of Safety, in B Roberts and M Kivilu et al (eds), *South African Social Attitudes: 2nd Report: Reflections on the Age of Hope*, HSRC Press 2010, 250, 254.
9. Ehlers, Frustrated Potential, 125.
10. Paschke, *supra* note 3, at 35.
11. Ehlers, Frustrated Potential, 128-134.
12. Ibid.
13. Ibid, 132.
14. Ibid, 134.

15. Ibid, 130-1.
16. Crime Statistics 1994-2003, Institute for Security Studies, <http://www.iss.org.za/CJM/stats0903/index.htm>
17. M Schönteich, Criminal Justice Policy and Human Rights in the New South Africa, *Queensland University of Technology Law and Justice Journal*, (2003) 333, 334. See also R Paschke, Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas, South African Law Commission, Research Paper No. 18, Project No. 82.
18. M Schönteich, Criminal Justice Policy and Human Rights in the New South Africa, 21. A more recent study of three magistrate's courts found that approximately 54% of charges were ultimately withdrawn or struck off the roll in 2007. This suggests that deep deficits in police investigatory capacities, as well as prosecutorial ability to convict, remain challenges to be tackled by today's government. See V Karth, M O'Donovan and J Redpath, *Between a Rock and a Hard Place: Bail Decisions in Three South Africa Courts*, Open Society Foundation for SA, 2008.
19. Sekhonyane and Louw discuss in detail the history of South African vigilantism and, in particular, its rise in the post-1994 period as a response to 'poor poor delivery of services associated with safety'. M Sekhonyane and A Louw, Violent Justice, Vigilantism and the State's Response, ISS Monograph 72, 2002, <http://www.issafrica.org/publications/monographs/monograph-72-violent-justice-vigilantism-and-the-states-response-makubetse-sekhonyane-and-antoINETTE-louw>; Van der Spuy, Crime and its Discontent, 171.
20. M Schönteich, Criminal Justice Policy and Human Rights in the New South Africa, 335.
21. Steve Tshwete, Minister of Safety and Security, Remarks at a Parliamentary Briefing, 28 June 1999.
22. Matthews, Government Responses in South Africa, 188.
23. Van der Spuy, Crime and its Discontent, 171.
24. Ibid. See also B Dixon, Zero Tolerance: The Hard Edge of Community Policing, *African Security Review*, 9(3) (2000), 73-78.
25. Van der Spuy, Crime and its Discontent, 171.
26. Matthews, Government Responses in South Africa, 188; J Burger, Crime Combating in Perspective: A Strategic Approach to Policing and the Prevention of Crime in South Africa, International Police Executive Symposium, Working Paper 10, 16 (2007).
27. The role of crime and the fear of crime is discussed in J Sarkin, E Steyn, D Van Zyl Smit, R Paschke, The Constitutional Court's bail decision: Individual Liberty in Crisis?, *South African Journal of Human Rights*, 16 (292) (2000), 294.
28. Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 296.
29. 51 of 1997. The amending law was Criminal Procedure Second Amendment Act 75 of 1995.
30. Section 60(11) referred to 'schedule 5' offences, typically more serious crimes such as murder and rape.
31. These amendments incorporated a preventative dimension to the bail enquiry, i.e. someone who *might* commit a further crime could be detained on remand, as opposed to someone who might evade trial or posed a threat to witnesses or the trial process.
32. Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 297. The authors refer to 1997 case in which a six-year-old girl, Mamokgethi Malebane, was raped and murdered by suspected offenders who had been released on bail. See also, Tangeni Amupadhi, Mamokgethi: and justice for all? *Weekly Mail & Guardian*, 31 July 1998.
33. Criminal Procedure Second Amendment 1997 (Act 85 of 1997).
34. Schedule six offences include crimes such as premeditated murder and gang rape.
35. Notably, Sarkin et al in The Constitutional Court's bail decision: Individual Liberty in Crisis, 297, make the point that, in their view, this section is 'more onerous than the bail laws under apartheid applicable to the same (non-political) crimes and that the only provision "more draconian were those relating to detention without trial of people accused of political offences.'
36. *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC).
37. *S v Dlamini* at para 65.
38. Section 36 of the Constitution permits the limitation of a right in the Bill of Rights 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'
39. *S v Dlamini* at para 66. At para 55 the Court stated: 'The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.'
40. See generally, Sarkin et al, The Constitutional Court's bail decision: Individual Liberty in Crisis, 297.
41. *S v Makwanyane* 1995 (3) SA 391 (CC).
42. The difference in approach is best captured in the following dicta (*S v Makwanyane*, para 88): 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.'
43. M Du Plessis, Between Apology and Utopia – the Constitutional Court and Public Opinion, *South African Journal of Human Rights* (18) (2002), 1, 2.
44. H Axi, If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail, *South African Journal of Human Rights*, 17 (2001), 320 and 339.
45. For example, Police Minister, Nathi Mthethwa, on 24 May 2011, was reported saying that government was looking into amending the bail legislation so as to curb the repeated granting of bail to serial offenders. SAPA, *News24*, 10 May 2011, <http://www.news24.com/South>

- Africa/Politics/Bail-legislation-ripe-for-change-Mthethwa-20110510 (accessed on 19 April 2013).
46. The 1998 Act refers to 'inmates', which is defined in section 1 of the 1998 Act as 'any person *whether convicted or not*, who is detained in custody in any correctional centre or who is being transferred in custody or is en route from one correctional centre to another correctional centre.'
 47. See Chapter Three of the Correctional Services Act (1998), 'Custody of Inmates Under Conditions of Human Dignity'.
 48. Section 35(2)(e) of the Constitution, 1996.
 49. Section 85(1) of the Correctional Services Act 1998.
 50. All Annual Reports are available on the Office of the Judicial Inspectorate's website: <http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp>. See also, On the record: Interview with Judge Deon van Zyl, *South African Crime Quarterly*, 30 (2009), 45, 46.
 51. The amending legislation is the Correctional Matters Amendment Act 2011 (Act 5 of 2011).
 52. Section 2(d) of the Correctional Services Act 1998.
 53. Prior to the Correctional Matters Amendment Act 2011, Section 2 of the Correctional Services Act 1998 read:
The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe custody by enforcing sentences of the courts in the manner prescribed by this Act; detaining all inmates in safe custody whilst ensuring their human dignity; and promoting the social responsibility and human development of all sentenced offenders.'
 54. Section 49G(1) of the Correctional Matters Amendment Act 2011.
 55. Sections 49G(2) – (5) of the Correctional Matters Amendment Act 2011.
 56. The reporting procedure, while a step in the right direction, remains weak: the amendment sets out the procedure to bring an accused before a court, it does not, however, explain what the court must do. The court may indeed end up postponing a case for a further six months without interrogating the reasons for the delay, as provided for in section 342A of the Criminal Procedure Act 1977.
 57. The problem of creating aspirational targets or benchmarks from sources unintended to be so is illustrated well in *S v Jackson*. 2008 (2) SACR 274 (C). In this case, Mr Justice Moosa included in his judgment a table setting out the average amount of days it took to reach various pre-trial and trial stages, which he then used as a benchmark to determine whether the delays in the case before him were 'unreasonable'. He concluded that they were not, given that they did not exceed the reported average.
 58. Courts themselves have also exhibited frustration with the extent to which institutional and systemic delays affect the accused person's right to 'have their trial begin and conclude without unreasonable delay' (section 35(3)(d) of the Constitution) and the right 'not to be deprived of freedom arbitrarily or without just cause'. (Section 12(1)(a) of the Constitution). See for example *S v Maredi* 2000 (1) SACR 611 (T) where the accused had been kept in custody for 17 months before the charge was put to him.
 59. Excerpt from T Ramagaga, The conditions of Awaiting Trial Prisoners look set to improve in South Africa, Institute for Security Studies, News on ISS Africa, 7 March 2011.
 60. Awaiting Trial Detainee Guidelines <http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20%283c%29%20doc%20final.pdf> (accessed on 12 May 2013).
 61. ATD Guidelines, 19-20.
 62. I Matthews, The National Prosecuting Authority in C Gould (ed), *Criminal (in)justice in South Africa: a civil society perspective*, Institute for Security Studies, 2009.
 63. Ibid.
 64. Since its inception, 32 650 cases have been finalised as a result. See http://www.justice.gov.za/newsletter/JT/JT2009_Vol5.pdf See also South African Government Information, <http://www.info.gov.za/aboutgovt/justice/system.htm> (accessed 12 May 2013).
 65. Parliamentary Question, Court Backlogs, DefenceWeb, http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=14215:parliamentary-question-doj-court-backlogs&catid=86:parliamentary-questions&Itemid=187 (accessed on 19 April 2013).
 66. Department of Correctional Services Management Information System, <http://www.dcs.gov.za/WebStatistics/> (last accessed on 6 June 2011). With a remand detainee population of 46 432, this is still almost double the Department of Correctional Services' proposed benchmark figure of 25 000. As mentioned above, remand detainees constitute about 30% of the total prison population. When compared to the population ratios of other African countries, this is not a particularly large number (See International Centre for Prison Studies, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pretrial.) However, in at least two thirds of the country's most overcrowded prisons, the occupancy rates of which range from 200-250%, the remand detainee population are the obvious driving factor behind such overcrowding. See The Judicial Inspectorate for Correctional Services 2010/2011, Annual Report, 13.
 67. Public Service Commission, Report on Inspections of Regional Courts: Department of Justice and Constitutional Development, 2011, <http://www.psc.gov.za/documents/2013/FINAL%20REPORT%20DOJCS%20NATIONAL%20%28C%2926%20JAN%20%202012%20docx.pdf> (accessed on 12 May 2013).
 68. M Schöenteich, Criminal Justice Policy and Human Rights in the New South Africa.
 69. V Karth et al, Between a Rock and a Hard Place: Bail Decisions in Three South Africa Courts, 12.
 70. Ibid.
 71. Karth et al, Between a Rock and a Hard Place, 28.
 72. Karth et al, Between a Rock and a Hard Place, 26.
 73. Karth et al, Between a Rock and a Hard Place, 27.
 74. The wide range of effects of remand detention are described in D Berry, The Socioeconomic Impact of Pre-trial Detention: A Global Campaign for Pre-trial Justice Report, Open Society Foundation and United Nations Development Programme, 2011.
 75. D Berry, The Socioeconomic Impact of Pre-trial Detention, 40.
 76. Ibid.

