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Brian Stout

Youth Justice 2006 6: 129
DOI: 10.1177/1473225406065562

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>> Version of Record - Jul 10, 2006

What is This?
Is Diversion the Appropriate Emphasis for South African Child Justice?

Brian Stout

Correspondence: Dr Brian Stout, Community and Criminal Justice Division, Hawthorn Building, De Montfort University, Leicester LE1 9BH, UK. Email: bstout@dmu.ac.uk

Abstract

Diversion is central to the aim of achieving a South African child justice regime that is compliant with constitutional and international obligations. Future plans for South African child justice are dependent on large numbers of child offenders being diverted. This article presents research suggesting that although diversion from court in South African child justice improves the treatment of many children, it will continue to exclude large numbers of children from the most progressive interventions. The research suggests that the practice of diversion will exclude persistent and serious offenders, and raises questions about whether it is appropriate for advocates of reform to place such an emphasis on diversion.

Keywords: child, diversion, justice, South Africa

Introduction

Diversion is essential to South African child justice. Proposed new legislation, the Child Justice Bill, envisages the majority of children being diverted instead of entering the criminal justice system. Prior to its enactment diversion is regularly, if unsystematically, utilized. The achievement of the aims of the child justice reformers leading the campaign for a new child justice system is largely dependent on diversion being utilized for large numbers of child offenders. This article presents research into how diversion decisions are made by child justice professionals in South Africa.

The treatment of child offenders in South Africa attracts a high degree of internal and external attention. Reformers within the country hope that the new Bill will be the mechanism by which South Africa meets its commitments to its own constitution and to international instruments, addressing the chaotic and at times inhumane way that child offenders are currently treated. International observers, particularly those associated with restorative justice, consider South Africa as an example to the world of how to turn restorative principles into a functioning child justice system, by placing diversion at the centre of the regime (Braithwaite, 2003).
However, the early optimism about the Child Justice Bill (Bill 49 of 2002, hereinafter referred to as the Bill) has dissipated somewhat, due to the delays in its implementation and the compromises that seem to be necessary to ensure that it is enacted and implemented. Child justice in South Africa is now in a situation of uncertainty, where practitioners and Non-Governmental Organisations (NGOs) are utilizing diversion measures under existing legislation, but it is unclear when new legislation will be enacted, and in what form.

The research presented here indicates that diversion will not be used to the extent necessary to allow South African child justice to function in the manner envisaged. It suggests that the assumptions of practitioners will tend to produce under-intervention with serious first-time offenders and over-intervention with persistent minor offenders, and raises the question of whether diversion is an appropriate mechanism to be so central to the system. This research is presented in the second part of the article but prior to that it is necessary briefly to outline the context of the last few years of South African child justice.

Part One: The Context – South African Child Justice


South Africa throughout the last decade and a half has been a country in transition. The relationship between crime and that transition is a complex one (Dixon, 2002, 2004) but it is clear that the criminal justice system has been affected in the need to devise new laws, create new institutions and respond to the requirements of the Constitution. This journey ‘from rhetoric to reconstruction’ (Brewer, 1994: 3) incorporates the field of child justice. The existing legislation on child justice draws on a range of Acts reflecting a variety of different sentencing and political philosophies (Koch and Wood, 2001). The national situation is further affected by the implications of international instruments and the requirements of the South African constitution. The Constitution (Act 108 of 1996) provides special rights to children and child justice legislation, both new and existing, and must be interpreted in light of the constitutional requirements (Singh, 1995; Sloth-Nielsen, 1996).

Although the Constitution does not specifically require that new child justice legislation be developed, and it may have been possible simply to interpret existing laws in light of the Constitution, child justice NGOs and other reformers campaigned throughout the 1990s for a system to be created that centred on the rights of children. The government responded positively to this campaign but the first attempt to drastically reduce the use of custody for child offenders led to the premature release of hundreds of children in 1994. The result of this was ‘pandemonium’ (Skelton, 1998: 6) with children absconding all over the country, many not returning to stand trial. Emergency legislation was introduced to deal with the crisis, allowing children awaiting trial to be detained in prison.

