INTERIM NATIONAL PROTOCOL

FOR THE MANAGEMENT OF CHILDREN AWAITING TRIAL

• DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT • DEPARTMENT OF SOCIAL DEVELOPMENT
• DEPARTMENT OF SAFETY AND SECURITY • DEPARTMENT OF CORRECTIONAL SERVICES

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FOREWORD

By ratifying the Convention on the Rights of the Child on 16 June 1995, South Africa embraced its responsibilities towards children i.e. boys and girls below the age of 18 years. According to Article 40 of this Convention, children accused of crimes are entitled to be treated in a way that promotes their sense of dignity and worth, and encourages in them a respect for the rights of others.

The Convention also requires countries to develop special procedures and laws to deal with children in the criminal justice system. The Ministry for Justice has received a report on juvenile justice from the South African Law Commission, and a draft Bill has been placed on the parliamentary agenda. Until such time as that comprehensive legislation has been enacted and implemented, however, the government is acting to ensure appropriate management of children accused of crimes through the publication of this interim protocol.

Of particular concern are children who are awaiting their trials in custody. The government is committed to honouring section 28(1)(g) of the South African Constitution, which states that a child has the right "not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years; and treated in a manner, and kept in conditions, that take account of the child's age".

The implementation by all relevant sectors of government of this interim protocol will go a long way to promote South Africa's international and constitutional obligations towards children accused of crimes.

Background

Recent changes to the law regarding the detention of children awaiting trial

On 8 May 1995 parliament passed the Correctional Services Amendment Act 17 of 1994.This law amended section 29 of the Correctional Services Act 8 of 1959 in such a way that children (under 18 years) could no longer be held in prisons or police cells to await trial. They were to be released to the care of their parents or guardians, or failing that, to be accommodated in places of safety which are administered by the Department of Social Development. There was no history of inter-sectoral planning at this stage, and the Department of Social Development was thus unprepared when the new law was suddenly brought into operation. Places of safety are not "lock-ups", and the staff in the facilities were not trained to deal with children requiring intensive management, nor were the staff-child ratios adequate. Problems developed within the system, with child and youth care workers going on strike and children absconding from places of safety. The Inter-Ministerial Committee on Young People at Risk (IMC) was set up to deal with the crisis. In September 1995 the IMC suggested that secure care facilities should be created as an alternative to imprisonment for children awaiting trial. The Ministers of the IMC agreed to this and it was decided that one secure care facility would be established in each province.

The National Minister for Social Development then asked the Provincial Departments of Social Development to identify one facility which could be upgraded, or where no such facility was available, to identify a site for the building of a new facility. Funding was made available for this purpose from funds from the Reconstruction and Development Programme and the process could commence.

In 1996 a second amendment to section 29 of the Correctional Services Act was made (Act 14 of 1996) which allowed for the holding of children in prison to await trial if they were charged with certain serious offences, which were listed on a schedule to the Act. This emanated from a private member's bill. This legislation also said that children could only be held in prison if there was no "secure place of safety" within a reasonable distance from the court. This was the first time that the phrase "secure place of safety" was used in legislation.

The current law regarding the release and detention of children awaiting trial

The current law relating to the release and detention of children awaiting trial is complex. In order to get the full picture, sections 71, 72, 74 and chapter 9 of the Criminal Procedure Act no 51 of 1977 must be read together with section 29 of the Correctional Services Act no 8 of 1959 (as amended). The law derived from these sections can be summarised as follows:

The police have a duty to notify parents and guardians that a child has been arrested. They also have a duty to notify a probation officer of every child's arrest as soon as possible after the arrest has been effected.