CHILD JUSTICE IN PRACTICE

The diversion of young offenders

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South Africa's democratic transition ushered in a new era in child justice reform efforts. The Child Justice Act 75 of 2008 is arguably one of the best pieces of child justice legislation in the world. A central objective of the Act is to encourage the diversion of young offenders away from formal court procedures, giving children the opportunity to express their views on the circumstances of their offending behaviour. An intriguing issue remains the introspection of children themselves on their behaviour and how they are being dealt with by the justice system. This article reports on a preliminary analysis of feedback from children who were diverted to a particular diversion programme, to determine key reasons for youth offending behaviour and to understand their engagement with the diversion process and the diversion programme itself. The many intersecting risk factors at the individual, relationship, community and societal levels that are likely to impact on a child's likelihood of engaging in anti-social or criminal behaviour, are also highlighted.

Responses to child and youth offending have gradually moved from punishing and incarcerating youngsters to a 'new penology'; concerned with the prediction of risk through 'identification, classification, and managing unruly groups'.¹ In fact, 'the growing importance and visibility of risk-orientated thinking and practice can be seen across the whole of the criminal justice system'.²

South African children are exposed to a number of risk factors.³ As a result of intergenerational poverty and unemployment, caused by little or no education, children grow up in communities characterised by violence, crime and weak social cohesion.⁴ Extensive international research has shown that exposure to violence and crime at a young age within the home, school and community environments, including acts of

personal victimisation, is likely to impact significantly on the individual's likelihood of engaging in anti-social or criminal behaviour at a later stage in life. Young people who are exposed to such incidents of violence within their communities and homes are also at greater risk of victimisation themselves.⁵ Young males are more at risk of becoming victims of crime and violence, with almost one out of two (46%) males reporting victimisation, compared to 37% of young females.⁶

The long term and deep poverty in which many children grow up is part of a 'range of contextual drivers' to anti-social and violent conduct in young people.⁷ Not only does poverty exacerbate the effect of other risk factors such as exposure to violent subcultures⁸ and substance abuse, it may also increase the likelihood of youth turning to crime in order to 'redress the exclusion felt through not having material goods that define social inclusion'.⁹

It is imperative that the criminal justice system, when dealing with children in conflict with the law,

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recognises the realities facing children in South Africa and responds by placing greater emphasis on programmatic interventions that address the risks that children are exposed to in their communities.

DIVERSION AND RESTORATIVE JUSTICE

The Child Justice Act 75 of 2008 (hereinafter referred to as the Act) has a strong restorative justice ethos and provides the framework for a criminal justice system specifically geared towards children in conflict with the law. Restorative justice is defined in the Act as ‘an approach to justice that aims to involve the child offender, the victim, the families concerned, and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.’¹⁰ Therefore, to be in line with the objectives of the Act, diversion programmes should include a restorative justice element that aims to heal relationships. This should include the relationship with the victim and or his/her family so as to ensure that the child understands the impact of his or her behaviour on others, including the victim(s) of the offence, and should, where possible, involve parents, appropriate adults, or guardians.

Not only does diversion seek to refer cases away from the formal criminal court procedure in order to protect children from the negative effects of the criminal justice system, it is also one way of managing children ‘at risk’. By assessing the child at the pre-trial assessment, the court is able to decide on the best diversion option for that child; keeping in mind the best interest of the child. Restorative justice-influenced reforms offer the prospect of a ‘more participatory and deliberative form of youth justice’,¹¹ whilst encouraging children to take responsibility for their actions and make amends for the crime committed.¹²

The objectives of diversion are clearly set out in the Act¹³ and include the following: encouraging

the child to take responsibility, promoting reintegration, preventing stigmatisation and reducing the chances of recidivism. Diversion can be achieved at four levels: Firstly, prosecutorial diversion (for minor offences),¹⁴ after the pre-trial assessment is conducted,¹⁵ at the preliminary inquiry,¹⁶ as well as during the trial in a child justice court.¹⁷ The Act also sets out a number of diversion options,¹⁸ including monitoring of a diversion option,¹⁹ a diversion register,²⁰ and accreditation of diversion programmes.²¹

The Act applies to all criminal offences. However, it divides them into three schedules, depending on the seriousness of the offences. Schedule 1 contains the least serious offences and Schedule 3 the most serious offences.²² These schedules then have different implications for children. For instance, children charged with Schedule 3 offences (the most serious) can only be diverted in exceptional circumstances. If a child is charged with more than one offence and these are all dealt with in the same criminal proceedings, the most serious offence will guide the manner in which the child must be dealt with.²³ Diversion may even be considered in suitable cases where a child offender has a record of previous diversions.²⁴

Most specific to this discussion are the provisions relating to diversion at the pre-trial stage of child justice processes.²⁵ It is usually at the assessment and preliminary inquiry phase that the diversion determination is made. Every child accused of committing an offence is required to undergo an assessment, which assists investigators and prosecutors in deciding on the best treatment for the child. With the help of social workers (probation officers), the age of a child can be assessed and unique recommendations formulated, keeping in mind the ‘best interest of the child.’²⁶ The prosecutor can dispense with the assessment if it is in the best interests of the child; in which case the reasons for dispensing with the assessment must be recorded. A prosecutor can decide to divert if the matter is a Schedule 1 offence and a level 1 diversion option, and the matter then proceeds no further. The decision to divert will be referred to a magistrate in chambers, who will make the diversion an order of the court.²⁷

However, if a case is not diverted by the prosecutor it proceeds to a preliminary inquiry, where a decision to divert can also be taken. In all cases, a matter may only be diverted if the child acknowledges responsibility for the offence; the child has not been unduly influenced to acknowledge responsibility; there is a *prima facie* case against the child; and the prosecutor indicates that the matter may be diverted.

Where a child is charged with a schedule 3 offence, the Director of Public Prosecutions (DPP) must agree to the diversion. In the case of schedule 2 and 3 offences the views of the victim, or any person who has a direct interest in the affairs of the victim, and the police official responsible for the investigation of the matter should be taken into account, where it is reasonably possible to do so. Other considerations include, *inter alia*, the seriousness of the offence and whether the child has a record of previous diversions.²⁸ In practical terms, diversion is also dependent on the availability of appropriate diversion programmes, and the presence of an NGO service provider for these programmes near the child's home.

Ideally the diversion programme should be 'restorative' in nature, where both victims and offenders are given the opportunity to participate in a restorative process, such as victim offender mediation or victim offender conferencing. However, not all diversion programmes are fully restorative in nature. In order to determine 'restorativeness', various factors are taken into consideration, namely; does it address harms and causes? Is it victim oriented? Are offenders encouraged to take responsibility for their actions? Are all stakeholder groups involved? Is there an opportunity for dialogue and participatory decision making? Is it respectful to all parties? While the central objective of diversion is to encourage children to take responsibility for the harm caused by their actions, thereby promoting the integration of the child back into the family and community, it also creates an opportunity for them to talk about the circumstances surrounding their offending behaviour.

The Act states that all diversion programmes should be 'structured in a way that their effectiveness can be measured'. Thus, service providers are expected to ensure that quality assurance takes place through the effective monitoring and evaluation of programmes. This preliminary study sought to examine the documentary records of children diverted to a specific diversion programme run by Khulisa, in Pinetown, Durban, in order to draw conclusions about, *inter alia*, the children participating in the diversion programme, their offences, their experiences of the diversion programme, and the efficiency and effectiveness of the programme.

METHODOLOGY

The nature, scope and challenges associated with youth diversion in this country have been widely researched and written about.²⁹ This preliminary study, in which documentary records of children diverted to Khulisa's³⁰ 'Positively Cool' diversion programme were analysed, was conducted in June 2010.³¹ A profile of the children was compiled from documentary/statistical information in 'divertee' case files at Khulisa's regional office in Pinetown. Triangulation was achieved through semi-structured interviews with two key informants; the diversion manager and the diversion programme facilitator of the programme. All identifying information, such as the names and addresses of the children, was deleted to protect the identity of the children and maintain anonymity and confidentiality. Due to the unobtrusive nature of the research, the data collection process did not affect the integrity of the data collected, and uniformity and objectivity was maintained in all cases. Both quantitative and qualitative content analysis was utilised to categorise and unravel textual recordings in 'divertee' case files.

A purposive, non-probability sampling technique was adopted. Only children who had committed Schedule 1 and Schedule 2 offences and had been diverted by prosecutors from the Pinetown Court to the 'Positively Cool' diversion programme between 1st April 2009 and 30th September 2009, were included. This programme deals with youth between the ages of 14 and 18 years. One or more

of the following outcomes are expected of each programme: development of self-awareness, development of self-management skills, building self-esteem and self-image, replacing negative behaviour with positive behaviour, understanding the impact of behaviour on self and other people, rebuilding of damaged relationships in the community, and empowering self in peer relationships.