The first full draft of the Child Justice Bill (South African Law Commission [SALC], 2000) was devised by the Juvenile Justice Project Committee and released by the SALC in August 2000, at the end of a lengthy period of consultation. A further draft was accepted by Cabinet in November 2001 and published in 2002; all references to the Bill...
in this paper refer to this draft, which remains the most recently published version. The progress of this Bill is described later in this section.

**Diversion in the Child Justice Bill**

The use of diversion and the introduction of the preliminary inquiry are at the heart of the Bill and the proposed new child justice regime. As Gallinetti (2002: 27) has stated, the preliminary inquiry is ‘the central and defining feature of the new child justice system’. The inquiry is a compulsory procedure presided over by a designated district court magistrate, and should be held within 48 hours of a child’s arrest and prior to his or her plea. It provides an early opportunity for ascertaining whether an accused child can be diverted from the criminal justice system. The Bill, as currently written, does not limit the use of diversion by prescribing that certain classes of repeat offender, or those accused of serious offences, must be dealt with within the traditional criminal justice system. Rather it is stated that the appropriateness of diversion should be decided by taking into consideration both the circumstances of the child and the interests of society. The options available, once a decision to divert has been taken, allow for an individualized response to be made to a child’s problems while simultaneously providing for that response to be roughly proportional to the seriousness of the offence of which he or she is accused (Sloth-Nielsen, 1999).

There are three main groups of professionals who are involved in the decision as to whether to divert a child from the criminal justice system at the preliminary inquiry stage. Prior to the introduction of the Bill, the most important figure in this decision to divert is the prosecutor with whom the final decision about whether to divert or proceed lies (Mukwevho, 2001). The prosecutor role will continue to be vital but the introduction of the preliminary inquiry will move the magistrate to a more influential position in the decision to divert; all decisions could have to go through him or her. Until the Bill is finally enacted the relative decision-making power of the prosecutor and magistrate will not be absolutely certain. The probation officer is given a pivotal role within the preliminary inquiry process: he or she undertakes the assessment of the child and is accorded wide powers under the Bill. The report prepared by the probation officer is submitted to the prosecutor, containing recommendations on the child’s release or detention and whether the matter should be diverted or should proceed.

**Diversion as the crucial feature of the Child Justice System**

Diversion is the defining aspect of the proposed child justice regime. South Africa was influenced by international instruments in this, with both the United Nations Convention on the Rights of the Child (UNCRC) (UN, 1989) and the United Nations Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (UN, 1985) giving prominence to the desirability of diversion. Although both these instruments envisage the possibility of categories of child offenders being excluded from diversion, the South African approach is one of an inclusive and near universal diversion regime. The original goal of the introduction of formal diversion and the preliminary inquiry in the Bill was not just to divert some children, but most children. It was intended that by setting out a range of options, and providing for diversion on a series of levels, that diversion could be used in complex cases and for serious offences (Skelton, 2002b;
Sloth-Nielsen, 2003). Pinnock et al. (1994) envisaged that restorative justice diversionary interventions could be considered for up to 70 per cent of children in the criminal justice system. Barberton and Stuart (2001) suggest that, when the Bill is fully implemented, 30 per cent of the most minor offenders will be diverted by the police or prosecuting authorities prior to the preliminary inquiry, and then two-thirds of those brought before the preliminary inquiry will be diverted. Their estimate is that this will result in 55,000 children being diverted each year. In comparison, South Africa’s largest criminal justice NGO, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) states that 18,000 children are currently diverted each year (Mpuang, 2004). The Bill provides for the possibility of diversion measures being used as sentences but the emphasis is very much on pre-trial diversion, and the available resources are being dedicated to developing diversion measures. The new legislation is expected to result in costs to the state being saved but this is dependent on these large numbers of children being diverted (Barberton and Stuart, 2001).


