

Juvenile Justice in Namibia: Background

THE BEGINNING AND NEW DEVELOPMENTS

- ò Namibia ratified the **United Nations Convention on the Rights of the Child** in September 1990.
- ò The Convention provided the framework for a programme of cooperation (1992-1996) between the Government and UNICEF, which looks at means to address the situation of **children and women in extremely difficult circumstances (CWEDC)**.
- ò The 1995 prisons survey, *A Study of Young Offenders in Namibia*, revealed:
 - Most offenders were sentenced without access to lawyers.
 - Most appeared in court without parents/guardians present.
 - Pre-trial detention is common - averaging 3 months.
 - Most offenders were sentenced for non-violent crimes (economic crimes).
 - Most offenders are illiterate and early school dropouts.
 - Most were raised by grandparents.
 - Young offenders are commonly abused by older and/or more hardened prisoners.
 - Half had friends or family members who exposed them to alcohol and drugs.
 - All came from low-income homes.
 - There is a definite racial bias: no white children were in prison!
- ò The **Juvenile Justice Forum (JJF)** was established in 1994 to bring together key role-players to discuss and recommend ways of improving the juvenile justice system in Namibia.
- ò The Prosecutor General granted permission in 1995 for a **Pilot Diversions Programme** at the Windhoek Magistrate's Court.
- ò The Legal Assistance Centre established a **Juvenile Justice Project (JJP)** in 1995 and implemented the Pilot Diversions Programme at the Windhoek Magistrate's Court.
- ò The Pilot Diversions Programme is a **pre-trial programme aiming to ensure proper assessment** of juveniles before their court appearance. This involves screening all children under 18 years old alleged to have committed a criminal offence.
- ò An **Arrest and Awaiting Trial Committee** formed in 1995 as a JJF sub-committee. This sub-committee's achievements are:
 - attempting to separate awaiting trial juveniles from adult counterparts by allocating two cells at Wanaheda Police Station for juvenile offenders;
 - an internal NAMPOL directive stipulating that all juveniles arrested in Windhoek magisterial district are taken to the Wanaheda cells immediately after arrest;
 - the designation of two police officers at Wanaheda to assist in tracing parents/guardians;
 - motivating for training community volunteers to assist with this tracing task;
 - motivating for child-friendly living conditions at the Wanaheda cells by way of, e.g. painting the cells in bright colours.

SCREENING

The screening of juvenile offenders at the Windhoek Magistrate's Court is carried out daily by JJP personnel and social workers of the Ministry of Health and Social Services.

ò Screening aims

- To identify the circumstances of the offence and the offender's personal circumstances.
- To ensure placement of the offender with parents/guardians or other responsible adults.
- To monitor the treatment of juveniles by police.
- To make recommendations to the prosecutor.

ò Screening process

- The control prosecutor gives the juvenile's dockets to the social worker before the offender's first court appearance.
- The social worker interviews the offender and their parents / guardians to ascertain if the offender admits guilt and to establish the offender's personal circumstances.
- If parents / guardians are not present at court, the investigating officer is requested to trace and inform them of the offender's arrest.
- If parents / guardians / other responsible adult cannot be traced, JJP personnel ensure that the offender is transferred to the Wanaheda cells.
- The case is then postponed until the relevant people are traced.
- All attempts are made to avoid returning a juvenile to the cells, but sometimes this is unavoidable.
- If parents / guardians are present and the offender admits guilt, the screener assesses whether diversion is a possible option.
- The screener discusses possible diversionary options with the offender and obtains the offender's consent to participate.
- The screener may recommend diversion now, OR, contact the victim to discuss the victim's feelings about the crime.
- Victim and offender may then meet in a mediated process: "consensus decision-making".
- The meeting takes place one week after the initial screening.
- The screener's recommendation to the senior prosecutor depends on the outcome of this victim-offender meeting.
- The senior prosecutor makes the final decision on diversion. Social workers can recommend but not decide to divert the offender.
- The charge is provisionally withdrawn if the offender is diverted, on condition that the offender complies with stipulated conditions.
- The offender signs a contract agreeing to comply with the conditions for diversion.
- If guilt is denied, legal representation is advised and the case proceeds to trial.
- If the offender does not comply with the conditions for diversion, the docket is returned to the senior prosecutor for a further decision and the charges may be reinstated.
- The screening method is child-friendly, with every attempt made not to frighten or force the offender to admit guilt. The focus is on upholding the child's rights.

ò Basis for diversion

- Offender freely admits guilt.
- Offender is willing to make amends.
- Offender's admission is not admissible evidence in court (confidential statement).

ò Possible recommendations

- Withdrawal of charge
- Life-skills programme
- Letter of apology
- Probational supervision
- Victim-offender mediation
- Children's court enquiry
- Juvenile court trial

ò **Problems**

- Children are still arrested and detained for very minor crimes.
- Separation of juveniles from adult prisoners is only being attempted in Windhoek, leaving rural children at risk of being held with adults.
- Screening is often delayed due to missing parents / guardians.
- Screeners must often trace parents / guardians themselves, causing a bottleneck.
- Loopholes in the justice system and inadequate monitoring mechanisms lead to juveniles being held for longer than 48 hours and failure to screen them before their first court appearance.