The facilitator is responsible for facilitating the diversion programme sessions, providing mentoring to the youth, and supporting the youth and his/her family by looking at what impact the diversion programme has had on the child. At the outset, both the child and his/her parents are interviewed in order to establish the needs of the child. Once this information is available to the facilitators, they complete a pre-programme assessment. The children also complete a pre and post behaviour assessment in order to establish whether or not behaviour changes have resulted due to the programme. Information on the participants' age, gender, level of education, and type of offence was extracted from the files, providing us with a profile of the children. Children's views and experiences, as recorded by the diversion facilitator, were also accessed from the files.

Six months after the completion of the programme, the facilitator makes telephonic contact with the family members and/or children to inquire about the children's progress. In this instance the last follow-up call would therefore have taken place by March 2010. This feedback is then recorded and captured in the offender files. Information on reoffending and whether or not the programme had an impact (if any) on the children's behaviour was accessed from these written records of the feedback from these calls (as recorded by the facilitator), as well as from face-to-face interviews with the manager and facilitator. These individuals provided further valuable insights on the impact of the diversion programme.

As highlighted in the discussion below, a major impediment in this study was incomplete record

keeping by the service provider, and in many instances important information was missing from the records.

RESEARCH FINDINGS AND DISCUSSION

Fifty-four youth offenders were referred to the programme between 1 April 2009 and 30 September 2009. The oldest was 18 and the youngest only 13 years of age at the time of diversion. The mean age of the children was 15,5 years. While the children's educational levels and grades ranged from grade 5 to 12, most children were in grade 9 (n=10), grade 10 (n=12), grade 11 (n=5) and grade 12 (n=8) at the time of their offence. Interestingly, eight children were not in school, either temporarily or permanently. Textual

Table 1: A profile of the children in the Khulisa study

Demographic profile of children	Data set	Percentage
Number of cases	54	100
Number of perpetrators	54	100
Age distribution		
13 yrs	3	05,56
14 yrs	7	12,96
15 yrs	11	20,37
16 yrs	18	33,33
17 yrs	13	24,07
18 yrs	2	03,70
Gender		
Male	35	64,81
Female	19	35,19
Current school grades		
5	1	01,85
6	1	01,85
7	1	01,85
8	6	11,11
9	10	18,52
10	12	22,22
11	5	09,26
12	8	14,81
Not in school	8	14,81
Technical school	1	01,85
Unknown	1	01,85
Types of offences		
Assault	5	09,26
Assault (GBH)	7	12,96
Theft	33	61,11
Housebreaking	2	03,70
Drug-related crimes	6	11,11
Crimen injuria	1	01,85
Classification of offences		
Minor	22	40,74
Moderate	30	55,56
Serious	2	03,70

information was analysed according to the following themes: The child and the offence; family life and relationships; the impact of diversion; compliance; and programme evaluation.

The child and the offence

Most referrals were for theft (n= 33), followed by assault with intent to do grievous bodily harm (GBH) (n=7) and common assault (n=5). Six children were involved in drug-related crimes, and two in housebreaking. For the majority of the children this had been their first offence; making them ideal candidates for diversion. Five children were repeat offenders but it was not apparent whether they had participated in a diversion programme on a previous occasion or not.

A prerequisite for diversion is that the child acknowledges responsibility for the offence. The majority of the children (n=43) accepted responsibility for their actions, with many expressing remorse for their actions: *'Yes, if I can turn back the hands of time, I wouldn't have done what I did.'* Only one child did not accept responsibility. The issue of accepting responsibility was not clearly indicated in the files of ten children.

Only nine children admitted to being addicted to some form of substance. The majority of children used alcohol and cigarettes. According to the facilitator, children sometimes arrived under the influence of alcohol and missed out on valuable lessons taught during the sessions.

Money and money-related issues was another popular reason for involvement in crime. Some of the reasons cited for stealing included unemployment of parents, hunger and to 'buy school shoes'.

Five children admitted that they were provoked and reacted in anger. Of these, three claimed that they were accused of stealing and ended up fighting, while another (who stabbed his friend with a nail clipper), claimed that he did it out of anger. Another child who was in a fight with a group of boys claimed that they were provoked and acted in 'self-defence'.

Family life and relationships

Family environment is one of the most important influences on the psychosocial development of young people.³² At least half of the children said they had a good relationship with their families and extended families. Eight children described their relationships with their parents or guardians as strong, and had realised how their crime had affected not only themselves, but also those closest to them. Only three children described their relationship as poor, and another four said their relationship was 'average'. In the case of twelve children, this information was not available. However, in the majority of cases (n=17) the children came from homes where parents were divorced, single, or had never married, while in seven cases one or both parents had died. Again, this information was missing in seventeen cases.

Twenty-two of the forty-two children said that they wanted to change either themselves and their behaviour or their relationships with their families and friends. Many children wanted to *'be a better person'* and to make their families proud. One child even wrote that she wanted to change her bad behaviour and *'learn harder'*, while others said that they want to be *'a good friend to rely on'* and *'a good listener'*. One child, who was adopted, said that he wanted 'different parents'.

Ten children admitted falling prey to peer pressure from their friends. This is not surprising, since deviant youth seek out other deviant youth, and the greater the exposure the youth has to deviant peers, the more likely s/he is to be influenced negatively by them. Some children realised that their friends can be a bad influence on them and said they want to 'change friends'. One child said that his three wishes were to *'quit being a criminal, quit having bad friends and quit smoking.'* Quite a few children also mentioned how they would like to get closer to God.

The school environment plays a major role in the lives of children; not only in the development of their self-esteem but also profoundly influencing their hopes and dreams. At least 30 children had a positive attitude towards school and said that they

enjoy school and learning new things. Only four children had a negative attitude towards school, claiming that they disliked school, the teachers, and just school life in general. For 20 of the children this information was not available. Of the 46 children that were still schooling, 25 had never failed a grade, and were doing relatively well in school. However, the majority of the children had failed grades at school. In one case, a 13-year old child was still in Grade 5.

The impact of diversion

The diversion programme facilitator is responsible for making follow-up calls to parents and/or family members to ascertain if, and in what way, the programme has impacted on the child's behaviour; and whether or not the child's behaviour has improved, remained the same or deteriorated.

The majority of the children (n=43) were able to sustain the positive outcomes of the programme during the six months since participation in the programme. Deterioration in behaviour was noted in the cases of two children. Both children were female, black, had committed theft, were 16 and 17 years old and came from poorer areas such as Hammersdale and Chesterville (urban townships). Both children came from incomplete families where the parents were either single or had never married, and both parents reacted with punishment to their child's offence. Of the children that could be reached, the majority had not reoffended. According to the facilitator this meant that these children had not committed any further offences and had not come into conflict with the law since attending the programme. Four children and/or their families could not be reached to ascertain this fact.

Compliance

Attendance and participation is compulsory for all the children. Forty-two children (out of 54) attended and participated well in the programme, going on to graduate from the programme. Of the 12 children that did not complete the programme, one child was referred to another programme to complete the sessions he had missed, and 11

children did not complete the programme. These children displayed very poor attendance or no attendance, showed a lack of interest, and some didn't attend the programme at all. These files were closed and their cases referred back to court. According to both the manager and facilitator, some of the reasons for non-compliance included non-interest, bus strikes (inability to attend), and dishonesty. Some children do not complete the programme because of transport costs. However, even where children were given money for transport, some still did not attend. This may be due to a lack of commitment and interest, and the fact that at the beginning of the court process, the case against the child is withdrawn. Thus there is no compulsion to complete the programme. Although children are warned of the consequences of not attending and completing the programme, in some cases the child's full commitment is lacking.

Programme evaluation

Interviews with the facilitator revealed that Khulisa uses both short term and 'long' term evaluation. Short term evaluation is based on the child's attendance, homework, involvement in group discussions, and their overall interactions. Once the follow-up calls are made, the facilitator will tick one of three options: reoffended, deteriorated or improved. She explained that she often went beyond what the diversion manual prescribes and would give the children little 'tasks' to do at home.

I normally ask the children to do just little acts of gratitude at home, you know, make your mom some coffee, just wash the windows, just once off and see what the reaction will be. So once they've done that, they come back to class and we say to them okay 'share how that made you feel, don't you want to feel like that forever, like all the time? That means you must keep doing this...' The children are aware that these little 'tasks' are not a part of the programme and that they won't be punished for not doing them. In some instances the children will come to the session the next day and say; 'you know, I tried that, I made my mom coffee and she was so happy that she gave me five rands'.

The facilitator further explained that this is how she is able to measure the impact; 'they want to feel special, they want to feel loved, so it's up to them what they want to do, over and above the programme'.

Internal 'long' term evaluation takes place only in the form of one or two follow-up calls made by the facilitator four to six months after completion of the programme to ascertain the progress of the children. Parents and/or guardians provide information on the behaviour of the child, the child's school attendance and performance, challenges that parents may be facing, and whether and how the programme has impacted on the child's life. Khulisa only contacts those children that have graduated and thus no information was available on the eleven closed files.

DISCUSSION

As emphasised by Ward et al in the opening paragraphs of this paper, the discussion below highlights the fact that risk factors act as 'contextual drivers' to anti-social conduct, and that children grow up within 'an ecology of contexts where smaller more intimate contexts such as family and school are nested within larger contexts such as neighbourhood'.³³ Family and community factors also intersect with the levels of violence occurring at schools. Results from the 2012 National School Violence Survey highlight the extent to which this happens; showing that by the time young people enter secondary school many of them have already been exposed to violence, either as victims or witnesses, in their homes or communities.³⁴

The findings indicate that the majority of the child offenders referred to the programme are male, isiZulu speaking,³⁵ in Grade 10, and come from a poor socio-economic and disadvantaged background. They reside in areas plagued by widespread poverty, unemployment, a high prevalence of HIV infection, crime, abuse, domestic violence, orphaned children, dysfunctional households, low levels of education, and a general lack of support.³⁶

One of the most powerful factors in the development of antisocial behaviour is deviant peer influences, which can affect an adolescent both directly and indirectly. In the case of direct peer pressure, children are coerced into taking risks. Due to the fear of rejection, or the desire for peer approval, the child will be indirectly influenced by his or her peers. 'The peer group can be enormously powerful in transmitting culture, values, and norms that influence behaviour.'³⁷ At least ten children admitted to falling prey to negative peer influences.

