

CHAPTER 7

DIVERSION: A CENTRAL FEATURE OF THE NEW CHILD JUSTICE SYSTEM

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Diversion can be understood as the channelling of children into appropriate reintegrative programmes and services, where the intervention of the formal court system is not necessary. If a child acknowledges responsibility for the wrongdoing, he or she can be diverted to an appropriate programme, thereby avoiding the stigmatising and even brutalising effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time the programmes teach them to be responsible for their actions and to avoid further trouble. Diversion has been acknowledged as a key element in the shift from a retributive to a restorative justice system for child offenders.

Current diversion practice

Although the current law does not specifically provide for it, diversion is practiced in South Africa. Experiments with diverting young offenders were pioneered by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO). In the early 1990s – with the cooperation of public prosecutors – NICRO introduced the use of diversion as an alternative to incarceration, especially for children who had committed petty offences.⁷⁶ Since then, the National Director of Public Prosecutions has published a Policy Directive on Diversion, setting out the circumstances in which diversion may take place.

In the late 1990s the Department of Social Development also began to offer diversion services in some parts of South Africa through the interventions of probation officers and assistant probation officers.⁷⁷ At the same time, other non-governmental organisations began to experiment with a range of innovative diversion options such as mentoring, adventure programmes, drama therapy, diversion into music, etc. Some of these models have been successfully introduced and utilised by courts in parts of the country. It is estimated that approximately 15,000 children were diverted by prosecutors to

recognised programmes offered by NICRO and the Department of Social Development in 2001.

Diversion in the new child justice system

Diversion is the central feature of the new child justice system. According to the Bill, diversion aims to:

- encourage the child to be accountable for the harm caused;
- meet the particular needs of the individual child;
- promote the integration of the child into the family and the community;
- provide an opportunity to those affected by the harm to express their views of its impact on them;
- encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- promote reconciliation between the child and the person or persons or community affected by the harm caused;
- prevent the stigmatisation of the child and the adverse consequences flowing from being subject to the criminal justice system; and
- prevent the child from having a criminal record.

The Bill further sets out a range of diversion options by proposing three 'levels' of diversion for children aged 10 years and older based on the intensive nature of the intervention as well as the circumstances around the child. For the purpose of developing appropriate diversion programmes, it is important to understand these levels.

Level one diversion includes less intense, short term interventions that can be implemented through a range of orders issued by the magistrate at the preliminary inquiry. Examples include compulsory school attendance orders, family time orders, and placement under guidance or supervision. These orders are meant to encourage positive behaviour in children and support parents in their parenting and guidance roles. Even though these orders may look uncomplicated, they serve an important function. They also require supervision during implementation from an individual in the family, a community leader, or someone from a community-based organisation.

Level two diversions are more intense than those at level one, and programmes can run for a maximum period of six months. They include, for instance, compulsory attendance at a specified centre or place for vocational training, or performance of tasks without remuneration for the benefit of the

community under the supervision of an individual or an institution. Referral to a family group conference or a victim-offender mediation programme is also an option at this level.

Level three diversions can only be applied to children of 14 years or older if the court believes that upon conviction, the child would be sentenced to detention for a period not exceeding six months. At this level, diversion options include referral to a programme with a residential component, performance of duties without remuneration, and referral to counselling or therapeutic intervention.

In addition, the Bill sets out minimum standards applicable to diversion options and these are that:

- No child may be excluded from a diversion programme owing to an inability to pay any fee required for such a programme.
- A child of 10 years or over may be required to perform community service as an element of diversion, with due consideration for the child's age and development.
- Diversion options must:
 - promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society;
 - not be exploitative, harmful or hazardous to a child's physical or mental health;
 - be appropriate to the age and maturity of the child; and
 - not interfere with the child's schooling.
- Diversion must, where reasonably possible:
 - impart useful skills;
 - include a restorative justice element which aims at healing relationships, including relationships with the victim;
 - include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including victims of the offence, and may include compensation or restitution; and
 - be presented in a location reasonably accessible to children, and in cases when transport is unaffordable, the means to reach the diversion programme should, as far as possible, be provided.