ILLUSTRATIONS

HANDOUT 1

WINDHOEK JUVENILE DIVERSION PROGRAMME
Sworn Statement by Juvenile Offender

(1 page)

SUMMARY: Session 1

Namibia ratified the **United Nations Convention on the Rights of the Child** in September 1990.



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Pilot Diversions Programme is **pre-trial programme aiming to ensure proper assessment** of juveniles before court appearance. This involves screening all children under 18 years old alleged to have committed a criminal offence.



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Screening seeks to:

- identify circumstances of offence and offender's personal circumstances;
- ensure placement of juvenile with parent/guardian or responsible community member;
- monitor treatment of juveniles by police;
- recommend diversion to prosecutor.

The United Nations Convention on the Rights of the Child

WHAT IS THE CONVENTION

- ò This is an **international human rights treaty** which is **legally binding** on any country which ratifies it.
- ò **Namibia ratified the CRC in September 1990.**
- ò The CRC provides for **universal standards** regarding children's rights.
- ò The CRC provides for **special protection** for children.
- ò The CRC is an **umbrella** for the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Children Deprived of Their Liberty. These three sets of rules are non-binding in nature, but many of their principles are incorporated into the CRC.

OVERVIEW OF CONTENT

ò **Obligations**

- Article 1 defines a child as **any person under the age of 18** years.
- Article 2 provides that the rights contained in the CRC must be enjoyed by **all children without discrimination.**
- Article 3 tells States Parties to the CRC that all actions taken in respect of children must be in the **best interests of the child.**
- Article 4 tells States Parties to undertake **specific implementation measures.**
- Article 5 tells States Parties to **respect the responsibilities, rights and duties of parents or extended family members or community or legal guardians.**

ò **Rights**

The type of rights accorded by the CRC are the rights to **provision, protection and participation.**

ò **Key principles**

The 4 key principles are: **non-discrimination; best interests of the child; right to life, survival and development; participation in decision-making.**

IMPLEMENTATION AND MONITORING

States Parties must **report regularly** to the Committee on the Rights of the Child. An initial report must be submitted two years after ratification and follow-up reports must be submitted every five years.

After Namibia submitted its first report, the Committee suggested that Namibia comply with Articles 37 and 40 and the three sets of rules falling under the CRC umbrella.

ò **Article 37**

This is a **protection clause**:

- It protects children against torture, cruel punishment, unlawful arrest or deprivation of liberty.
- The arrest, detention or imprisonment of child should be a **measure of last resort**, for the **shortest possible period of time**.
- If a child is deprived of liberty, this must be done in a manner which takes account of the **special needs of a person of their age**, and in a manner which is **humane and respectful** of the child's inherent human dignity.
- Children must be **separated from adults** in detention.

ò **Article 40**

This is the longest and most detailed Article in the CRC. It stipulates that:

- a child should be treated in a way that **promotes their dignity or worth**;
- a child should be treated in a way that **reinforces their respect** for the human rights and fundamental freedoms of others;
- a child should be treated in a way that **takes account of their age**;
- a child should be treated in a way that **promotes their reintegration and their playing a meaningful role** in the community.

ò **Fundamental due process rights (Article 40)**

- The **presumption of innocence**, i.e. presumed innocent until proven guilty in a court of law.
- The right to be **informed promptly and directly** of the charges; and
- to be informed **in the presence of their parents / guardians**.
- The right to **legal assistance** in preparing their defence.
- The right to have the **case fairly determined without delay**.
- The right to **legal assistance in court**.
- The right to have **parents/guardians present in court**.
- The right to **silence**, i.e. not to be forced to give evidence or confess.
- The right to **call and cross-examine witnesses**.
- The right to a **review** of a decision.
- The right to a **free interpreter**.
- The right to **privacy** throughout court proceedings.

ò **Support for the principle of diversion (Article 40)**

- Whenever appropriate and desirable, **alternatives to judicial proceedings and institutional placement** should be provided for children who conflict with the law.
- These alternatives should fully respect the child's **human rights and legal safeguards**.
- Children must be dealt with in a manner appropriate to their **well-being** and **proportionate to both their circumstances and the offence** ("principle of proportionality").

ILLUSTRATIONS

HANDOUT 2

UN CONVENTION ON THE RIGHTS OF THE CHILD

(3 pages)

The Beijing Rules

WHAT ARE THESE RULES?

- ò The full name for the Beijing Rules is the **United Nations Standard Minimum Rules for the Administration of Juvenile Justice**. The Rules were adopted by the UN in Beijing, China, in 1985.
- ò They provide for the **development of separate and specialised systems of juvenile justice**.
- ò They are **non-binding**.
- ò Their **principles have been incorporated into the CRC**.