South African child justice during this period has been dominated by the, as yet incomplete, process of having the Child Justice Bill enacted. The main campaign to implement the Bill has been led by the Child Justice Alliance, which was established in 2001. The Alliance is made up of individuals and organizations working in the field of child justice. Its purpose is to ensure that the Bill is passed by Parliament, through making information available to government and civil society (Skelton, 2004). The Alliance follows in a tradition of child justice changes in South Africa being advocated for by a small group of committed reformers (van der Spuy et al., 2004; van Zyl Smit and van der Spuy, 2004).

Although the process up until the acceptance by the Cabinet of the Bill in 2001 was more protracted than these child justice reformers would have liked, progress since then has been slower still. The Bill was sent to the Department of Justice Portfolio Committee (the Portfolio Committee) for scrutiny after it received approval from Cabinet in November 2001. The Portfolio Committee has been critical of aspects of the Bill and recommended redrafting on two occasions. It demonstrated a reluctance to divert serious offenders and expressed concern about the implementation of the Bill and the resources that need to be made available (Parliamentary Monitoring Group [PMG], 2003a, 2003d, 2003e). The Portfolio Committee discussed ensuring that offences where the child would be sentenced to more than six months in custody would not be considered for diversion, but there does remain a possibility that children committing such serious offences, including rape, might be diverted (PMG, 2003f).

South African public opinion has hardened against crime since the mid 1990s (van der Spuy et al., 2004) and this appears to have been a factor in the deliberations of the Portfolio Committee and the delay in the passage of the Bill.

The election in South Africa in 2004 caused further delay in the enactment and implementation of the Bill and it was only the introduction of special legislation that allowed the Bill to continue in the parliamentary process after the election. The Bill was sent back to Cabinet in June 2005 and at the time of writing it is not clear if, when or in what form the Bill will be enacted.
South African Child Justice in 2005
In the absence of the implementation of the Bill, practitioners and NGOs have endeavoured to practice in the spirit of the Constitution and the Bill. However, criticisms of the South African child justice system have continued (see, for example, Fagan, 2004; McClain-Nhlapo, 2004; Human Rights Watch, 2005). Recent figures show that many children are still detained in custody. At the end of May 2004 there were 3594 children under 18 in South African prisons; 1857 of those were unsentenced; 1737 were sentenced (Department of Justice, 2004). The youngest of these were four children aged 7–13, detained in KwaZulu-Natal province (Department of Justice, 2004). Human Rights Watch, in its 2005 World Report (Human Rights Watch, 2005), puts the number of children in detention awaiting trial at more than two thousand. Judge Fagan, the inspecting judge of prisons, stated that the combination of overcrowding in prison and the inappropriate imprisonment of children has meant that many children are detained in ‘terrible’ conditions (Fagan, 2004: 2). Judge Fagan found that the majority of the approximately 4000 children either sentenced or awaiting trial are held in prisons. South African prisons are generally overcrowded (van Zyl Smit, 2004) and all imprisoned children are held in overcrowded conditions. Children in prison may be assaulted by staff members or other inmates (Kiessl and Wurger, 2002). The worst overcrowding exists in Pollsmoor Prison, near Cape Town where 2090 children are held in cells with capacity for 1111 (Fagan, 2004).

The South African Human Rights Commission (HRC) (McClain-Nhlapo, 2004) added its voice to the criticisms in its submission to the Parliamentary Portfolio Committee on Correctional Services in 2004 (PMG, 2004). One of the examples it cited was of a girl, charged in a hijacking case, being remanded in custody awaiting trial for four years (McClain-Nhlapo, 2004).

Although it is unclear what will happen to the Bill, diversion remains both an important part of the existing regime and the fundamental aspect of the regime envisaged for the future. As the prison figures demonstrate, however, this emphasis on diversion is failing to provide benefit for all child offenders. The research presented in the next section offers a possible explanation for this.