A child who has been arrested and charged with a crime which is referred to in Part II or Part III of the Criminal Procedure Act, may be released by a police official on bail or into the care of the person in whose custody he/she is, with a written warning. The police are also empowered to place a child in a place of safety or under the supervision of a probation officer or correctional official. If a child is not released by the police he or she can be held for 24 hours in police cells, whereafter he or she should be released into the care of his or her parents or guardians. Where this is not possible the child may be held in a place of safety. Where there is no secure place of safety within a reasonable distance from the court and if the child is 14 years or older and is charged with an offence listed in a schedule to the Correctional Services Act, then the child may be sent to prison to await trial. The magistrate also has the discretion to send a child (of 14 years or older) to prison if the child is charged with any other offence, if the magistrate is of the view that the circumstances are so serious as to warrant such detention. These discretionary cases (often referred to as "non-scheduled offences") account for approximately 50% of children awaiting trial in South African prisons. The law relating to bail also applies to children, so magistrates can and do set bail for children who are imprisoned. The magistrate makes the decision regarding placement of the child in a particular facility. If a child is placed in prison he or she must be brought back before the court every 14 days.

The Probation Services Amendment Bill was debated by the National Parliamentary Portfolio Committee on Welfare during 1999 and is expected to be passed during 2001. The Bill requires mandatory assessment of each arrested child within 48 hours.

Policy framework and law reform

The government policy regarding children accused of crimes can be found in the Interim Policy Recommendations for the Transformation of the Child and Youth Care System. The document describes an integrated service delivery model, in which every child arrested should be assessed by a probation officer, diversion should be considered and deprivation of liberty should be a measure of last resort. The document speaks of the need for children to be placed in the "least restrictive and most empowering" residential option available and appropriate to their circumstances. This was the first South African policy document to mention a "secure care facility". The document recommended the conversion of existing facilities or, where necessary, the establishment of new secure care facilities to provide specialised alternative care for children who would otherwise be in prison. "Secure care facility" was defined in the Child Care Amendment Act 13 of 1999 as follows: "Secure care means the physical, behavioural and emotional containment of children, offering an environment and programme conducive to their care, safety and healthy development".

Secure care facilities are specially designed to ensure the safety of both the children and the community. This involves a higher degree of physical restriction than one would find at a place of safety, but also means that fur-

niture, lighting, windows and bathrooms are designed to prevent children from hurting themselves or others. Far more important than these physical attributes, according to secure care philosophy, is the care and attention that children are given by well trained staff, as well as specially designed programmes to keep them occupied. The staff to child ratio should ideally be five children to one staff member on duty. A secure care facility should operate according to minimum standards which have been developed by the National Department of Social Development. All of these requirements make secure care a highly specialised form of residential care for children. It is not, and should never be, a prison with another name.

The decision about where a child should be placed should not be based on the offence alone. Rather, the assessment should look at the child and his or her circumstances and history. The seriousness of the offence is certainly one of the factors that must be taken into consideration, but the central question is whether or not the child needs containment, and if so, how restrictive does that containment need to be. Some children charged with relatively serious offences may be assessed to be of little risk to the community. Other children who repeatedly commit less serious offences may be assessed to need containment. Thus the departure point for making a decision regarding placement is the offender, not the offence.

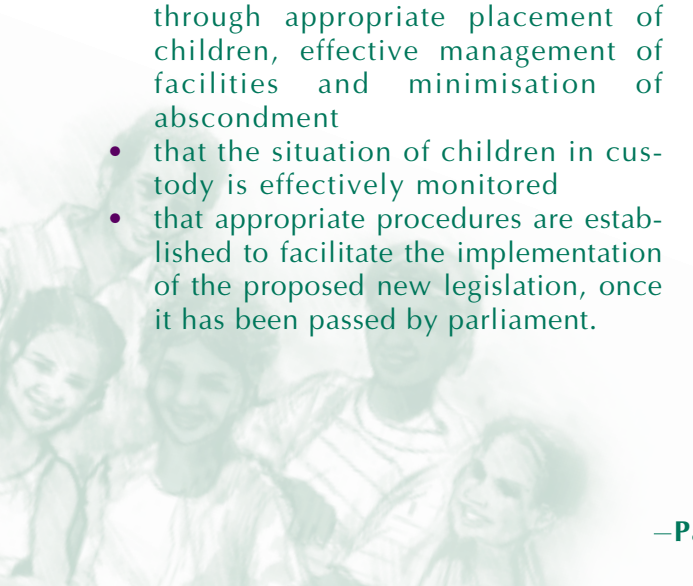
In July 2000 the South African Law Commission published its report on juvenile justice which contains a comprehensive draft Bill that will deal with children accused of crimes. The draft Bill is called the "Child Justice Bill". This proposed new law will provide for diversion of less serious offenders away from the criminal justice system whilst at the same time allowing for the fast-tracking of children charged with serious crimes through the criminal courts. The law will make the assessment of every arrested child compulsory, and within 48 hours the child must appear before a magistrate at a "preliminary inquiry", where decisions about his or her release or placement will be made, based on the assessment report. The draft Bill is expected to be processed through the parliamentary law-making process during 2001.