PART 1: FUNDAMENTAL PRINCIPLES

- ò 13 principles
 - The **fair and humane treatment** of juveniles who conflict with law, thus promoting the **well-being** of the child.
 - The system must **react proportionately** to both offender and offence ("principle of proportionality").
 - The use of community programmes for **diversion** from formal court procedures, with the **juvenile's consent**.
 - The use of **detention** only as a measure of **last resort**, for the **shortest possible period of time**.
 - Juveniles should not be **detained separately from adults**.
 - Proceedings should always be conducted in the **best interests of the child**.
 - Proceedings should be conducted in a manner which encourages the **child's full participation**.
 - **Deprivation of a child's liberty** should be **carefully considered** and **only for serious offences**.
 - **Capital and corporal punishment should be abolished**.
 - **Institutionalisation** should be a **last resort measure** after consideration of alternatives.
 - There should be **continuous and specialised training for police officers** dealing with juveniles.
 - Where juveniles *do* undergo institutional treatment, **educational services** should be provided to enable the juvenile to return to society.
 - **Release** should be considered **as soon as possible** after arrest.

ò **Aims of a juvenile justice system**

The primary aim of a juvenile justice is to **promote the child's well-being** and to ensure that young offenders are dealt with according to the **principle of proportionality**.

To apply this principle means to **react fairly**: to consider **not only the offence** but also the **offender's personal circumstances**, e.g. the offender's social status, their family situation, the harm caused by the offence, the offender's attempt to compensate the victim and the offender's willingness to turn away from a life of crime.

ò **Discretion**

The Beijing Rules call for discretion. Discretion **means choice**. This allows personnel to **react in the most appropriate way**, taking the offender's personal circumstances into account. No discretion means no choice, which means no alternatives.

ò Due process rights

The Rules call for due process rights for juvenile offenders, these being the:

- **presumption of innocence;**
- right to be **notified of the charges;**
- right to **remain silent;**
- right to **legal representation;**
- right to the **presence of parents/guardians;**
- right to call and cross-examine **witnesses;**
- right to **appeal;**
- right to **privacy.**

PART 2: INVESTIGATION AND PROSECUTION

ò Initial contact with justice system

The young offender's initial contact with the justice system is the **point at which the police get involved. Police should behave in a manner which is appropriate to the juvenile's legal status** (consider their age) **and which promotes their well-being.** Police should therefore not treat juveniles in a humiliating, rough or uncaring way. Such treatment can seriously influence the juvenile's attitude towards State and society.

ò Diversion

The Rules call for diversion and state the following:

- Where appropriate, consideration should be given to dealing with juveniles **without a formal trial.**
- **Alternatives to formal processing** through the justice system should be provided for.
- These alternatives should be **used at any stage of the decision-making process by the police and the prosecution.**
- **A police officer can divert a child** from arrest and detention.
- Diversion is **not always best.** It may be better not to intervene, e.g. in cases of **non-serious offence**, particularly where the **family or community has already responded.**
- By refraining from intervention in such cases, **communities are empowered** to solve their own problems.
- The **benefits of diversion** are highlighted, e.g. avoidance of attaching a stigma at an early stage in the child's development.
- There must be **free consent** of the juvenile and their parents/guardians for diversion to take place.

ò Training and specialisation

The Beijing Rules call for the **training of all law enforcement officials** and the establishment of **specialised police units** to deal with juvenile offenders.

ò Avoidance of delay

The Beijing Rules call for the avoidance of unnecessary delay, by **prioritising the tracing of parents/guardians and witnesses**, which process should **start immediately upon arrest.**

ò Pre-trial detention

- Pre-trial detention should only be used as a **last resort** and for the **shortest possible period of time.**
- If a juvenile is detained, they are entitled to the rights contained in the **UN Standard Minimum Rules for the Treatment of Prisoners:** they should be kept separate from adults and receive the necessary care, protection and assistance.

ò **Research should be promoted** as an attempt to obtain more information on the problem of juvenile crime and the success or failure of current practices.

ILLUSTRATIONS

The Riyadh Guidelines

- ò These are the **United Nations Guidelines for the Prevention of Juvenile Delinquency**, adopted by the United Nations in Riyadh, Saudi Arabia, in 1988.
- ò These Guidelines **embody a new approach to the prevention of juvenile crime.**
- ò **Prevention policies are for all young people** and not just for offenders.
- ò **Prevention is a measure taken *before* a criminal or delinquent act** has occurred, for the purpose of guarding against such an act.
- ò **Control is a measure taken *after* the crime** has occurred.
- ò The Guidelines call for the **active prevention of crime.**
- ò **Community-based services** should be developed.
- ò **Youthful behaviour is perceived as part of the growing up process:** non-conformism tends to disappear with reaching adulthood.
- ò The **family (including the extended family)** is the **central unit responsible for the socialisation of children.**
- ò **Society has a responsibility to assist the family.**
- ò **Alternative placements**, such as foster care and adoption, should replicate (be modelled on, imitate) the family environment.
- ò The aim is to **promote human rights in general and children's rights in particular.**
- ò Young persons should be **informed about the law and their rights and responsibilities.**
- ò If you **promote the general well-being of children, juvenile crime will decrease.**
- ò **Special attention** should be paid to **young people at social risk.**
- ò **Special assistance** should be given to **school drop-outs.**
- ò The **Government** has a **special responsibility** to provide services for **street children.**
- ò **Institutionalisation** should be a measure of **last resort** and for the **minimum period necessary.**
- ò The **best interests of the child** are of paramount importance.
- ò **Formal intervention** should be **limited** to the following situations:
 - Where the child has **suffered harm** inflicted by parents/guardians.
 - Where the child has suffered **sexual or physical abuse** by parents/guardians.
 - Where the child has been **neglected/abandoned/exploited** by parents/guardians.
 - Where the child has been **threatened by physical/moral danger** due to behaviour of parents/guardians.
 - Where the child's behaviour causes serious physical/psychological danger and **neither parents/guardians/child, nor non-residential community services, can meet the danger other than by institutionalisation.**
- ò **Law enforcement officials should be trained** to deal with the special needs of young people.
- ò Law enforcement officials should be aware of and use **diversion programmes.**