Part Two: Research into Diversion Processes

Research methods
Between 2001–2003 the author conducted a piece of research investigating the ways in which South African criminal justice practitioners exercised discretion (Stout, 2005). At the time of carrying out this research the Child Justice Bill had been devised and was being debated so it was necessary to ascertain how diversion decisions were being approached by practitioners. Research was carried out into hypothetical diversion decisions at the preliminary inquiry, investigating both the decisions that practitioners would make, and the reasoning that led them to those decisions. This meant that conclusions could be drawn about the decision-making process that would be useful under any legislative regime. The research gathered data that provides insight into the exercise of discretion by role players in the criminal justice system. The analysis of the data considers whether the aim of diverting children away from the criminal justice system is likely to be achieved.
A research instrument was devised that allowed information to be gathered both from self-administered questionnaires and through face-to-face interviews. Four case vignettes were used to create a situation as close to the real circumstances as possible, encouraging practitioners to think about actual diversion decisions relating to four fictional child offenders. A mixture of open and closed questions was utilized to draw out general questions about the respondents’ backgrounds, their attitude to proposed child justice reforms and the diversion decisions that they would make. The case studies themselves were designed to elicit particular issues including persistent offending, serious offending, adolescent sex offending, restorative justice, race and gender.

The research instrument was administered to a sample of the three groups of professionals involved in the decision to divert: probation officers,1 prosecutors and magistrates. The transitional state of the child justice regime made sampling more difficult, in that the necessary specialist posts had not been created in every area. The sampling technique used was snowball sampling, which requires the researcher to make initial contact with a member of the population, and to use their help to find other members of that population (Francis, 2000; May, 2001). All professionals who were contacted were asked to provide details of other child justice professionals that they knew of who were then contacted in turn.

The research instrument was administered to practitioners in two of South Africa’s nine provinces: the Eastern Cape and in the Western Cape. These areas were chosen because of the contrasts between them. The Eastern Cape is mainly a poor rural province, and child justice initiatives can be slow to reach it. The research in the Western Cape was primarily carried out in Cape Town, a large city, relatively resource rich, and the site from which many child justice initiatives originate.

In addition, the research instrument was administered to five key reformers who have been involved in drafting the Bill and advocating for its implementation. All were associated with the Child Justice Alliance. Gathering information from child justice reformers allowed it to be ascertained what the people who knew the Bill best, and supported it most strongly, hoped would happen to the children governed by it.

The research was limited by being carried out in a time of uncertainty in South African child justice, but this was to a certain extent inevitable due to the length of time that the new Bill has been considered to be imminent. The use of fictional case vignettes and open questions, without too narrow a focus on existing or anticipated legislation, allowed data to be gathered that would be of some use regardless of which child justice reforms were eventually implemented.

**Research findings**

In total information was gathered from 67 individuals: 62 practitioners and 5 reformers. The 62 practitioners comprised 32 probation officers, 20 prosecutors and 10 magistrates. All three groups of professionals were committed to the new Bill and 93 per cent agreed or strongly agreed with the principle that some child offenders should be diverted away from the criminal justice system.

Respondents were asked whether they would divert each of the four children and were invited to explain the reasons for their decisions as well as discussing the prospects
for the child’s future and the likely response of other professionals. Although there was a stated commitment to the principle of diversion the research raised questions about whether serious and persistent offenders would be diverted. These two groups of child offenders are considered in turn.

The diversion of serious offenders

Two of the case studies were designed to elicit issues relating to the diversion of serious offenders. The first of these was Vusi: a fourteen year old young black man with a previously clear record who committed a serious sexual offence against his eleven-year-old sister, when drunk. He admitted assaulting her but denied her claim that it was rape.

Seventy-five per cent of respondents said that they would be likely or very likely to recommend diverting Vusi. Only one probation officer and one prosecutor said that they would be unlikely to recommend diversion, with the remainder being unsure. Practitioners were prepared to recommend him for diversion because he was said to be generally a good child, who showed remorse and had many strengths. Nearly 90 per cent of respondents said that they were greatly influenced by Vusi’s clear previous record or his positive personal circumstances in recommending diversion. Fewer than a quarter considered the nature of the offence to be the most important factor. Optimism that Vusi could avoid future offending and that the programme for child sex offenders would be suitable to meet his needs was also a significant influence on the decisions that were made. Most respondents who recommended diversion wanted Vusi to undergo a therapeutic programme and great faith was expressed in the ability of that programme to change the behaviour of children such as Vusi. Such programmes have been developed with the Bill in mind, with the idea that interventions can be put in place at a pre-trial stage with children who commit sexual offences (Stout and Wood, 2004).