Interim national protocol for the management of children awaiting trial

1. *The objectives of the interim protocol*

The objectives of the interim protocol are to ensure:

- effective inter-sectoral management of children who are charged with offences and who may need to be placed in a residential facility to await trial
- appropriate placement of each child based on an individual assessment
- correct use of the different residential options available
- the flow of information between the residential facilities and the courts
- that managers of facilities are assisted to keep the numbers in facilities manageable
- that communities are made safer through appropriate placement of children, effective management of facilities and minimisation of abscondment
- that the situation of children in custody is effectively monitored
- that appropriate procedures are established to facilitate the implementation of the proposed new legislation, once it has been passed by parliament.



2. Arrest

When a child is arrested every effort must be made by the police, as soon as possible, to:

- notify parents or guardians about the fact that the child has been arrested (section 50(4) of the Criminal Procedure Act 51 of 1977, hereafter "CPA")
- notify parents about the time, place and date at which the child will appear in court (section 74(2) of the CPA)
- consider the release of the child to parents of guardians on "police bail" where this is suitable (section 59(1)(a) of the CPA)
- consider the release of the child into the "care of the person in whose custody he is" and the issuing of a written notice to appear in court in cases where the child could be released on police bail (section 72 (1)(b)of the CPA)
- notify a probation officer that a child has been arrested (section 50(5) of the CPA)
- take a child directly to a probation officer for assessment if there is a probation officer on duty
- obtain confirmation of the age of the child when notifying parents of the arrest.

The Provincial Department of Social Development must make available to all police stations in the area of service:

- the times that probation services are available
- venues where children are to be brought for assessment

- relevant names and contact details of probation officers
- assistance the Department can offer with family finding

It should be noted by all role-players that the Criminal Procedure Act does not define "guardian" and the courts have been left to interpret this. They have generally given it a broad interpretation, allowing family members such as aunts and uncles, grandparents and older siblings to stand as guardians for children. This facilitates the release of children, and is a positive practice provided that the person into whose care the child is released is 18 years or older, and has a pre-existing relationship with the child, although this need not necessarily be a blood relationship. For children in boarding school or residential care, the teacher or care worker may stand in as a guardian.

3. Assessment

The Provincial Department of Social Development will ensure that:

- every arrested child is assessed by a probation officer as soon as possible and not later than 48 hours of the arrest having taken place
- a sufficient number of trained staff are made available in the area of service to undertake such assessments
- probation services liaise between the residential care facilities (run or subsidised by the Department of Social Development) and the Court, ensuring that the courts are informed about the various facilities, and the availability of places in each facility on an ongoing basis

The assessment will be recorded on an assessment form. It will include the following relevant information:

- name
- address
- age (source included)
- CAS number, police station and investigating officer's name
- availability of parents/guardians and attempts to contact
- relevant background information.

It will also contain recommendations regarding:

- diversion
- release into care of parent/guardian
- placement (and availability of places in recommended facility)
- age estimation.

The Department of Justice and Constitutional Development will assist the Provincial Department of Social Development by:

- ensuring that probation officers have easy access to all children appearing in the courts, including those appearing in the ordinary (not "juvenile"') district courts.
- designating one court within a district to deal with all juvenile matters, as far as is reasonably possible
- channelling of regional court cases involving juveniles through one regional court where reasonably possible
- allowing adequate time for assess-

ments to take place on the morning of the first appearance, if such assessments have not already been completed
- notifying Probation Services if a child is due to appear in court and has not been assessed, and make such child available for assessment

