

The solution is to find the right balance between sensible child protection measures and other constraints. There is no reason why sensible laws which protect children in workplaces should interfere with family businesses. If a child between 10 and 14 is allowed to work for up to 12 hours per week during term-time without any need for a licence, most parents would regard that as a reasonable maximum, given the evidence that working more than 10 hours per week affects school performance. If a child is under 10, or wants to work more than 12 hours per week, then there are good reasons for requiring a licence to ensure that the work is appropriate and safe.

The advantage of having appropriate child labour laws is that they set community standards. They send clear messages about what is acceptable and what is not, what is beneficial to children and what is not, what is dangerous, and what is not. Families need to know this as much as anyone else. It is the role of the Parliament to set such community standards after proper consultation and debate. NSW and the other Australian states which have not yet done so need to make an immediate start on this.

Child Labour and Exploitation in South Africa in relation to Children in the Criminal Justice System

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Possession and trafficking of drugs

Children and young people under 18 are often used by adult drug dealers to carry drugs. If caught, they are charged. The policy of the Office for the Director of Public Prosecutions depends to a great extent on the quantity and type of the drugs concerned. Children may be diverted to drug counselling programmes if the quantity is small and if it is clear that the child is a user rather than a dealer. Dealing in drugs is considered serious, and children can be held in prison to await trial where they have been charged under with "any offence under any law relating to the illicit conveyance or supply of dependence producing drugs": see Schedule 2 of the Correctional

Services Act 8 of 1959. They can be sentenced to imprisonment for such offences.

South Africa is in the process of reforming the way it deals with children accused of crimes. The *Child Justice Bill* is a draft law which has been presented to the Minister of Justice by the South African Law Commission, and which is soon to be considered by Cabinet and debated by the South African Parliament.

The draft *Child Justice Bill* accompanying the SA Law Commission's report on Juvenile Justice suggests an amendment to the way in which this offence is described in the schedule. The aim is to try catch syndicates, which will in almost all cases be operated by adults. This may mean, however, that children working with syndicates are more likely to be held in custody while awaiting trial, a negative aspect to this proposed formulation. The idea, however, is to get to the adult perpetrators who are using children to traffic drugs. It is always possible to divert young people or find alternative rehabilitative sentences for them once they have given evidence. If it is clear that children are selling drugs for survival or because they are dependent on drugs

themselves, the matter can be converted to a Children's Court inquiry, and this can be done even after the conviction, but before sentence.

Reformers in South African are promoting the idea that the focus should be on finding and prosecuting the adults who traffic drugs. This may sometimes mean prosecuting children as well, as to separate the trials may lead to the adult offender being acquitted. Once the adult is convicted, the child can always be given a rehabilitative sentence, or where the circumstances indicate that it would be appropriate, the matter can be converted to a Children's Court inquiry after conviction (under section 254 of the Criminal Procedure Act no 51 of 1977).

Gang related offences

Children and young people are active in gangs¹ in South Africa, a problem which is particularly prevalent in urban areas in Western Cape and Eastern Cape, Kwa Zulu Natal and Gauteng. The government's determination to deal with gangsterism led to the passing of the *Prevention of Organised Crime Act no 121 of 1998*. Section 11(b) of the Act states that a child can be identified as a member of a criminal gang by his or her parent or guardian. Section 11(c) refers to the factors that a court may take into account in interpreting whether a person can be regarded as a member of a criminal gang. These include style of dress, language and tattoos. Concern has been raised that these criteria could reasonably apply to many children who gather in groups, dress similarly in the latest street-gangster style and who use "street speak", and that typical teenage behaviour may become criminalized². There is no doubt, however, that children are committing crimes in gangs and that in many cases the gangs are run by adults.

Members of the gangs who are under 18 are often co-accused with adults. While it may be necessary to prosecute them together with the adults to ensure the conviction of the adults, the sentences of children or young people should take into consideration the influence of adult co-accused. As prisons are breeding grounds for gang activity,

reformists make the point that young people involved with gang activity should not be imprisoned wherever possible.

In the long run, preventing children getting involved with gangs is the solution. Some non-governmental organizations in South Africa have been experimenting with the idea of incorporating some of the positive aspects of gangs as part of the programmes on offer for prevention, diversion and alternative sentencing.³ The Journey project of NICRO⁴ and the programmes offered by Usiko⁵ are examples of programmes which have attempted to build on this innovative idea.

The utilization of children by adults in the commission of offences

Comments on the SA Law Commission Issue Paper on Juvenile Justice⁶ indicated a concern that increasing the minimum age of criminal capacity would lead to younger and younger children being used by adults in the commission of crimes⁷. The proposal that there should be an increased use of diversion and of alternatives to custodial sentences gave rise to a similar concern - namely that children would be used to commit crimes or would be left to "take the fall" because they would be less likely to go to prison⁸. The project committee's response to these concerns are to be found at section 117(3) of the draft Child Justice Bill, which states that:

"Any adult who incites, persuades or encourages a child to commit an offence is, in addition to any other offence for which such adult may be charged, guilty of an offence and is liable upon conviction to a fine or to imprisonment not exceeding two years."