Non-compliance of diversion orders is a major challenge to the implementation of diversion programmes, and is plagued by inconsistency and uncertainty. The study found that at least 11 children displayed very poor attendance or no attendance, showed a lack of interest, and that some didn't attend the programme at all. This is a cause for concern, especially in the light of the fact that the Act is specific on compliance and the procedures to be followed in cases where compliance is lacking.³⁸

However, the lack of commitment of children must be seen against certain problems in the way the system deals with non-compliance. A recent research report³⁹ highlighted a number of challenges experienced by diversion service providers, due to the lack of uniformity in the official forms used by the courts and inconsistencies among presiding officers and/or prosecutors who deal with diversion matters. This may be due to a lack of commitment and interest on the part of court officials. Some courts withdraw the charges before the child can attend the diversion programmes and others withdraw the charges after successful completion of the programme. Some courts require reports on completion of diversion programmes and others just want to know whether the child was compliant or not. Some courts are not even interested in whether the child complied with the diversion order or not. Some courts want the child to come back to court after completion of the programme, and others close the file once the child is diverted. Therefore, service providers also tend to be lax in emphasising and monitoring compliance.

The Act has a strong restorative ethos, and diversion programmes are just one of many mechanisms through which restorative values and practices may be incorporated. In order to determine whether or not a programme or process is restorative, practitioners and scholars refer to and make use of a 'continuum' of restorative justice. In so doing, they are able to declare a programme to be less or more restorative. Thus, if a diversion programme addresses the harms and causes of the offence, and encourages the offenders to take responsibility, but ignores the victims of the crime, it can be said that the programme is 'potentially' or 'partially restorative'.⁴⁰ The 'Positively Cool' diversion programme answers 'yes' to three of these questions. It addresses the harms and causes, encourages the child to take responsibility, and provides the child with an opportunity for dialogue and participatory decision-making. However, the involvement of the victim is minimal or non-existent. This means that all parties are not involved in the decision-making process, and thus the programme can only be described as 'partially restorative'.

RECOMMENDATIONS

Recent research indicates that 'good [outcome] evaluation practice is lacking in South African programmes'.⁴¹ As was evident in this study, service providers tend to not pay much attention to an evidence-based approach to programme delivery, and do not put in place adequate mechanisms whereby the efficiency and effectiveness of the programme can be properly measured. It is extremely difficult to effectively monitor and evaluate diversion programmes if accurate and reliable statistics are not available. In this study, for example, information in the children's files was at times found to be inconsistent and incomplete. This in turn impacts negatively on the service provider's information management systems. It also raises the question whether the integrated information management system as envisaged by the Act⁴² has been established and implemented. Role players and decision makers in the child justice sector need accurate and reliable information, not only on the

number of children in the system, but also on their 'pathways', once diverted from the system.

Intake forms and pre and post assessment forms used by service providers, containing information on the child, the crime and his or her background, should be standardised and consistent for all service providers. This would contribute to better record keeping and synergy between government departments and NGO service providers. These should form part of a national data base for court personnel (prosecutors and magistrates) which would lead to better monitoring and evaluation of programmes.

While Khulisa uses both short term and 'long' term evaluation interaction, there are no clear indicators set out to measure success. It is not enough to merely talk to the parents six months after the programme has been completed. In addition to the follow-up calls, face-to-face interviews and assessments with the children and their parents or primary care-givers would go a long way towards understanding how children experienced the programme and whether it has made a difference to their behaviour. This would enable one to obtain a more comprehensive picture of how children themselves experienced the programmes, whether it made a difference in their lives, and how they viewed criminality. Interviews with educators (if the child is in school) on the child's behaviour in school would also provide valuable insights. A more focused and in-depth follow-up process would yield better information, which can be used to strengthen and improve the programme.

An in-depth qualitative study that seeks the opinions and experiences of the children themselves is recommended. In addition, a national comparative study of programmes offered by other service providers would prove to be extremely beneficial in identifying good practice, sharing information and providing guidance for less resourced service providers in the NGO sector. This would lead to a greater understanding of the individual risk factors that contribute to reoffending. Greater support for children through community mentors and/or a buddy system could

go a long way towards providing children with the necessary support to sustain the outcomes of the programme.

Evaluation research in South Africa has utilised mostly non-experimental designs.⁴³ While some writers view such studies as having absolutely no form of control or comparison and being 'of almost no scientific value',⁴⁴ and believe that only a randomised experimental design can provide reliable information on the impact of a programme, there are others that disagree. Even though true randomised experimental designs are seen by some as the best way to determine the impact of a programme, quasi-experimental methods/approaches that have many, but not all, of the attributes of the true experimental design may be seen as a powerful alternative.⁴⁵ The choice of method will depend upon the nature of questions being asked, how time consuming it is, and the human and financial resources available, especially in the South African context.⁴⁶ While it may be unrealistic to expect service providers to monitor the effectiveness of every diversion programme, they should make a dedicated effort, in collaboration with researchers, to 'conduct a small number of carefully designed outcome studies of different diversion programmes to inform good practice'.⁴⁷

Even though only 11 children did not complete the programme, non-compliance of diversion orders is a major challenge to the implementation of diversion programmes and is plagued by inconsistency and uncertainty.⁴⁸ However, this problem may be generated by the system itself, where some children do not feel compelled to complete the programme, since the case is sometimes withdrawn at the beginning of the court process. Although children are warned of the consequences of not attending and completing the programme, in the main the child's full commitment is lacking. Therefore, it may be better to keep the case pending until the child has completed and graduated from the programme, and only withdraw the case if the child shows commitment to the programme, shows genuine remorse, and there is evidence of positive behaviour change.

One of the biggest challenges facing service providers in the youth diversion sector is accessing adequate funding. According to the diversion manager, while the Department of Social Development provides substantial funding for the implementation of diversion programmes, it does not cover operational costs. For this, heavy reliance is placed on international and national donor funding. Funding constraints also impact on the ability of the NGO to attract and retain suitably qualified staff for the development and implementation of programmes.

Another challenge raised by the facilitator was the training of facilitators. Facilitators are usually trained in English, while the majority of children in the programme are isiZulu speaking with 45 out of 54 children (83,3%) speaking isiZulu. In order to retain the quality of the message provided by the programme, it is recommended that cultural and linguistic backgrounds of children be accommodated in the content and delivery of diversion programmes.

CONCLUSION

The research found that the majority of children that attended the diversion programmes can be considered to be 'at risk' due to the various negative social conditions they find themselves in. As emphasised in the opening paragraphs of this paper, and highlighted in the findings and discussion above, risk factors act as 'contextual drivers' to anti-social conduct, and children grow up within 'an ecology of contexts where smaller more intimate contexts such as family and school are nested within larger contexts such as neighbourhood'.⁴⁹ Risk and protective factors 'operate and interact on a number of levels, typically at individual, familial and community levels and in everyday settings where young people interact regularly and frequently'.⁵⁰

The children in this study live in disorganised neighbourhoods where poverty and crime is rife. They perform badly in school, are exposed to negative peer influences, abuse substances, and live in unfavourable conditions where only one parent is working. Despite programmatic

interventions such as diversion programmes, the social conditions that children grow up in and return to on a daily basis, unfortunately remain the same. Sustaining the outcomes of the diversion programmes therefore remains a challenge. Much broader interventions at the individual, relationship, community and societal level, as well as those that specifically address 'developmental pathways towards anti-social behaviour',⁵¹ will have to be undertaken simultaneously. Furthermore, South African diversion programmes have some way to go in terms of basing interventions on systemic and ecological approaches, and incorporating adequate programme theory at the programme development stages.⁵²

Despite the many challenges facing diversion programmes, they do have the potential to positively influence the behaviour of children and reduce the risk of further exposure to crime, violence and victimisation while the child is in the criminal justice system. However, there is an urgent need for government departments to strengthen the delivery of a wide range of social services, to review the implementation of policies that prioritise the creation of safe environments for young people, and to provide support and interventions for those exposed to ongoing violence and crime. The need for the efficient and rapid implementation of an integrated and coherent youth safety strategy, involving a wide range of relevant stakeholders, cannot be overemphasised.⁵³

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NOTES

1. See M Feeley and J Simon, The New Penology: notes on the emerging strategy of corrections and its implications, *Criminology* (30)(4) (1992), 455.
2. T Newburn, *Criminology*, Willan Publishing: Cullompton, Devon, 2008, 333; See also R Ericson and K Carriere, The