ILLUSTRATIONS

UN Guidelines for the Protection of Juveniles Deprived of Their Liberty

SUMMARY: Session 5

- ò “Deprivation of liberty” is **any form of detention, imprisonment or placement of a person in a custodial setting from which they are not allowed to leave at will.**
- ò The purpose of the Rules is to **counteract the detrimental effects of deprivation of liberty by ensuring respects for the rights of detainees.**
- ò The general rule is that **detention before trial should be avoided.** Detention before trial should be **limited to exceptional circumstances**, and priority should be given to ensuring a **speedy trial** where juveniles are detained.
- ò **Reintegration into society should be encouraged.** In particular the juvenile should be allowed to:
 - perform paid voluntary **work**;
 - continue their **education and training**;
 - receive **recreational materials**;
 - participate in **educational and vocational training** in the community;
 - **exercise** daily outside;
 - participate in **leisure activities**;
 - retain their **personal belongings**;
 - have **contacts** with the wider community;
 - have private **visits** at least once per week and not less than once per month;
 - have **fair disciplinary hearings**;
 - have a copy of the **facility’s rules** given to them upon admission, and the names and addresses of **organisations providing legal assistance.**
- ò The **facility should provide**:
 - **clean bedding**;
 - enough **blankets** in winter;
 - **sufficient sanitary facilities**;
 - **clean drinking water**;
 - **medical care.**
- ò The juvenile should be **informed if a family member becomes ill or dies.**
- ò The **use of physical force and carrying of weapons should be restricted.**
- ò **Cruel, inhumane and degrading treatment or punishment is prohibited.**
- ò There should be **regular inspections** by qualified independent professionals.
- ò Juveniles should be **interviewed upon admission** to decide on the most appropriate form of placement.
- ò Juveniles should be **separated from adults.**
- ò **Older and younger juveniles should also be separated.**
- ò There should be as few juveniles as possible in both open and closed facilities.
- ò All efforts should be focused on **minimising differences between life inside and outside the facility.**
- ò Personnel should receive **adequate remuneration.**

ILLUSTRATIONS

The African Charter on the Rights and Welfare of the Child

WHAT IS THIS CHARTER?

- ò The Charter was adopted by the OAU in Ethiopia in 1990.
- ò The Charter is an **African convention** which **recognises the unique position of the African child and their special needs.**

MOST IMPORTANT PROVISIONS

- ò The child **should grow up in a family environment for the full and harmonious development** of their personality.
- ò The child requires **particular care** in regard to their health, physical, mental, moral and social development.
- ò The child should be afforded **legal protections** in conditions of freedom, dignity and security.
- ò **The promotion and protection of the rights and welfare of the child requires the performance of duties by everyone.**
- ò The African child occupies a position of **great responsibility within the family** and has the right to be an **active participant** in society.
- ò **Article 17:** A child accused or found guilty of having committed a crime must have the **right to special treatment** in a manner consistent with the child's **dignity and worth** and which **reinforces the child's respect for the human rights and fundamental freedoms of others.** In particular there must be:
 - **no torture, inhuman or degrading treatment or punishment;**
 - **separation from adults** if in detention;
 - a **presumption of innocence** before proven guilty;
 - the right to be **informed promptly, in detail, of the charge, in a language the child understands;**
 - the right to an **interpreter's assistance** if the child cannot understand the language used;
 - the right to **legal and other appropriate assistance;**
 - the right to have the **matter decided as speedily as possible;**
 - the right **not to be compelled** to testify or confess guilt.
- ò The essential aim is **reformation, reintegration into the family and social rehabilitation.**
- ò There must be a **minimum age** below which children cannot break the law.
- ò **Parents/guardians are to be notified** of the arrest as soon as possible.
- ò The people responsible for raising the child should act in the **best interests of the child** at all times, and in all actions concerning the child the best interests of the child must be of **primary consideration.**
- ò In all judicial or administrative proceedings which affect the child an **opportunity must be provided for the child to be heard,** and the **child's views must be taken into account** by the relevant authority.