4. After assessment, prior to appearance in court

- the probation officer will hand over the completed assessment form to the prosecutor, and, where possible, should discuss or explain the recommendations
- the prosecutor will peruse the completed assessment form, together with the docket and will make a decision regarding whether or not to prosecute
- If the matter is to be remanded for further investigation or for trial, the issue of placement will also need to be considered
- the probation officer will inform the prosecutor as to availability of places at the various facilities. If further information is required regarding placement, the prosecutor can ask for such information to be provided by the probation officer
- if it appears likely that the child can be released into the care of the parent or guardian but such persons are not present at the court, the matter should stand down, and the prosecutor must request the probation officer and investigating officer to make all reasonable efforts to ensure that the parents or guardians come to court. If they do not come to court on that day the remand date to be recommended by the prosecutor should be for a matter of a few days

5. First appearance in court

At the first appearance in court, consideration will be given to the completed assessment form and the recommendation of the probation officer regarding release or suitable placement, including availability of places in the recommended facility. If the magistrate does not agree with the probation officer's recommendation, the probation officer should, where possible, be called to give reasons to support his or her recommendation.

The options for placement to be considered are set out below hierarchically. The least restrictive options should be considered first:

- release of children into the care of parents/guardian. If it seems likely that the child could be released to parents or guardian but that all efforts to get such person(s) to court on that day have failed, the child should be remanded to a suitable placement, based on the recommendation of the probation officer, for a short period of time
- the placement of the child into the care of the parent or guardian, with additional conditions such as regular reporting to the police or to the probation officer. This option would be suitable where the family is willing and able to take the child into their custody but the court has some concerns about abscondment
- the placement of the child in a place of safety
- the placement of the child in a secure care facility
- the suitability of setting bail in an affordable amount

- detention in prison as a last resort and for the shortest possible period of time.

6. Remands

According to the current law, children awaiting trial in prison must be remanded for periods of no longer than 14 days. The idea of bringing children back to court regularly was aimed at giving children an opportunity to raise problems or concerns with the magistrate regarding his or her placement, and thus attempted to serve as a monitoring system for children in detention. It is recognised that the practical application of these regular remands tends to place an additional burden on the courts and even adds to the possibility of delays in the case, thus ultimately having a negative result for the child in some instances. For these reasons the draft Child Justice Bill published by the SA Law Commission extends this 14 day remand period to 30 days. However, until such time as the new law has been passed, the 14 day remand rule should be observed.

The Department of Social Development can use remands as an opportunity to suggest a new placement for the child if, for example, it has become apparent that the child has been inappropriately placed, or if a vacancy has become available in a more suitable placement option. The social workers at the residential facilities should contact the probation officer at the court or the prosecutor and arrange to have a new recommendation made to the court. Police must transport children awaiting trial in facilities run by the Department of Social Development to and from court for remand and trial appearances.

Dockets regarding child accused must be read very carefully at each remand, and the prosecutor should assess the progress of the investigation and the prospects of a successful prosecution. If the prospects of a successful prosecution appear to be dwindling, consideration should be given to the release of the child, even if the matter is to remain on the roll.

In order to streamline the process of very regular remands of children, courts may consider "clustering" the remands for certain days of the week, for example, on Tuesdays and Fridays, thus providing days which are clear of remands on which trials can be heard. In areas where the prisons have been designated as "places of sitting" (Pretoria and Port Elizabeth) consideration can be given to clustering the remands and doing them on two days every week in the prison. If this is done, due regard must be had to enable their families to attend such remands where this is possible.

It should be noted that the 14 day remand rule also places pressure on parents, guardians or other family members who are required to attend each hearing. Whilst the presence of such persons to support children should always be encouraged, court personnel should be sensitive to the fact that working parents may not be able to be absent from work every two weeks for long periods of time. It is possible to release them from this responsibility, provided that measures are taken to ensure that they are present on the date of trial, either by being warned by the court, or through the assistance of the police to appear on the trial date.

7. Requisitions

Where, in the opinion of a manager of a residential facility, a child has been placed inappropriately and a more appropriate placement option is available, the child can be requisitioned to court for a change of the order to be considered.

If a child has been placed in a residential facility because his or her parent or guardian was not at court on the first appearance, but the parent or guardian is now available and is willing to take the child in their custody, the child can be requisitioned to court so that the order can be reconsidered.