- fragmentation of criminology, in D Nelken (ed.) *The Futures of Criminology*, Sage, London 1994, 102-3.
3. See C Gould, We can't 'fight' violence, *The Star*, Thursday, 21 February 2013, 15; See also M Malan, Creating a new normal for SA's men, *Mail & Guardian*, February 22-28, 2013, 7.
4. F Steyn, *Approaches to Diversion of Child Offenders in South Africa: A Comparative analysis of programme theories*, Doctoral Thesis, Faculty of Humanities, Department of Criminology, University of Free State, 2010, 6.
5. See P Burton, Snapshot results of the 2005 National Youth Victimization Survey, Centre for Justice and Crime Prevention, Research Bulletin, No 1, May 2006, 3.
6. Burton, snapshot results, 1.
7. A Dawes, C Ward & A van der Merwe, The development of youth violence: An ecological understanding, in C Ward, A Dawes & A van der Merwe (eds), *Youth Violence: Sources and Solutions in South Africa*, UCT Press, 2012, 53.
8. See A Walsh and C Hemmens, *Introduction to Criminology*, London, Sage, 2011, 362. 'A subculture of violence is a subculture in which the norms, values, and attitudes of its members legitimize the use of violence to resolve conflicts.'
9. See Ward et al, The development of youth violence: An ecological understanding, 53.
10. J Gallinetti, *Getting to know the Child Justice Act*, The Child Justice Alliance, The Children's Rights Project, Community Law Centre, University of Western Cape, 2009, 14.
11. T Newburn, *Criminology* (2008), 420.
12. J Sloth-Nielson, cited in C J Davel, *Introduction to Child Law in South Africa*, The Rustica Press: Ndabeni, Western Cape, 2000, 420.
13. The Child Justice Act 75 of 2008, Section 51.
14. Child Justice Act, Section 41.
15. Child Justice Act, Section 34.
16. Child Justice Act, Section 52 (1)
17. Child Justice Act, Section 67 (1)
18. Child Justice Act, Section 54.
19. Child Justice Act, Section 57.
20. Child Justice Act, Section 60.
21. Child Justice Act, Section 56.
22. See Appendix B in Gallinetti, *Getting to know the Child Justice Act*, Community Law Centre, University of Western Cape, 2009, 66-67, for a full description of the different types of offences that constitute schedule 1, schedule 2 and schedule 3 offences.
23. Gallinetti, *Getting to know the Child Justice Act*, 16.
24. C Badenhorst, *Second Year of the Child Justice Act Implementation: Dwindling Numbers*, Child Justice Alliance Research Report, The Child Justice Alliance, The Children's Rights Project, Community Law Centre, University of Western Cape, 2012, 3.
25. The Child Justice Act 75 of 2008, Section 34 (1)
26. Child Justice Act, Section 35.
27. Child Justice Act, Section 41.
28. Child Justice Act, Section 52.
29. See A Skelton, Restorative Justice as a framework for juvenile justice reform, A South African Perspective, *British Journal of Criminology*, 42 (2002), 496-513; Gallinetti, *Getting to know the Child Justice Act*; L M Muntingh, Policy Issues in Child Justice, in C Gould (ed) *Criminal*

- (In)justice in South Africa, Institute of Security Studies, Pretoria, 2009.
30. See www.khulisaservices.co.za for a full range of services offered by this national NGO.
 31. See also another study on the same diversion programme delivered in the North-West Province in D van Biljon, C Strydom & A Vermeulen, The Influence of a Diversion Programme on the Psycho-social Functioning of Youth in Conflict with the Law in the North-West Province, *Acta Criminologica*, 24(2) (2011), 75-93.
 32. J J McWhirter, B T McWhirter, E H McWhirter & R J McWhirter, *At Risk Youth: A Comprehensive Response for Counselors, Teachers, Psychologists and Human Service Professionals*, Brooks/Cole, Cengage Learning (2013), 132.
 33. Ward et al, The Development of Youth Violence: An ecological understanding, 54, further emphasize the need to understand risk and anti-social behavior in terms of an ecosystemic model where all the elements are linked and that none can be viewed in isolation. See also Figure 3.1: Established sources of risk for child anti-social behavior.
 34. P Burton & L Leoschut, *School Violence in South Africa*, Results of the 2012 National School Violence Study, Centre for Justice and Crime Prevention, Monograph series, No 12, Cape Town, March 2013, xiii.
 35. The study took part in KwaZulu-Natal, where the majority of children are isiZulu speaking. Therefore this finding should not be taken out of context.
 36. See also Ward et al, The Development of Youth Violence: An ecological understanding, 75.
 37. See McWhirter et al, *At Risk Youth*, 17-18; See also Ward et al, The Development of Youth Violence: An ecological understanding, 73.
 38. See The Child Justice Act 75 of 2008, Section 57.
 39. See C Badenhorst, *Overview of the Implementation of the Child Justice Act, 2008 (act 75 of 2008) Good intentions, questionable outcomes*, Criminal Justice Initiative of Open Society Foundation for South Africa, 2011, 31.
 40. A Skelton & M Batley, *Charting Progress, mapping the future: restorative justice in South Africa*, Institute for Security Studies, Restorative Justice Centre, 2006, 7.
 41. A Dawes & A van der Merwe, Interventions for young offenders: What we know about what 'works' in diversion programmes, in Ward et al (eds), 363, criticise South African diversion programmes for not incorporating 'highly structured cognitive behavioural approaches or inter-personal social skills training'.
 42. The Child Justice Act 75 of 2008, Section 96(1)(e).
 43. Research that is conducted to evaluate effectiveness of programmes that use non-experimental designs means that a single group is studied only once after the programme has been delivered. See R Bachmann & R K Schutt, *Fundamentals of research in criminology and criminal justice*, London: Sage, 2008, 247-269.
 44. Campbell & Stanley, as cited in R Bachmann & R K Schutt, *Fundamentals of Research in Criminology and Criminal Justice*, 262.
 45. See R Bachmann & R K Schutt, 247-269.
 46. H Hargovan, Evaluating restorative justice: *Working out what 'works'*, *Acta Criminologica*, 24(1) (2011), 78.
 47. See A Dawes & A van der Merwe, Interventions for young offenders: What we know about what 'works' in diversion programmes, 365-366.
 48. See C Badenhorst, *Second Year of the Child Justice Act Implementation: Dwindling Numbers*, 2012, 15.
 49. Ward et al, The Development of Youth Violence: An ecological understanding, 53.
 50. Ibid.
 51. See Figure 3.2 in Ward et al, The Development of Youth Violence: An ecological understanding, 63, for a description and explanation of 'developmental pathways for anti-social behaviour'.
 52. Dawes & van der Merwe, Interventions for young offenders, 349, highlight the fact that diversion programmes are not specialised, hence different types of offenders are likely to attend the same type of intervention, making it difficult to refer children to interventions based on individual need and that 'currently diversion programmes tend to overlook some of the explicit theories of the change process they seek to bring about'. Furthermore, desired programme outcomes (a reduction in anti-social and/or violent behaviour) are not directly linked to the programme activities and objectives'.
 53. See P Burton, *Snapshot results of the 2005 National Youth Victimization Survey*, 4.

CASE NOTE

The automatic review of child offenders' sentences

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This case note considers the automatic review of child offenders' cases. Adult offenders' cases go on 'review in the ordinary course' in limited circumstances, but section 85 of the Child Justice Act aims to provide automatic review in a wider range of cases. The wording of section 85 and how it should be read with the Criminal Procedure Act has caused interpretational difficulties. Two cases have provided answers to certain questions: Do all cases regarding children under 16 years go on review? Do all cases regarding custodial sentences (that are not suspended) go on review, regardless of the experience of the magistrate, whether it was a regional court that issued the sentence, the length of the sentence and even if the child was legally represented? The courts have answered these in the affirmative. In reaching these conclusions, the courts have interpreted the law within the context of the Child Justice Act as a whole, and within the provisions of section 28 of the Constitution.

The North Gauteng High Court, Pretoria, has described the Child Justice Act (CJA) as having introduced a comprehensive system for the treatment of children in conflict with the law; one that represents a decisive break with the traditional criminal justice system.¹ Under the CJA 'the traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law ... and reintegration of the child into the community'.² Whilst this is certainly true as an aspirational and operational departure point for the CJA, in reality the courts have experienced some difficulties in determining when the Criminal Procedure Act (CPA) is to be read together with certain provisions of the CJA, and when not. The issue of automatic review of sentences of children has proved to be a particularly thorny issue for interpretation by the courts.

This article begins by explaining how 'review in the ordinary course' works for offenders in the

mainstream criminal justice system, how the provision for 'automatic review' was conceptualised, and how it differs from 'review in the ordinary course'. The article then goes on to discuss the deliberations regarding automatic review, both by the South African Law Reform Commission and in parliament. This discussion is provided as a backdrop to inform the reader, but would not be of assistance to the courts in the exercise of statutory interpretation, because the Supreme Court of Appeal has found that 'little purpose is to be served by speculation as to the intention of parliament'.³ The article explains Section 85 of the CJA, and identifies the problems regarding its interpretation, before discussing the cases. The judgments of two full benches of the High Court in the cases of *S v FM* and *S v LM* are then closely examined. The contextual approach followed by both courts in coming to their conclusions, as well as their attention to children's constitutional rights, is evaluated at the close of the article.

IN THE ORDINARY COURSE

South African criminal procedure affords some offenders the right to have their cases 'reviewed in

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the ordinary course' under the Criminal Procedure Act 51 of 1977. This unique provision requires the records of the cases eligible for review to be typed up and sent to a judge of the High Court.⁴ Lawyers describe this procedure as being 'sui generis', which means 'one of a kind', because although it is referred to as a review it is in fact closer in nature to an appeal, as the reviewing judge has powers that go beyond the usual review. The procedures are set out in sections 302-304 of the CPA. The judge reviews the record in chambers, and must determine whether the proceedings were in accordance with justice. If the judge is uncertain as to whether the required rules were complied with, s/he will seek information from the magistrate, who must respond to the inquiry. In some cases the opinion of the Director of Public Prosecutions may also be sought. If the judge finds that the proceedings were in accordance with justice s/he issues a certificate to this effect. If it appears to the judge that the proceedings were not in accordance with justice, or if doubt about this exists, s/he places the record before a court comprised of two judges, which sits as a court of appeal. In important cases, the deputy Judge President may convene a full bench of three judges.⁵ This process has proved to be a protective measure, particularly for unrepresented accused persons, and has also promoted consistency in sentencing.⁶

Section 302 of the Criminal Procedure Act (CPA) is headed 'Sentences subject to review in the ordinary course' and it delineates the types of cases that are included within its ambit. Essentially there are three considerations – the type of sentence, the experience of the judicial officer who passed the sentence, and a requirement that the offender was not legally represented. The sentences to which the review procedure is applicable are imprisonment (including detention in a child and youth care centre) for a period exceeding three months if the judicial officer has been a magistrate for less than seven years, or exceeding six months if s/he has been a magistrate for longer than seven years.