In addition to the above it is important to ensure that the following guiding principles are adhered to for effective delivery of diversion services:

- target priority problem areas and identify strengths to which children in a particular community are exposed;

- provide intensive contact with children, offering multiple contacts per week and in some cases even daily contacts;
- focus on interventions that build on strengths of children rather than focus on deficiencies;
- deal with children in the context of their relationships to and with others rather than solely on the individual level;
- encourage cooperation among various community members;
- address problem areas and identify strengths early and at appropriate developmental stages;
- focus on education and strong family support;
- focus on continuing school, positive peer role models and creating opportunities for work especially among the adolescent population.

The new child justice system is designed to cater for the majority of children who have committed crimes. The different levels outlined above offer an innovative way of dealing with these children based on an appropriate assessment by the probation officer. Diversion through these different levels is meant to address the individual needs of each particular child who enters the system, and any case may be considered for diversion.

The challenge presented by the Child Justice Bill is that of ensuring that there are adequate programmes and opportunities for diversion than are currently available. This means that there is a need to include as many diversion service providers as possible. Children who come into the criminal justice system have different needs and the 'one-size-fits-all' type of programming should be avoided. More creative options must be developed, while ensuring that effectiveness is maintained. An audit of existing diversion related services shows that there are several different categories of programmes.

Types of existing diversion programmes

Developmental life skills and life centre models

Programmes in this category include a wide range of life skills education covering topics such as personal awareness and growth, communication skills, conflict resolution and effective mediation, sexuality, crime awareness and crime prevention, gender sensitivity, leadership development, family life and many more. What is important is that every community has some form of life skills education for children or youth. These are offered by youth clubs as well as church groups. Many life skills programmes are packaged in the form

of a 'course' that lasts for a specified number of hours or days. These vary from one programme to the other.

Peer/youth mentorship

These programmes make use of peers, youth and adult mentors from the community, sometimes referred to as 'youth leaders'. Basically mentors are assigned to a child or a young person and they develop a unique relationship with them. They offer guidance, they play the role of big brother or big sister, and they offer friendship to the child. They also help the child negotiate his or her way at school and with other institutions such as the family.

In most programmes, mentors report back to the programme manager on the progress of the child. Mentoring involves an element of restorative justice in that some mentors also facilitate family group conferences. In several cases, mentors have been trained in counselling and offer a range of services to children. The nature of the relationship between the mentor and the child is important – at most it is flexible and easygoing but can also become formal if the needs of the child require it. These models are based on the importance of peers in the lives of children, particularly considering that children learn more from their peers than from adults.

Wilderness/adventure therapy

These programmes offer education, leadership and even therapeutic support through outdoor experiential learning. Many are especially designed for children with serious behavioural and emotional challenges and they respond well to level three diversion. Participants in these programmes go on 'wilderness journeys' for specified periods of time to learn more about themselves and how to cope with the challenges of the natural environment.

Proponents have successfully designed the programmes to use the environment to promote self-awareness, self-sufficiency, and increased self-esteem, and to make a 'personal transformation' possible. Since nature is healing, the wilderness experience also offers participants freedom to experiment with the self and to experience themselves differently. Different coping strategies are also developed in the process.

Vocational skills training and entrepreneurial programmes

These programmes offer vocational training in activities relating to computers, hairdressing, arts and crafts, motor mechanics, catering, bookkeeping and

basic office maintenance, to mention a few. Many of these programmes target youth, especially unemployed and out-of-school youth. Assistance with obtaining employment or starting a business is also provided as a follow-up to training. This category is very important for children who are facing adulthood. International research has shown that strategies that focus on vocational training and employment with an intensive educational component and after-school activities are most likely to produce the desired outcomes for children in the criminal justice system.

Restorative justice programmes

These programmes include family group conferencing (FGC) and victim-offender mediation (VOM) activities. The Bill promotes the use of restorative justice processes through participation in restitution efforts, community service programmes and compensation to victims.

Counselling and therapeutic programmes

Many children who commit crimes have behavioural and mental health related problems, and need intensive counselling. In some cases, no programme can effectively help them unless substance abuse treatment is offered. This is another area that needs development, since many existing drug rehabilitation programmes serve adults only. More programmes in this area need to be developed, as well as those that provide counselling and therapy. These services are not readily available to children, particularly in rural areas.