ILLUSTRATIONS

The Constitution of Namibia

POINTS AND PROVISIONS TO NOTE

- ò Article 144 states that the **general rules of public international law and international agreements which are binding on Namibia form part of Namibian law**. This means that the **CRC is part of Namibian law!**
- ò **Chapter 3 of the Constitution guarantees fundamental human rights and freedoms.**

These are the rights to:

- **life;**
- **liberty;**
- **dignity;**
- **freedom from slavery or forced labour;**
- **equality and freedom from discrimination;**
- **freedom from arbitrary arrest or detention;**
- **a fair trial;**
- **privacy;**
- **a family;**
- **children;**
- **property;**
- **political activity;**
- **administrative justice;**
- **cultural activity;**
- **education.**

Fundamental freedoms are the rights to freedom to/of:

- **speech and expression;**
- **thought;**
- **conscience and belief;**
- **religion;**
- **peaceful assembly without arms;**
- **association;**
- **withhold labour without criminal penalties;**
- **move freely throughout Namibia;**
- **reside and settle in any part of Namibia;**
- **leave and return to Namibia;**
- **practice any profession, trade or business.**

- ò **Arrest and detention (Article 11):**
 - There shall be **no arbitrary arrest or detention**.
 - All arrested persons shall be **informed promptly** in a **language they understand** of the **grounds** for arrest.
 - Arrested persons must be brought to **court within 48 hours** of arrest.
 - The **presumption of innocence** applies.
 - The **trial** must occur **within a reasonable time** after arrest.
- ò Article 14 emphasises the **family as the fundamental grouping** in society.

ò **Children's rights** (Article 15):

- Children have the right to a **name** from birth.
- Children have the right to acquire a **nationality**.
- All actions concerning children must be in the **best interests of the child**.
- Children have the right to right to **know and be cared for by their parents**.
- Children have the right to be protected from **economic exploitation**.
- No child under the age of 14 shall work in any **factory or mine**.
- No child shall be **compelled to work** for their parent's employer (e.g. on a farm).
- There shall be no **preventative detention** for children under the age of 16.

ILLUSTRATIONS

The Criminal Procedure Act (Act 51 of 1977)

ò GENERAL POINTS TO NOTE

- Although the Act distinguishes between juveniles and adults, the **safeguards regarding juveniles fall far short of expectations** in terms of international standards.
- Despite the many shortcomings, the Act **can still be used creatively** in respect of juveniles who are arrested, detained and tried for criminal offences.

ò ARREST AND DETENTION

- The **purpose** of arrest is to **investigate** the charge and bring the accused person before **court**.
- A person who arrests a suspect to **punish or reprimand** them is guilty of an **unlawful arrest!**
- Arrest is a serious **infringement on the liberty and freedom** of the arrested person. Where the person is a juvenile the consequences of arrest can be **serious and traumatising**.
- Arrest of a juvenile should not be taken lightly. The circumstances should first be **thoroughly investigated** and **alternatives** to arrest considered.
- In detaining a juvenile, you should be **very sure that detention is necessary** and you should then **inform the juvenile, in the presence of their parents/guardians** as to the grounds for the detention.
- Section 54 authorises a **summons** as a means of securing a person's attendance in court.
- Section 56 authorises a **written notice** as a means of securing a person's attendance in court.
- Section 59 authorises a **police officer of or above the rank of non-commissioned officer to grant bail** before the expiry of the 48-hour period if the offence is not found in Parts 2, 3 or 4 of Schedule 2: *A police officer may grant bail where the charge is theft and the value of the goods stolen is less than N\$600.*
- Section 71 provides for a juvenile to be **placed in a place of safety** rather than released on bail or detained.
- The **problem** with Section 71 is that the Children's Act **includes a police station in defining places of safety** so children still end up in police cells!
- Section 72 states that the police may release a juvenile into the **care of the person in whose custody** they were prior to the arrest: this should be done where possible! Where the Act gives the police official a **discretion**, this should always be exercised in the **best interests of the child** concerned.
- Section 73 states that a person is entitled to **legal assistance** from the time of arrest and juveniles may be assisted by their **parents/guardians** at court.

ò TRIAL

- Section 74 states that the **parents/guardians shall be warned to attend** proceedings if they are **known to be within the magisterial district** and can be **contacted without delay**.
- If this is not possible, the **trial can continue in the absence of the parents/guardians** (Section 74). The child will then have no support in court. This is **extremely problematic**.

- The fact that the majority of juveniles interviewed in the **prisons survey** were in detention during their trials is largely due to the **numerous postponements** of their trials, some of which were **caused by parents/guardians not attending** court.
- If parents/guardians cannot be traced, this does not necessarily mean that child should be detained in police cells. If the child **trusts** you, they will probably tell you about an **older brother or sister or responsible community member** who will be prepared to ensure the child's attendance at court.
- It is **vital to take all reasonable steps to contact** the parents/guardians or some other community member **as soon as the child is arrested!**
- It is **vital to establish the status of the youth** as soon as possible after arrest.
- **Collaboration** with community organisations is recommended.
- Section 153 states that the trial of a juvenile shall be **in camera**.
- Section 154 states that **publicity is prohibited**.
- Section 254 states that the court may **refer** a juvenile accused to the **children's court** if it appears to the magistrate that the accused is a "**child in need of care**". This is a form of **diversion**, which can even occur after conviction.

o SENTENCING AND DIVERSION

- Section 290 provides for **probational supervision, placement in the custody of any suitable person, and placement in a reform school**. However, there are no reform schools in Namibia, and in any case, experts hold that these institutions are "breeding grounds for crimes", and courts have also expressed this opinion.
- Section 297 provides for the **conditional or unconditional postponement or suspension of sentence subject to conditions** such as the rendering of compensation to the victim, service for the benefit of the community or victim, submission to supervision and control, the compulsory attendance at a specified residence, or good conduct.