DELIBERATIONS ABOUT THE CHILD JUSTICE BILL AND AUTOMATIC REVIEW

When drafting the Bill that would culminate in the Child Justice Act (CJA), the South Africa Law Reform Commission (SALRC) considered the 'review in the ordinary course' provided by section 302 of the CPA to be insufficiently protective of the rights of child offenders to be detained as a measure of last resort and for the shortest appropriate period of time.⁷ This was based on reports by monitors and social workers who had found numerous cases of children serving prison sentences because they could not pay paltry fines. Such sentences escaped High Court scrutiny because they were short sentences, were imposed by longer serving magistrates, or because the child had been legally represented.⁸ The SALRC's proposed Bill therefore extended automatic review to any residential sentence, regardless of the length of the sentence, the experience of the magistrate or whether the accused was represented.⁹

Although the Child Justice Bill (CJB) was first introduced into Parliament in 2002 it was not until 2008 that the final deliberations occurred.¹⁰ The relevant clause of the CJB looked similar to the final version of section 85. The minutes of the Justice and Constitutional Development parliamentary portfolio committee (the portfolio committee), as recorded by the Parliamentary Monitoring Group (PMG), indicate that the intention was that there would be automatic review of 'decisions from the lower courts.'¹¹ By this stage, the clause had been altered to provide different rules for two age categories – below 16 years and between 16 and 18 years – to bring it in line with an amendment that had been made to the Criminal Procedure Act regarding the rules for appeal.¹²

It is clear from the PMG minutes that the portfolio committee intended that *all* sentences imposed on children below the age of 16 years should go on automatic review, whilst 'any custodial sentence' imposed on a child in the category 16 to 18 years should be so treated. The

PMG minutes also confirm that the portfolio committee considered the automatic review to operate regardless of whether the child was legally represented, and in any case, as was pointed out at the portfolio committee hearings, all children dealt with in terms of the CJA would be legally represented.¹³ It appears, though it was not crisply stated by the portfolio committee, that the clause that would eventually become section 85 of the CJA would render the operation of section 302 'review in the ordinary course' redundant. The lack of clarity about whether section 302 of the CPA continued to have any relevance to child offenders drifted into the wording of section 85, and has subsequently caused difficulties in interpretation for courts working under the operation of the new law.

The above deliberations have been included in this article so that the reader might understand what the aim behind the provision was, but the parliamentary debates cannot be used to guide interpretation of the CJA. The Supreme Court of Appeal, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴ has made it clear that the courts will restrict their inquiry about the meaning of a particular section in an Act to the words actually used in the provision under scrutiny. Although lawyers often attempt to adduce evidence of what was intended by the legislature, or the drafter of the laws, the court deemed this to be unhelpful. This approach was more recently affirmed in *Director of Public Prosecutions, Western Cape v Prins and Others*.¹⁴ In that case the court was called upon to interpret the Criminal Law (Sexual Offences and Related Matters) Amendment Act, insofar as it failed to provide penalties for sexual offences. The court rejected the various explanations as to what the legislature had intended, and instead relied on the fact that the legislation evidently anticipated that if offenders were convicted of sexual offences, they would be sentenced. However, while the inevitable starting point is the language of the provision, the context and the purpose of the law are also important, as will be demonstrated in the approach adopted by the courts in the two cases discussed below.

AUTOMATIC REVIEW UNDER THE CHILD JUSTICE ACT 75 OF 2008

Section 85 of the CJA reads as follows:

Automatic review in certain cases

- (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence-
 - (a) Under the age of 16 years; or
 - (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre, providing a programme provided for in section 191(2)(j) of the Children's Act,

The sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

The first apparent problem with section 85 is its reliance on chapter 30 of the CPA and the specific reference to section 304. Chapter 30 is entitled 'Reviews and appeals in criminal proceedings in lower courts' and it deals with the procedure on reviews and appeals. If this new automatic review rule envisaged in section 85 of the CJA was supposed to replace the old rule in the CPA, why did section 85 make chapter 30 apply? The answer to this lies in the fact that although the CJA introduced a new child justice system, it lies on the bedrock of the criminal procedure laid out for all criminal matters in the CPA. Thus, not every detail of procedure appears in the CJA. For example, plea procedures are not spelt out in the CJA, but a child pleading to a charge would do so according to the procedures set out in the CPA.

Similarly, although section 85 indicates what triggers automatic review, and sets out the special rules, the procedure of how such reviews are to be undertaken are detailed in chapter 30 of the CPA

and are not repeated in the CJA. That is the reason why section 85 refers to chapter 30, and to section 304, which deals with the procedure of review. Section 4 of the CJA explains that the CPA applies except insofar as the CJA provides for amended, additional or different provisions or procedures. Schedule 5 to the CJA sets out in tabular form how the CJA is to be read together with the CPA, and how all the sections relating to review procedures are to be read with sections of the CJA. The schedule should be clearer that section 302 (the procedure for 'review in the ordinary course') is superseded by the new section 85.

Other interpretational difficulties arise from the wording of section 85. These include whether legal representation of the child has any relevance (as the section is silent on this issue), and whether the words 'criminal proceedings in the lower courts' include regional courts within its ambit. A further problem is the fact that section 85 includes only a term of imprisonment that 'was not wholly suspended'. The old section 302 of the CPA did not include this limitation, giving rise to the question whether the CJA has in fact reduced the rights of review of cases involving children in the 16 to 18 year old category.

The CJA came into operation on 1 April 2010 and it was not long before the courts began to experience difficulties in interpreting section 85. In a judgment of the Northern Cape High Court, Kimberley, *S v Fortuin* [2011] ZANCHC 28,¹⁷ Judge Olivier grappled with the question whether section 85 of the CJA could be read alone, without reference to section 302 of the CPA. The judge found that the requirement in section 302 that offenders who are legally represented are excluded from review could not logically be expanded to apply to section 85 of the CJA, because under sections 82 and 83 of the latter Act, the child is always assisted by a legal representative. This approach was endorsed by other High Courts in the Western Cape, Eastern Cape and Free State.¹⁸

The case of *S v FM*: A constitutional reading of automatic review arising from regional courts

The question of whether section 85 applies in relation to cases from the regional court as well as the district level of the magistrate's court came up in the course of a special review of a case that was referred to the North Gauteng High Court, Pretoria. The regional court magistrate was uncertain as to whether regional court cases should be sent on automatic review. Due to the importance of deciding the proper interpretation of the clause, the Deputy Judge President convened a full court to hear the matter. The case is reported as *S v FM* 2013 (1) SACR 57 (GNP). The crime was a serious one and therefore had been heard in a regional court. The accused, who was 14 years old at the time of the offence, had pleaded guilty to 'an act of sexual penetration' of an 11 year old girl who was unable to consent to sexual intercourse due both to her age and the fact that she was mentally disabled. A crime of this nature would attract a sentence of life imprisonment for an adult under the minimum sentences legislation, but that legislation has never applied to child offenders below 16 years of age, and since the case of *Centre for Child Law v Minister of Justice* [2009] (2) SACR 477 SACR 477 (CC) no longer applies to persons who were 16 or 17 years of age at the time of the commission of the offence. The regional court had heard from the probation officer's report that the boy's home circumstances were impoverished, he had dropped out of school and started using drugs, including nyaope (a mixture of dagga and heroin). The court had set a sentence of ten years effective imprisonment, plus a further five years suspended on certain conditions.

The Centre for Child Law was admitted as *amicus curiae* (a friend of the court). The legal representative of the accused, as well as counsel for the *amicus curiae*, argued that section 85 applies to cases decided by the regional court, because the words 'lower courts' in that section includes both the district and regional courts, and that section 85 of the CJA should be read alone, without reference to section 302 of the CPA. The state argued, on the contrary, that on their reading of the law only the

cases involving sentences of detention longer than three months or six months (depending on the length of the experience of the magistrate concerned) would go on automatic review. As a general rule, regional courts are presided over by more experienced magistrates. Furthermore, the state pointed out that a child accused sentenced to a term of detention would also have the right to appeal without first applying for leave, and that automatic review was therefore unnecessary for this category of offenders.

Judge Tuchten, writing for the full court,²⁰ explained that interpretation must be conducted in a contextual manner in the light of the document as a whole.²¹ The apparent purpose of the document is important. A sensible meaning is to be preferred over one that leads to insensible results or undermines the apparent purpose of the document, though a court should not be tempted to stretch the meaning of the actual words of the text too far in the attempt to reach a sensible outcome.²² When a statute is capable of different meanings, a court should prefer the interpretation that better promotes the spirit, purport and objects of the Bill of Rights.²³ Having laid this groundwork, Judge Tuchten then examined the legal framework in a contextual manner. He concluded that 'current legal policy favours a high degree of scrutiny over sentences imposed on child offenders'.²⁴

The judge went on to undertake an analysis of the provision against the constitutional rights guaranteed to children. He considered that section 28(1)(g) of the Constitution gives every child the right not to be detained, except as a measure of last resort, in which case the child may be detained only for the shortest appropriate time. He noted that the preamble to the CJA refers to the Constitution, the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). In particular, he observed that article 37, regarding detention as a measure of last resort and shortest appropriate period of time, is framed in similar terms to section 28(1)(g) of the Constitution, and he drew attention to the fact that the ACRWC provides that the essential aim of the treatment of every child found guilty of infringing the penal law

shall be his or her reformation and reintegration into his or her family, and social rehabilitation.