The reformers also considered Vusi to be an appropriate candidate for diversion, although two of the five reformers would have liked him to undergo further assessment before the final decision was made. The existing criminal justice system has been seen to fail children who commit sexual offences and hopes of reform have been high (Redpath, 2002; Wood, 2003; Ehlers, 2004).

The second case study designed to elicit issues relating to child offenders who committed serious offences was that of Peter. This sixteen-year-old young white man stole a car, belonging to the father of one of his friends, and crashed it, writing it off. Peter had an exemplary school record and was fortunate enough to have parents who were willing and able to recompense the car owner for the damage caused. This study also drew out race and class issues.

Over 80 per cent of practitioners would have recommended Peter for diversion. Although Peter’s race was identified as a factor in how he was likely to be treated, respondents who referred to his race said that they thought that it might be a factor for other decision makers, rather than themselves. His class and relative wealth were also identified as affecting the lenient approach taken. The most popular diversion options recommended for Peter were community service or some form of restorative justice intervention. Practitioners were confident that, if such measures were taken,
Peter would not re-offend. All the reformers also suggested that Peter could be appropriately diverted.

The responses to the case vignettes therefore suggest that there are grounds for optimism in that practitioners are inclined to consider serious offenders for diversion. However, this optimism must be tempered by the response of the Portfolio Committee to the proposed new legislation. The Portfolio Committee’s deliberations suggest that parliament is likely to prohibit serious offenders from being diverted. The explanation for this is at least partly political: crime in South Africa is a significant issue both nationally and internationally, and the government will not allow the rights of child offenders to be perceived to be more important than its ability to control crime (van Zyl Smit, 1999). Although the Portfolio Committee, in its deliberations, did not entirely rule out the diversion of serious offenders, it demonstrated a reluctance to divert children who commit sexual and other serious offences, and expressed concern about the implementation of legislation and the resources that need to be made available (PMG, 2003a, 2003d, 2003c). The programmes that have been developed for children who commit sexual offences do not inspire the confidence of the Portfolio Committee, and it is concerned that they may not be acceptable to the public (PMG, 2003b, 2003c, 2003d). Restorative justice is an important influence on the proposed legislation and the Bill permits restorative interventions to be used with all children who are diverted, or who receive diversion options as a sentence, and there is no specific prohibition on the type of offence or offender for whom it is available. However, there is no indication from the Portfolio Committee (PMG, 2003c) that, when the Bill is enacted, restorative justice interventions are any more likely to be used with serious child offenders than any other diversion options.

So, despite the positive response of the practitioners, the view of the Portfolio Committee casts doubt over whether serious child offenders will receive the benefits of diversion. In the next section it will be indicated that it is the response of the practitioners themselves that is likely to prevent persistent child offenders from being diverted.

The diversion of persistent offenders

The remaining two case studies elicited issues relating to persistent offending. Sipho is a fifteen-year-old young black man who has committed a large number of minor offences but had also experienced a recent period of offending-free stability. In the scenario presented he stole a CD from a shop. Sipho’s case was designed to represent an unexceptional offender who would be recognizable to any child justice practitioner. Repeat offenders such as Sipho would not be diverted in many jurisdictions but the three levels of diversion envisaged by the Bill would be expected to provide for such children.

Sipho was the least likely of the four children to be recommended for diversion. Fewer then half the respondents said that they would be likely or very likely to recommend Sipho for diversion with 54 per cent saying that they would be unlikely or very unlikely to divert him. The two main reasons given for not diverting Sipho were that he had a lengthy criminal record and that he had failed to respond to previous interventions. Despite the minor nature of Sipho’s recent offence it was felt that he had
had an opportunity to undergo a rehabilitative programme and would not benefit from
another such opportunity. Many respondents thought that Sipho could only be
adequately dealt with by a sentence to a residential facility: prison, reform school or a
place of safety. This view was taken despite the high degree of consensus that prison
was detrimental to children.