ILLUSTRATIONS

The Children's Act

(Act 33 of 1960)

Draft Children's Legislation

The Prisons Act

(Act 8 of 1959)

THE CHILDREN'S ACT

- ò Section 1 defines a “**place of safety**” as any police station, hospital or other place suitable for the reception of a child and into which the occupiers are willing to accept the child.
- ò Section one defines a “**child in need of care**” as a child who:
 - is **abandoned** or **without visible means of support**;
 - is **without their parent/guardian** or these persons are **unable to look after** the child;
 - is in the **custody of someone who has deliberately injured the child** and has been **convicted** of this in court;
 - **cannot be controlled**;
 - is a **habitual runaway**;
 - keeps **company with immoral or violent people**;
 - **begs** or is a **hawker at under 16** years of age;
 - is being looked after **apart from their parents** and in **circumstances which are counter to their interests** and whose **parents/guardians cannot be found**, or, are **unable to provide** for the child when asked to do so;
 - is in a state of **physical or mental neglect**.
- ò A **children's court determines** whether a child is “in need of care”. In terms of Section 31, a children's court **has the power to**:
 - order that the child remain in the **custody of the same person** who had custody prior to the children's court enquiry (which could be coupled with supervision by a **probation officer or social worker**);
 - place the child in the custody of a **foster parent** (which could also be coupled with supervision by a probation officer or social worker);
 - place the child under the control of an **approved agenc**;
 - send the child to a **children's home**;
 - send the child to a **school of industries**.
- ò Section 26 gives a **police officer the power to a remove a child if the officer is of the opinion that the child is “in need of care”**, but you may only remove a child from their custodian, in a public place, if there is reason to believe that a **First Schedule offence** is being committed against the child.
- ò **As soon as possible after removal the police officer must bring the child before a children's court.**
- ò Section 54 states that any juvenile who has **run away** (absconded) from a school of industries or other institution or place of safety or a person's custody in which they were placed in terms of the Act, **may be arrested** without a warrant and **brought before a children's court** for a commissioner of child welfare to enquire into the **reasons** for their running away and decide what to do.

DRAFT CHILDREN'S LEGISLATION (Child Care and Protection Act and Children's Status Act)

- ò This draft legislation embodies a **child-centered approach** and aims to:
 - protect and promote the **well-being** of all children;
 - improve the **quality the relationships** between children and their family and community;
 - **provide services and facilities** to improve the quality of children's lives;
 - promote the **active involvement of families** in resolving problems;
 - ensure that **families are separated only as a last resort**;
 - ensure that **children separated from their families are well cared for**;
 - implement the **CRC and other international standards** relevant to the protection of children.
- ò In keeping with the spirit of the CRC, the draft legislation sees the **best interests of the child** as being of **overriding importance** when dealing with children.

THE PRISONS ACT

- ò This Act defines a "juvenile" as being anyone under the age of 21 years, which definition conflicts with the Criminal Procedure Act and the Children's Act and causes practical problems, e.g. when juveniles of vastly differing ages are detained together in a cell.
- ò Section 29 states that an accused person under 18 years of age shall not be detained in a prison or police cell or lock-up **unless such detention is necessary and no suitable place of safety is available**. This provision is **problematic** because it has been used to **justify holding juveniles in prisons!**

ILLUSTRATIONS

The NAMPOL Operational Manual

Chapter 1: IMPORTANCE OF THE CONSTITUTION

- ò Chapter one **emphasises the importance of the Constitution:**
 - **Every member of NAMPOL must know and respect the fundamental rights and freedoms** contained in the Constitution (F.3)
 - **Respect for human rights** must become part of everyday life for all people in Namibia (F.4).
 - Police officers must **support the exercise of rights by all citizens including suspects, arrested persons and convicted prisoners** (F.5).

Chapter 2: ROLES AND RESPONSIBILITIES OF NAMPOL

- ò Chapter 2 stipulates that **police should only use their power of arrest when another method is impractical** (H.2.1).
- ò The following **alternatives to arrest** are currently available:
 - **Oral warning**
 - **Warning Notice (J127)**
 - **Notice to Appear in Court (J534)**
 - **Setting bail**
 - **Requesting the prosecutor to issue summons**

Chapter 3: COMMUNICATION

- ò **Productive communication** with the community is recommended to enable the Police to succeed in their duties (F.1.d). “Productive” is defined to mean “free and relaxed exchange of views and information.”