Judge Tuchten then considered the arguments of counsel in the light of this constitutional and international law framework. He pointed out that the state's argument was criticised by counsel for the accused and the *amicus curiae* on the ground that it would exclude from the ambit of automatic review the cases of children found guilty of more serious cases, which are usually heard in the regional courts, and carry the heavier sentences. This would be contrary to the constitutional injunction of, at the very least, ensuring that the child accused is sentenced to the shortest appropriate period of time in detention. The court found that there was merit in these criticisms. One of the objects of the CJA is 'to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults'.²⁵

The court also dealt with an ancillary argument of the state that the broad interpretation of section 85 being sought would add unreasonably to the workload of 'an already overburdened and under-resourced justice system'.²⁶ The court accepted that this might be so, despite a lack of evidence before it, but was of the view that this should not carry weight. The court found that the solution to this problem, consistent with the Constitution, is that the resources must be provided if the legislature requires the task to be done.

The court ultimately found that, at a linguistic level, there was merit in the state's arguments, but that a contextual and constitutional interpretation favoured the arguments of the defence and the *amicus curiae*. Over and above section 28(1)(g), Judge Tuchten also made it clear that the best interests principle included in section 28(2) of the Constitution applies to children who have collided with the law, and while it does not necessarily override other considerations, the paramountcy principle 'does call for appropriate weight to be given to the best interest of the child'.²⁷ The court accordingly came to the conclusion that section 85

of the CJA should be interpreted to provide for automatic review in respect of all children who are sentenced to a period of imprisonment or detention in a child and youth care centre, including children who are sentenced in a regional court.

The court then considered the facts of the case and determined, taking all factors into consideration, that the sentence was too severe, and reduced it by removing the suspended sentence that had been added to the ten years of imprisonment.

S v LM: A constitutional interpretation of several aspects pertaining to automatic review

The Western Cape High Court also set up a full bench to consider the interpretation of section 85 of the CJA. The full bench issued directions inviting interested parties to join as *amici curiae*. The Community Law Centre at the University of the Western Cape and the Centre for Child Law at the University of Pretoria both responded to the invitation, and filed separate submissions. The Director of Public Prosecutions in the Western Cape and the representative of the accused also filed submissions, and all parties presented oral argument.²⁸

In contrast to the offence committed by the child FM, the offence which the child LM had committed was very minor. He was 15 years old and was convicted in the child justice court held at the magistrates court in Cape Town, of possession of one 'stop' of dagga.²⁹ He was legally represented and pleaded guilty to the offence. The court postponed the passing of sentence for one year on the conditions that the accused had to submit to the supervision of a probation officer and had to appear before the court if called upon to do so.³⁰ In practice, the sentence works like a conditional caution; if the offender does not breach the conditions and commits no further crimes during the postponement period, no sentence will be put into effect.

The magistrate had been uncertain whether, despite the accused being below the age of 16

years, such a sentence should be referred to automatic review. He accordingly sent it on special review for consideration by the High Court. The full bench issued directions, setting out a range of questions that counsel should respond to in their arguments. These included the following:

- (a) Are all matters in which children under the age of 16 years at the time of the offence are sentenced, subject to review, notwithstanding that the accused was legally represented?
- (b) Are cases where children were 16 years or older, but under the age of 18 years at the time of the commission of the offence, and sentenced to imprisonment or detention in a child and youth care centre, subject to review, notwithstanding the length of the sentence or that the accused was legally represented?
- (c) Are the provisions of s 85 of the CJA applicable to children sentenced by a regional court?
- (d) What is the effect of s 85 on a suspended sentence where such a sentence would otherwise be reviewable in terms of s 302 of the CPA?

With regard to the question of legal representation Judge Henney, writing for the full bench,³¹ found that the section should be interpreted within the context of a proper interpretation of the CJA, taking into account the principle enshrined in section 28(2) of the Constitution that the child's best interests are of paramount importance in all matters concerning a child. The court went on to undertake a constitutionally compliant reading, making reference to Constitutional Court judgments that require judicial officers to read legislation, where possible, in conformity with the Constitution.³² Courts must prefer interpretations of legislation that fall within constitutional bounds, provided that such an interpretation is reasonable.³³ Judge Henney found that where it is unclear whether the CJA or the CPA is applicable, the CJA must prevail. This is consistent with the idea that the CJA seeks to establish a separate criminal justice system for children. Following this general approach, the court worked its way through the

arguments, and set out its conclusions in summary form at the end of the judgment³⁴ as follows:

All cases are subject to automatic review in terms of the provisions of section 85 of the CJA where a child was

- (a) below the age of 16 years, or
- (b) 16 years or older and under the age of 18 years, if the sentence to imprisonment was not wholly suspended, or to detention in a child and youth care centre, or
- (c) if sentenced to a period of imprisonment after a suspended sentence was put into operation.

This would be irrespective of:

- (i) the duration of the sentence or the length of time the judicial officer had held the rank of magistrate; or
- (ii) whether the child was legally represented; or
- (iii) whether the child was sentenced by a regional court.

The judgment also made it clear that section 302 of the CPA does not apply to child offenders. As in the *FM* case, the state had argued that the interpretation proposed by the defence and the amici would cause the High Court to 'be flooded with reviews, resulting in unmanageable workloads for judges and other court staff'.³⁵ In this instance, the Minister of Justice and Constitutional Development put up some statistics in support of this claim. The court was unconvinced by the figures, and found that the fear raised by the Minister was unwarranted. Justice Henney went on to find that even if the workload is increased, 'this fact alone cannot serve as a legally and constitutionally permissible reason not to have these matters considered on review'.³⁶ The proceedings in relation to the child *FM* were found to be in accordance with justice.

CONCLUSION

The conclusions reached in both *S v FM* and *S v LM* are, in the author's view, correct. However, it

is notable that not only did the courts reach the correct conclusion, but they also both applied an approach to statutory interpretation that relies on a contextual and constitutional analysis of the provisions. Using this expansive approach, both courts looked beyond section 85 to the broader aims of the CJA, and undertook their interpretation with those objectives in mind. Furthermore, both courts were aware of the Bill of Rights, and the importance of its application to their endeavours. Judge Tuchten, in particular, went to great lengths to consider that although there were different arguments before him that had merit from a textual point of view, the court was enjoined to prefer a reading which was in keeping with the constitutional injunction that detention must be a measure of last resort and for the shortest appropriate period of time. He also made the important point that the wording of section 28(1)(g), dealing with the last resort principle, was closely based on the wording of the Convention on the CRC, and that the ACRWC aims to reintegrate child offenders. Judge Henney relied on the best interests principle, perhaps because the sentence on review in the *LM* matter did not involve detention, thus section 28(1)(g) was less on point.

The courts in both of the judgments discussed in this case note were very much alive to the new philosophy regarding the Child Justice Act. They understood the importance of what Judge Tuchten referred to as 'the enhanced scrutiny of the case of the child accused contemplated by the CJA'. The judges saw the advantages of the operational thrust of section 85 – the automatic review of children's criminal cases in as wide a range of cases possible.

The decisions of the full bench are binding in their respective provinces, namely Gauteng and the Western Cape. These judgments are also persuasive in the other provinces. Furthermore, the legislature plans to write the courts' interpretations into the law, as evidenced by clause 44 of the Judicial Matters Amendment Bill [B7-2013], which was tabled before Parliament on 8 April 2013.³⁷

The reviewing judges of the future will be the important ‘upper guardians’ of an effective child system. Their vigilance can indeed ensure that children’s best interests are protected in the child justice system, that detention truly is a measure of last resort, and, where unavoidable, that it is for the shortest period of time so that ‘every day a child spends in prison should be because there is no alternative.’³⁸