The views expressed by the professionals with regard to Sipho were out of step with
the intention of the proposed new legislation. This is highlighted by the responses of
the reformers to the case vignette. Four of the five reformers interviewed stated that
Sipho was an appropriate case for diversion, the fifth was unsure and wanted more
information. One went even further and explained that the Bill would make it
compulsory to divert for an offence as minor as this one, notwithstanding Sipho’s
criminal record.

The fourth young person, Zanele, was not a persistent offender but had one previous
cautions. Zanele was a fourteen-year-old young black woman who had assaulted a school
friend. This was the second time that she had assaulted this same victim, and she had
been cautioned on the first occasion. Although she had no other convictions her
behaviour at home and school was difficult and she expressed no remorse regarding
the assault. This fourth and final case study also raised gender issues.

The position with regard to Zanele was less clear than that regarding Sipho. Two-thirds of respondents were likely or very likely to recommend diversion for
Zanele, but 28 per cent were unlikely or very unlikely to do so. Respondents who chose
not to recommend Zanele for diversion were concerned about her failure to heed the
previous caution as well as her difficult behaviour at home and at school. Those who
wanted to divert her felt that now was the time for her to receive an intervention but
that she should be kept away from the damaging effects of custody. There was some
evidence that Zanele was judged differently from the male offenders on the basis of
her gender: for example it was suggested that a welfare approach might be more
appropriate than a justice approach. There was also reference made to the general lack
of provision for female offenders. Her lack of remorse created a problem for many
respondents, and some practitioners considered that to be an absolute barrier to
recommending diversion. Although some reformers shared this concern about Zanele’s
attitude, they all considered her to be an appropriate candidate for diversion.

Probation officers, magistrates and prosecutors do remain unwilling to divert repeat
offenders. It does not appear as if the Portfolio Committee will specifically exclude
repeat offenders from the diversion regime and child justice reformers are keen to offer
diversion to those who have been diverted previously. Despite this, it appears possible
that the diversion regime introduced by the Bill could exclude persistent offenders such
as Sipho. Even an offender such as Zanele with only one previous caution might find
herself excluded from diversion by some practitioners. In contrast, emphasis was put
on the previous clear records of Peter and Vusi to such an extent that they were more
likely to be diverted than Sipho and Zanele despite committing much more serious
offences. The findings from this research are supported by the figures from NICRO,
South Africa’s largest provider of diversion services, which state that 94 per cent of
children diverted to its services are first-time offenders (Mpuang, 2004).
Conclusion: A Bifurcated System?

The reformers who advocated for the Child Justice Bill initially intended to create a diversion regime incorporating most children who offended. The original goal had been to create a diversion system that incorporated persistent offenders and serious offenders (Skelton 2002a; Sloth-Nielsen 2003; Department of Justice, 2004). It was hoped that the Bill could provide greater intervention for some offenders whose needs were not being met at all, such as child sex offenders (Redpath, 2002; Wood, 2003). Such an outcome appears to be becoming increasingly unlikely due to the practice of child justice professionals and the continuing delays in the enactment of the Bill.

There are indications that South African child justice, particularly if and when the Bill is introduced, will be based upon a bifurcated system of diversion. Bifurcation is a concept whereby serious penalties, notably imprisonment, are reserved for serious or repeat offenders and less serious offenders are dealt with in a more welfare-oriented way in the community (McLaughlin and Muncie, 2006; Matthews, 2003). It is an example of the tendency for criminal justice systems to be based around classification distinguishing the deserving from the undeserving and those who should receive treatment from those who should not (Cohen, 1985). Internationally, it appears to be inherent within the implementation of a diversion regime that some form of bifurcated system will result. In other jurisdictions bifurcation is explicitly acknowledged and even enshrined as policy, for example, in England and Wales young offenders can only receive one referral to a panel; after that they must be prosecuted (Goldson, 2000; Smith, 2003). In contrast, in South Africa the initial intention had been to create a diversion system that also incorporated persistent offenders and serious offenders. Where bifurcation is explicitly acknowledged the possibility exists, at least in theory, for imaginative and humane sentences to be imposed on child offenders at a different stage in the system, so excluding some children from diversion will not necessarily bring dire consequences. In South Africa, one consequence of placing diversion at the centre of the system has been that almost all the resources and creative energy have gone into developing diversion schemes. Children who are then excluded from diversion may find that they have no further opportunity to receive a community sentence of any sort.