Chapter 5: SAFETY OF PRISONERS

- ò Chapter 5 deals with the **safe custody, treatment, escort and continued detention** of prisoners. This is a very important chapter in relation to young offenders:
 - Children under 16 years of age **shall not be detained in police cells** if it is possible to accommodate them in another approved place (C.4).
 - Offenders under 18 years of age **shall be detained separately from adults** (C.4).
 - The Police are **responsible for the well-being and protection** of persons in custody (D.4).
 - Police officers **may not subject a person to personal abuse, indignities or inadequate protection** while in custody (D.4.c).
- ò The accused person has the **right to be free from bodily harm!**

THE “PRINCIPLE OF PROPORTIONALISM”

- ò Ask yourself **what goals** you want to achieve and **which method** you are going to use to achieve that goal.
- ò The **method which uses the least amount of force is the method you should use** to achieve your goal. This means, for example, that an arrest should not be effected if a written notice will achieve the same goal.
- ò You should look at **which methods contain potentially serious consequences** for both the Police and the community. **The higher the degree of force used, the more cautious you should be!**

ILLUSTRATIONS

An Introduction to Diversion

DEFINITION

- ò “Diversion” is **the use of voluntary alternative measures to the formal criminal justice system.**
- ò From the offender’s point of view, diversion means **a turning away from crime, towards being a productive member of the community.**

THE PROCESS

- ò The diversion process can start at court when the **prosecutor decides to withdraw the charges**, or in court when the **magistrate imposes a sentence other than imprisonment or converts the trial into a children’s court enquiry.**
- ò Diversion is a **concrete process**, in terms of which the diverted person comes to realise that there are **other options in life** apart from crime.
- ò **Police are the agents of diversion when they create an opportunity** for diversion to take place, for example, diverting a young person from arrest and/or detention.
- ò **Diversion can occur at any stage but the sooner it occurs the greater the chance will be to make a positive intervention** in the young person’s life

THE AIMS

- ò The aims of diversion are to:
 - prevent re-offending (recidivism);
 - avoid conviction, or give offenders a second chance;
 - improve resource usage;
 - avoid the delays, costs and traumas of trial;
 - provide a better service to victims;
 - improve perceptions of the police;
 - provide “help” to offenders.

RESTORATIVE JUSTICE

- ò Diversion is a part of “restorative justice”. Important points to note about this model of justice are as follows:
 - **Crime violates social harmony.**
 - The **chief objective** of a restorative justice model is to repair the harm caused by the offence, i.e. **reparation.**
 - Crime is not seen only as an attack on the State, but also as **damage done between individuals.**
 - The **offender is directly and actively involved** in the restoration or reparation process.
 - Diversion occurs within a **judicial or legal framework.**

COMPARISON: RESTORATIVE, RETRIBUTIVE, REHABILITATIVE

- ò **Retributive justice seeks punishment**
Victim’s needs not really taken into account.
- ò **Rehabilitative justice seeks to make the offender “normal”**
Victim’s needs are secondary.
- ò **Restorative justice seeks to repair the harm**
Victim’s needs are central to the process.

ILLUSTRATIONS

Community Service

DEFINITION

- ò The offender serves the community as reparation for the crime.

WHAT IS COMMUNITY SERVICE?

- ò The offender is required to **work a certain number of hours during their free time, for a non-profit organisation without payment.**
- ò If *pre-trial* (alternative to sentencing): the **charges are withdrawn on condition** that the offender completes the service within a given time.
- ò If *post-trial* (alternative sentencing option): the **community service order will be made in conjunction with a postponed or suspended sentence.**

PLACEMENT AND PLACEMENT AGENCIES

- ò The **placement agency** is the place where the offender performs community service.
- ò This could be a:
 - home or hospital for the physically or mentally disabled;
 - general hospital;
 - library;
 - municipality
 - police station.
- ò The placement **should be in the community where the offender normally lives.**
- ò Where possible, **placements should reflect the offender's own interests and preferences and the service should be seen to fit the crime.**

BENEFITS OF COMMUNITY SERVICE

- ò The **offender, their family and society all benefit** in many ways from this course of action:
 - The offender **remains in society.**
 - Their **family continues to function as a unit.**
 - The offender is able to **support their family.**
 - The offender **does not have to face the problem of reintegration** into society (as in after having served a prison sentence).
 - The offender **maintains their employment or education.**
 - The **cost to the tax-payer is minimised.**
 - **Overcrowding in prisons is reduced.**
 - The offender is **protected from the negative effects of imprisonment.**
 - The offender is **able to make reparation** to society for the harm done by rendering an **unpaid service.**
 - The server can provide **assistance to organisations which depend on volunteers.**
 - The server receives the **benefits of appreciation, enhancement of self-esteem and pleasure in having helped other people.**
 - It provides a **concrete way for the offender to make amends** for their wrongdoing.

ILLUSTRATIONS

Victim-Offender Mediation

WHAT IS VICTIM-OFFENDER MEDIATION (VOM)?