The social worker at the facility should notify the probation officer if a requisition is required, and the probation officer will make the necessary arrangements with the clerk of the court. Information regarding the specific court, the child's name and the case number, as well as the next date of appearance will be required for these arrangements to be made. It is the responsibility of the police to do the transporting from the facility to court for these requisitions. They will need to be notified about this responsibility in good time.

8. Age assessment

Where the age of a child is uncertain, and there is reason to believe that he or she may be over the age of 18 years, the magistrate may make an estimation of the age in terms of section 337 of the Criminal Procedure Act. Information obtained by the probation officer during the assessment process will assist the court in this regard. It is not necessary to resort to obtaining the assistance of the district surgeon or district medical officer to determine age, but this may be done if it is considered that it will be of value to the court in making a determination of age.

If it emerges as a clear matter of fact, after a child has been placed in one of the residential facilities, that he or she is 18 years old or older, the social worker at the facility may ask the probation officer or the prosecutor to bring this to the attention of the court on the date of next appearance. If the matter appears urgent, for example because the young person poses a threat to children in the facility, the social worker may ask the probation officer or prosecutor to make arrangements for the child to be requisitioned to court. The social worker or a child care worker from the facilitiy should make himself or herself available to give evidence regarding age where this is necessary or appropriate, and the court should hear and take note of evidence in this regard.

9. Monitoring

The situation of children should be monitored within each district. This can be achieved through an inter-sectoral meeting which should take place preferably on a monthly basis but not less than four times per year. Many of the larger towns and cities already have such structures.

The meetings should be attended by representatives of:

- the Department of Justice and Constitutional Development
- the Office of the DPP
- the Department of Social Development (preferably probation services

and a representative from the residential care services)
- the Department of Correctional Services
- the SAPS
- the Department of Education
- relevant NGOs, especially those providing services such as diversion programmes.

At these meetings cognisance should be taken of the number of children in custody, both prisons and Social Development facilities, the number of children diverted, the number of cases where children have been in custody for a period of more than three months, and more than six months. The purpose of keeping and examining these figures is to give attention to problems and ensure that priority attention is given to cases where children have been in custody for long periods of time. The meetings should provide an opportunity for the partners to raise issues and improve inter-sectoral management systems to make the system operate more efficiently. Crisis issues such as injuries or deaths of children during arrest or whilst in custody, over-crowding in facilities and escapes from facilities should be dealt with on an urgent basis, perhaps through sub-committees appointed by the meeting. Relevant national departments should be notified about these crisis issues. In the proposed new system such local inter-sectoral structures will become the core structure of a new monitoring system.

The government was assisted in the drafting of this protocol by the Child Justice Project, a United Nations technical assistance project arising from an agreement between the Government of South Africa, the UNDP, the CICP and UNOPS. The financial support for the project is provided by the Swiss Development Co-operation and the UNDP.

SWISS AGENCY FOR DEVELOPMENT AND COOPERATION SDC

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A LIST OF USEFUL CONTACT NUMBERS TO ASSIST PEOPLE WORKING WITH CHILDREN AWAITING TRIAL

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Joyce Matshego	Deputy Director: Youth Females Department of Correctional Services	(012) 307 9843	(012) 325 8080
Susan Pienaar	Head: Social Crime Prevention SAPS	(012) 421 8007/ 8271	(012) 421 8274
Mbali Mncadi	Director: Violence Prevention SAPS	(012) 421 8036	(012) 421 8274
Coenie du Toit	Deputy Director: Rights Advocacy (Children & Youth) Department of Social Development	(012) 312 7552	(012) 323 3733
Johanna Prozesky	Assistant Director: Rights Advocacy (Children & Youth) Department of Social Development	(012) 312 7509 082 576 3468	(012) 312 7604
Maggie Tserere	Senior State Advocate: Sexual Offences and Community Affairs Unit National Directorate of Public Prosecutions	(012) 317 5088	(012) 323 5686

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Serg. H Van Vreden (Captain Crime Stop)	North West	(018) 299 7119	(018) 299 7058
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