Under the new Child Justice Bill, it is clear that adults using children to commit an offence is an offence in itself. The emphasis will therefore be on the prosecution of adults, with children as far as possible being diverted away from the courts into suitable programmes, or if they are tried and convicted, being treated in a way which takes

account of their age and the influence of their adult co-accused upon them.

Diversion and Alternative sentencing

Under the current law, community service is used as both a sentence and as a diversion programme. Sentences involving community service derive from section 297(1)(a). The section limits sentences of community service to persons who are 15 years or older. This age accords with current provisions regarding child labour. Although there is currently no law which provides for diversion, the practice of diversion has grown primarily out of co-operation between prosecutors, probation officers and non-governmental organizations. NICRO has offered community service placements as a diversion option for a number of years, and also adhered to the 15 year age limit. The SA Law Commission's Report on Juvenile Justice takes a different approach:

“(The Commission) has decided that, in the interests of making available as wide a range of diversion options to as many children as possible, there should be no lower limit to community service, although care must be taken to ensure that the tasks set for a child to perform are proportionate to that child's age, and to both the physical and emotional maturity of the child. Community service of children is not labour in any normal sense - rather, it should be seen as similar to the performance of chores, which most people would agree are suitable (and possibly desirable) for children below the age of 15 years.”⁹

The draft Bill sets out minimum standards which are designed to prevent any exploitation of children:

“49(1) No child may be excluded from a diversion programme due to an inability to pay any fee required for such programme
(2) A child of ten years of age and over may be required to perform community service as an element of diversion, with due consideration to the child's age and

development.

(3) Diversion options must-

- (a) promote the dignity and well being of the child, and the development of his or her sense of self worth and ability to contribute to society;
- (b) not be exploitative, harmful or hazardous to a child's physical or mental health;
- (c) be appropriate to the to the age and maturity of the child; and
- (d) not interfere with the child's schooling.”

In the system proposed by the South African Law Commission, decisions about diversion will be made at a preliminary inquiry, and is thus moved away from one person making decisions about diversion. The preliminary inquiry is attended by the child and family, the probation officer and the prosecutor and is chaired by a magistrate. Decisions about the content and duration of community service will be made by this group.

The draft Bill also allows for community service as a sentencing option, either as a sentence in itself or linked to other sentences, as in the case of correctional supervision.

While allowing younger children to access diversion and alternative sentences, the draft Child Justice Bill provides a strong framework of principles and minimum standards to ensure that children are not exploited. The draft bill further requires all diversion programmes to be registered to provide further protection from exploitation.

It is proposed that persons knowledgeable about legal protections relating to child labour inform the drafting of the regulations to the Child Justice Bill

Work done by children in prison and reform schools

The policy of the Department of Correctional Services is that prisoners under the age of 18 years

are not required to do manual labour. They are required only to participate in the cleaning of their own living areas. Children in prison often experience “lethargy and boredom”¹⁰, and whilst some correctional facilities have educational and vocational training courses, others have no programmes at all.

Children in reform schools do sometimes perform work, such as making and selling pottery¹¹. This is, however, seen as an adjunct to their learning and as they are usually able to keep the proceeds of their work they are usually happy to be engaged in such activities. Care must be taken to ensure that they are not exploited through such work.

The United Nations Rules for the Protection of Juveniles Deprived of the Liberty¹² state at rule 42 that “Every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment”. The rules do not outlaw work for children deprived of their liberty, but make it clear at rule 43 that “All protective national and international standards applicable to child labour and youth workers should apply to juvenile deprived of their liberty”. Rule 45 goes further, stating:

“Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour”.

Reformists in the field of child justice take the view that vocational training serves a two-fold purpose of keeping children usefully occupied whilst preparing them to reintegrate into society. Vocational training should be offered to all children whose sentence deprives them of liberty. There is no legal impediment to children in custodial settings working, as it is preferable to them being bored and feeling useless. If children deprived of their liberty are to work, it should be for remuneration. It must always be in line with national and international protective laws for child labour. It may be particularly useful to link such work to vocational training.

Footnotes

1 See, generally, A Dissel Youth, Street Gangs and Violence in South Africa in *Youth, Street Culture and Urban Violence in Africa*, proceedings of a conference held in Avidjan, 5-7 May, 1997.

2 Ann Skelton “Juvenile Justice reform: Children’s Rights and responsibilities versus Crime Control” in ed CJ Davel *Children’s Rights in a transitional society*, Pretoria 1999.

3 D Pinnock, *Gangs, rituals and rites of passage*, Cape Town 1977

4 National Institute for Crime Prevention and Reintegration of Offenders.

5 A non-governmental organization in the Western Cape.

6 SALC Discussion Paper 79, 1998.

7 See comments by the Department of Legal Services, SAPS on page 28 of the Report.

8 See page 20 of the SALC Report on Juvenile Justice.

9 Page 106 of the SALC Report on Juvenile Justice.

10 Community Law Centre *Children in prison: A situational analysis*, 1998 3.

11 Inter Ministerial Committee on Young People at Risk *Report on Places of Safety, Schools of Industry and Reform Schools* July 1996 33.

12 Passed by the UN General Assembly on 14 December 1990.