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NOTES

1. The Child Justice Act is the first piece of legislation in South Africa that provides a comprehensive system for dealing with children in conflict with the law. Prior to this, the ‘system’ for child offenders had to be gleaned from a piecemeal reading of fragments of different laws, read together with case law. The fact that children were to be dealt with differently from adults, particularly in relation to sentencing, has been recognised by the courts over many decades; see S Terblanche *Guide to Sentencing* Butterworths, Durban, 375, 384-394 (1999).
2. Bertelsmann J in *S v CKM and Others* NGHC (12 January 2012), at para 7.
3. *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) para 36, citing *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2011, 2, All SA 262 (SCA) para 20.
4. E du Toit, F de Jager, A Paizes, A Skeen and S van der Merwe, *Commentary on the Criminal Procedure Act*, Cape Town: Juta, 2009, 30-8.
5. *Ibid*, 30-11.
6. The history of the protection, and its importance in the protection of the partially illiterate and undefended accused, is included in an article entitled *On the system of automatic review and the punishment of crime*, which the editors describe as ‘the contents of a memorandum to the Hon. Mr Q de Wet (Judge President of the Transvaal) by two members of the Transvaal bench’, 79, 1962, *South African Law Journal* 267. The memorandum also stresses the need for consistency in sentencing.
7. This principle is enshrined in s 28(1)(g) the South African Constitution, and is derived from article 37 of the Convention on the Rights of the Child, 1989, which was ratified by South Africa in 1995.
8. SALRC *Report on Juvenile Justice*, Pretoria, July 2000, 197.
9. *Ibid*, 299.
10. For a discussion about the delays in the passing of the Child Justice Bill see A Skelton and J Gallinetti, A long and winding road: The Child Justice Bill and civil society advocacy, *South African Crime Quarterly*, 15, 3-10 (2008).
11. Mr Bassett, senior state law advisor, PMG minutes of a Justice and Constitutional Development portfolio committee meeting, ‘Child Justice Bill: deliberations on clauses 81 to 98’, 24 April 2008.
12. In terms of section 309B(1)(a) children were permitted to appeal their cases if they were below the age of 14 years old at the time of the commission of the offence, and this was later changed to 16 years old.
13. Ms Gallinetti (Child Justice Alliance) pointed out that ‘no child could waive his or her right to legal representation’. Mr Jeffery (ANC member and co-chair of the committee) ‘wondered if the reference to legal representative should not be taken out altogether’ (PMG minutes, 24 April 2008).
14. See note ii PMG minutes, 24 April 2008.
15. *Ibid*.
16. Act 32 of 2007.
17. This case was handed down by the Northern Cape High Court, Kimberley on 11 Nov 2011. It is unreported but is available on www.saflii.org.
18. Namely *S v Ruiter* [2012] ZAWCHC 265, *S v CS* 2012 (1) SACR 595 (ECP) and *S v TS* 2013 (1) SACR 92 (FB). In *S v Nakedi* (2012) ZANWHC 5 the court found that section 85 should apply only to children not legally represented but this decision is, with respect, incorrect.
19. Criminal Law Amendment Act 105 of 1997.
20. J Molopa concurred in the judgment of J Tuchten.
21. *S v FM*, para 19.
22. These interpretational guidelines were developed by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Edumeni Municipality*, note ii, PMG minutes, 24 April 2008, para 18.
23. This principle was enunciated by the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 CC, paras 46, 84 and 107.
24. *S v FM* para 21.
25. Section 2(c) of the CJA.
26. *S v FM* para 34.
27. *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).
28. The judgment was reported as *S v LM*, Faculty of Law, University of the Western Cape: Children Rights Project of the Community Law Centre and Others as Amici Curiae, (1) SACR 188 (WCC) 2013.
29. Dagga is the colloquial term for marijuana and one ‘stop’ is a very small quantity for personal use.
30. Section 78(1) of the CJA read with s 297(1)(a)(i) of the CPA.
31. The other two judges were Desai J and Gamble. They concurred with Henney J.
32. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors and Others v Smit NO and Others* 2000 (2) SACR 349 (CC), paras 22-23.
33. *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).
34. *S v LM* para 64.
35. *S v LM* para 63.
36. *S v LM* para 62.
37. An explanatory summary of the Bill was published in Government Gazette No 36347 of 8 April 2013.
38. Cameron JA (as he then was), in *S v N* 2008 (2) SACR 135 (SCA), para 7.

ON THE RECORD...

Secretary of Police, Jenni Irish-Qhobosheane

Gareth Newham (GN): Could you briefly explain what the key developments in civilian oversight of the police have been in the current administration?

Jenny Qhobosheane (JQ): There are two entities that are responsible for oversight of the police, outside the police themselves. The one is the Independent Police Investigation Directorate (IPID) and the other is the Civilian Secretariat for Police. The new legislation governing the IPID has refocused it as an investigation unit, so that it now has the capacity to handle investigations against the police.¹ As the Civilian Secretariat for Police we started a process of institutional and organisational strengthening. New legislation has now been enacted, the only outstanding aspect of the implementation of that legislation is the Secretariat becoming a designated department.² On an organisational level, the Secretariat has been capacitated to perform its functions.

GN: What are recent achievements of the secretariat?

JQ: At a policy level we have a new public order policing policy, a new reservist policy and the development of a Green Paper on policing, which is the most important policy.³ We have also been involved in the drafting of various pieces of legislation, such as the South African Police Amendment Act to strengthen the independence of the Directorate for Priority Crimes Investigation (DPCI),⁴ the Bill on the collection of DNA for investigation purposes;⁵ and towards the end of this year we'll be redrafting the SAPS Act entirely to bring it in line with the Constitution and the White Paper on Policing.

GN: You talked about growth and capacity. Has the secretariat reached its full capacity or is there room for further growth?

JQ: When we first developed our organisational capacity plan we agreed that we would build capacity but not become a huge bureaucratic organisation. We have grown from 30 people a couple of years ago to a staff complement of 110 now. I think that we have reached our full capacity as it stands at the moment, but we are starting to see that there may be capacity gaps.

GN: When we interviewed you two years ago, you mentioned that one of the challenges of civilian oversight is getting the police to understand your role. Of course everywhere in the world there will be an inherent tension in civilian oversight of the police. Police organisations do not necessarily like people second-guessing or overseeing what they are doing. Has that been resolved or are there challenges that you are still facing? What tensions currently exist around police oversight?

JQ: The first two years were the most challenging in terms of the police understanding our role. Even though such tensions have mostly been overcome, they are always going to be there and so it is important that you institutionalise your approach to those challenges. You institutionalise them through effective regulations, and so we are finalising our regulations. As areas of cooperation increase between the Secretariat and the police, we need to make sure that the Secretariat doesn't get drawn into police operational matters. At the same time police need to recognise that policy is not just a document. Policy needs an implementation plan. I think our relationship has therefore become more

dynamic, and that some of the challenges we faced in the first two years have lessened. But they do still exist, and how you manage that tension is important. We are looking at more structured relations with the SAPS such as through joint compliance forums.

GN: Over the last three years, between 2011 and 2013, there have been very high profile incidences of police abuses – examples like the Tatane case and the Marikana tragedy. How does the Secretariat see this kind of policing challenge and what is your role in relation to in trying to understand and improve police conduct?

JQ: Two things: the stronger the IPID is, the better it is able to deal with those specific issues because they are firmly within the mandate of the IPID. We need to ensure that the IPID has the capacity to ensure that there are consequences for the police who are involved in such actions.

From the Civilian Secretariat for Police side, I think that we need to be looking at what policies and interventions are needed, and to assess how far we have come in transforming the police and what still needs to be done. There are areas where the regulations are not tight enough. Also, there are policy areas that need to be addressed, so our focus has been on the Green Paper. The Green Paper deals with those quite specifically. More importantly, there needs to be an implementation plan to address these issues, including dealing with acts of police brutality.

GN: What kind of regulations do you think are not tight enough in relation to managing police misconduct?

JQ: Over time the unionisation of the police has meant that a lot of disciplinary issues are being negotiated. We need to look very carefully at what is required for good discipline and have tight management controls. Then it becomes important that those are set out as part of a legislative approach. Management accountability needs to be very strongly legislated and it cannot only be part of a negotiated agreement.

GN: The new legislation aimed at strengthening the Secretariat includes provisions for police oversight shared between the national secretariat and the provincial secretariats as provided for in the Constitution. Can you speak a little about the way this has played out? Are you getting better coordination amongst the various secretariats?

JQ: The one area of coordination is with the provincial departments of community safety. Most provinces are beginning to establish their provincial secretariats. What has happened during this process has varied from province to province, with some provinces being ready to launch secretariats, and others still in the process of forming secretariats. The provinces have different capacities to deal with civilian oversight and we need to build on provincial capacity in this regard. There are also a number of coordinating forums such as the MINMEC (the inter-ministerial committee on policing). At the end of the day it comes down to becoming more coherent about our reporting and engagement.

GN: Chapter 12 of the National Development Plan deals with community safety and policing. For example, there are very specific recommendations around demilitarising the police and ensuring the code of conduct is in line with disciplinary processes. It also calls for the establishment of a police board to develop clear standards for appointing people, particularly into management positions. What is the way forward in this regard? How do you see those recommendations being implemented?

JQ: There are two aspects to it. The first is the whole area of community safety. We feel that the initiative to establish community safety forums fits in with what the National Development Plan is saying. This was an initiative that was started before the National Development Plan. The other aspects relating to the professionalisation of the police are being dealt with in the Green Paper. As the Green Paper is going to be the key policy, it is important that the Green Paper and the National Development Plan are able to speak to each other. The Green Paper aligns with the NDP and becomes an important way of taking forward the

NDP. There are also a number of processes between ourselves and the SAPS, looking at the practicalities, that will require more detail in relation to implementation.

GN: How would you summarise the core vision of the Green Paper on policing in South Africa?

JQ: I think that what we are looking at is a more professional policing organisation that offers services to the community in the context of crime becoming more and more complex, because you have the growing challenge of transnational and organised crimes.

GN: Do you think the White Paper will be finalised this year, and will that happen before the redrafting of the South African Police Service legislation?

JQ: We are hoping to begin our public consultations within the next month and we would like to engage publicly on the Paper. It is important that the public consultation processes take place before we finalise the White Paper. We hope to finish these in the next two months.

GN: Is there anything else you would like to say about policing and police oversight?

JQ: Initially there was a very strong oversight structure, then, to some extent, it collapsed. I think now it remains a work in progress; and we certainly have not reached the level we need to be at. That is what we need to be working on.

NOTES

1. Independent Police Investigative Directorate Act, 2011, (Act 1 of 2011).
2. Civilian Secretariat for Police Service Act, 2011 (Act 2 of 2011).
3. The process of drafting new legislation starts with a 'Green Paper' that describes government's preferred policy approach. Following consultation, the 'Green Paper' will usually be refined into a 'White Paper' that then guides the drafting of new legislation.
4. South African Police Service Amendment Act, 2012 (Act 10 of 2012).
5. The Criminal Law Forensic Procedures Amendment Bill B09-2013.

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In this edition of *SACQ* Anthony Collins argues that violence in South Africa is normalised in every aspect of our lives, from child rearing to intimate relationships. He challenges policy makers to consider deal with violence in ways that will change social norms; and concludes that until we do so we will not be able to reduce violent crime, or police brutality. These views are echoed in the interview with Rachel Jewkes that concludes this edition. Also in this edition, Vanya Gastrow considers the constraints to accessing justice for Somali shop owners who have been the victims of robberies in the Western Cape. David Bruce offers an overview and analysis of the effect of massive recruitment into the SAPS over the past ten years.



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