- ò **Aim**
To facilitate **communication** between victim and offender after a crime has been committed.
- ò **Focus**
Peaceful **conflict resolution**.
- ò **Objective**
To work out an **agreement** between victim and offender, with the aid of a mediator.
- ò **Where**
This process is currently used at the **Windhoek Magistrate's Court**, and is known as "**consensus decision-making**".

BENEFITS

- ò **For the victim**
 - Has the **opportunity to participate actively** in the criminal justice process.
 - Receives **restitution**. (Type of restitution will depend on the agreement.)
 - Has a **chance to confront** the offender with their feelings about the crime.
 - Programme personnel can provide **information** that the victim requires.
 - The meeting between victim and offender could **increase the victim's understanding** of crime and punishment and of the causes of crime. The victim could end up realising that the offender is also a victim.
- ò **For the offender**
 - **Gains insight** into the impact of the crime, because VOM demonstrates that the victim is a real person.
 - Has a **chance to make things right** and **feel better** about him/herself.
 - Has a **chance to reconcile** with society.
 - Has a **chance to play a role in determining their own future**.
 - **Increased sense of responsibility**.
- ò **For the community**
 - VOM need not be limited to crime-related conflicts. The **skills and processes** can be used to resolve **other forms of conflict**, e.g. family and interpersonal disputes.
 - **Cheaper than imprisonment** and the **offender performs useful function** within the community.
 - **VOM may reduce recidivism**.
- ò **For the criminal justice system**
 - Offers **alternative to imprisonment and other sentences**.
 - **Less expensive** than many other forms of sentencing.
 - Useful **mechanism for handling first offenders in property crime**.
 - As a **pre-trial** process, VOM can function as a **time-saving device** because the work load of court officials is decreased.
 - Creates a **mechanism for restitution outside of court** (and lessens the burden on court).
 - Creates a **mechanism for handling unsolvable cases** in the formal criminal justice process, e.g. family and interpersonal disputes.

ILLUSTRATIONS

The Life-skills Programme

WHAT IS THE LIFE-SKILLS PROGRAMME?

- ò This programme provides an **opportunity for the offender to take responsibility for their actions.**
- ò Attendance of the programme may be used as a **condition for pre-trial diversion** or as a post-trial **alternative to imprisonment.**
- ò The programme is **aimed at youth between 12 and 18 years old.**
- ò It is **not limited to first offenders.**
- ò **Offenders in cases of armed robbery, murder and rape are excluded from the programme.**
- ò “Life-skills” are the **skills that we all need to cope with the pressures and demands of daily living.**
- ò The **overall goal** of the programme is to **encourage the young person to behave within broadly acceptable social norms and to develop leadership qualities.**
- ò **Punctuality and attendance at every session are requirements for successful completion.** (Remember that the charges are finally withdrawn only on condition that the offender completes the programme.)
- ò **Parents attend first and last sessions** to enable discussion with their children about what has happened.

BENEFITS OF THE LIFE-SKILLS PROGRAMME

- ò The programme offers **crucial benefits** for offenders as well as for their families, society and the criminal justice system:
 - The offender is given a **second chance.**
 - If used as a **pre-trial** diversion, a **criminal record is avoided.**
 - If used as a **post-trial** alternative, a **prison sentence is avoided.**
 - The offender is **encouraged to take responsibility** for their actions.
 - Society benefits because there will be a **decrease in youth crime.**
 - The family benefits because **parents and children have a chance to talk and repair damaged relationships.**
 - The **courts no longer have to process petty offenders** through the system.

ILLUSTRATIONS

The Juvenile Justice Data Collection

WHY COLLECT DATA ON JUVENILE JUSTICE?

- ò A data collection will enable juvenile justice administrators to:
 - ascertain the **extent of the problem** of juvenile crime;
 - obtain a **profile of juvenile crime** in Namibia (e.g. types of crime, circumstances, localities);
 - determine the **effectiveness of the system** in dealing with juvenile offenders;
 - support **advocacy** (making suggestions) with facts;
 - address **loopholes**;
 - use research as a basis for an **informed juvenile justice policy** (which should comply with the CRC, Constitution and other standards);
 - provide for **mutual feedback** between research and policy;
 - ensure that **societal and judicial responses** to juvenile crime are not outdated and inadequate;
 - assist in **planning** around juvenile justice;
 - feed into the **National Programme of Action for Children** (by assisting with the submission of an annual report to the UN on Women and Children in Especially Difficult Circumstances);
 - assist **UNICEF** and the **National Planning Commission** with **funding decisions**;
 - assist **Regional Councils** to ascertain the problems in their regions regarding juvenile crime;
 - assist **Youth Councils** in their activities and planning;
 - assist the **Ministry of Youth and Sport** in their programmes for **out-of-school youth**;
 - assist the **Ministry of Health and Social Services** in developing **crime prevention programmes**;
 - assist the **Ministry of Justice** in dealing with crime;
 - assist the **Ministry of Prisons and Correctional Services** in dealing with juvenile offenders;
 - assist the **Juvenile Justice Project** in planning and implementing **diversion programmes**;
 - assist the **Juvenile Justice Forum** by strengthening **networking** and the **flow of information**.

ILLUSTRATIONS