This research suggests that there are improvements being made in the treatment of many children who are dealt with by the South African child justice system, particularly younger, first-time, minor offenders who will be diverted. In the very recent past, too many of those children were being prosecuted, or even incarcerated, and this investigation shows that there is a great commitment on the part of reformers and practitioners to changing the treatment of such children. Practitioners of all professions are committed to the principle of diversion and the actions of the government and NGOs in preparing for the proposed legislation have ensured that diversion is already an accepted practice in courts throughout South Africa. The enactment of the Bill should have a massive beneficial effect on the treatment of this group of children, and this positive effect is already being demonstrated.

It appears increasingly possible that the diversion regime introduced will be a bifurcated one that could exclude both serious offenders and persistent offenders. Each group, however, could be excluded in a different way. It seems from the responses of
the practitioners that they are willing to consider the diversion of serious offenders, providing their other circumstances permit it. However, the deliberations of the Portfolio Committee suggest that, if and when new legislation is finally enacted, such serious offenders may not even be able to be considered for diversion. It seems that the programmes that have been developed do not inspire the confidence of the Portfolio Committee, and it is concerned that they may not be acceptable to the public (PMG, 2003c, 2003d, 2003e). The combination of this legislative exclusion and the situation where programme providers are concentrating on developing diversion programmes for less serious offenders may lead to a situation where children who commit serious offences may not be provided with suitable interventions. Although diversion options will be available as a sentence, the courts may have no more faith in them than the legislators have, putting such children at risk of receiving a residential or even a custodial sentence. At this stage, it does not seem as if the Portfolio Committee will specifically exclude repeat offenders from the diversion regime and the child justice reformers are keen to offer diversion to those who have been diverted previously. However, probation officers, magistrates and prosecutors do appear unwilling to divert repeat offenders. There does therefore remain a risk that even the implementation of the new system will have little effect on the treatment of serious and persistent child offenders.

South Africa remains a relatively young democracy, and there are many pressing demands competing for the attention of policy makers. In light of this, it should perhaps not be a surprise that the Bill has taken so long to enact, and that some of the original ambitious objectives for child justice have been compromised. This research shows that the changes in the child justice system will achieve a lot, but that the emphasis on creating a diversion regime may not succeed in transforming the experience of the criminal justice system for serious and persistent child offenders. Experience in other jurisdictions suggests that it may not simply be that this group of practitioners or legislators are unwilling to sanction diversion, rather that it could be inevitable that a regime based on diversion will lead to a bifurcated system. It is debatable whether a system that gives such a central role to diversion could ever fully meet the needs of serious or persistent child offenders. The delays in the enactment of the proposed new legislation, although unwelcome, may provide an opportunity for child justice reformers to reconsider whether a system that is so strongly based on diversion will meet the needs of all child offenders.

Note

1 Although most social work offices had specialist criminal justice workers, not all of them used the term ‘probation officer’. The term is used here in line with the Child Justice Bill which refers to the definition of probation officer in the Probation Services Act 1991 (Act 116 of 1991). This includes all social workers carrying out work in the fields of crime prevention and treatment of offenders. The Bill also allows the work of probation officers to be carried out by assistant probation officers, who perform similar work but are not required to be qualified. The probation officer is given a pivotal role within the preliminary inquiry process; the probation officer undertakes the assessment of the child and is accorded wide powers under the Bill (sections 44 and 45).
References

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**Brian Stout** is a Senior Lecturer in Criminology at the Community and Criminal Justice Division, De Montfort University, Leicester, UK.