Family-based programmes

Children live and grow up in families and it is often their exposure to their families that leads them to the doors of the criminal justice system. Therefore 'treating' children in isolation from their families is like treating the symptom rather than the cause. The whole family may need intensive support, guidance and even treatment.

When using family-based services as a diversion option, the child is placed back with his or her family with the condition that specific support services are rendered to both child and family. Such services are referred to as intensive family support services or family preservation services. Intensive family support services operate according to certain principles in line with the family preservation movement. They are also limited in duration. If used to support the child justice system, a recommendation is made after an assessment to place the child under intensive family support services. The family support

personnel then have a responsibility to report to court the progress the child and the family is making. For the child justice system, the court will be able to issue level one orders (as proposed by the Bill) that can be supervised as part of intensive family support services.

Creative arts programmes

Creative arts such as music, dance, drama, painting, story telling, etc. can be used effectively to teach positive skills, to modify behaviour and to impart anti-crime messages while promoting a sense of mastery that many children are deprived of in their natural environments.

Combination programmes

These programmes combine a range of elements, such as life skills training, FGC, mentorships, vocational skills training, family support for children and adventure therapy. Some organisations have managed to successfully package their programme in a way that provides an enriching experience to the child. The strength of these programmes is that they are highly creative and stimulating for all those involved. Nevertheless, combination programmes need to be carefully evaluated to ensure that they meet the minimum standards for diversion.

Pre-trial community service

The Bill proposes the use of community service as a level two and level three intervention. Community service can be used as an alternative to paying compensation for offences committed and has been used successfully in this country, particularly by NICRO, for children who committed minor offences.

The procedure is for the child to commit himself or herself to serving the community for a recommended number of hours instead of going to court. The staff places young persons in suitable community service settings, depending on their skills and where they are needed most. Under the guidance of a local non-profit organisation, examples of tasks that may be assigned include picking up trash along roadsides and in parks, creating environmentally healthy surroundings, painting crèches, planting trees and growing small vegetable gardens.

Charges against the child are withdrawn on condition that the child performs a certain number of hours (ranging from 10 to 120 hours) of community service. Should the child fail to comply with the conditions, the charges are then re-instituted.

Community service programmes are often used in conjunction with other programmes such as life skills training or mentoring. Ideally community service should enable children to learn new skills and to enhance their self esteem while paying a debt to society. Working for non-profit organisations, libraries and schools is a good way of 'repaying' society and promotes positive reintegration. The chances are that if community service is well organised and effective, some children may continue to be involved in the activities after the charges have been dropped, either as volunteers or later in paid positions.

The significance of the various innovative programmes and services covered above is that they promote responsibility and accountability among the children they target. Whether focused on counselling, mentoring, life skills, or community service, all the programmes can incorporate a special emphasis on the child offender's personal responsibility and obligation to victims. Even those programmes that seek to change undesirable behaviour can also emphasise accountability.

Challenges facing diversion programmes

Ensuring that there are sufficient programmes

The Bill requires the availability of many more programmes for diversion than is currently the case. This means that more creative and innovative programmes should be identified, designed and strengthened to support the system. The shortage of diversion programmes is a major challenge, particularly in rural areas.

Geographic as well as programmatic gaps in service delivery must be addressed. An audit conducted by the Sexual Offences and Community Affairs Unit of the National Directorate of Public Prosecution identified areas where diversion is not practiced at all due to lack of appropriate programmes.⁷⁸ These areas lie primarily in the former 'homeland' territories of Bophuthatswana, Venda, Transkei and Ciskei (although the latter two seem better off than the other former homeland territories). Diversion is mostly practiced in the metropolitan areas of the country such as Durban, Cape Town and Johannesburg. In small towns it is practiced primarily in the predominantly white areas.

When it comes to the availability of programmes to address specific needs of children in the system, participants at the national and provincial *indabas* on

programmes to support the child justice system agreed that the following services should be developed throughout the country:

- diversion options for children requiring alcohol and drug treatment;
- counselling and therapeutic programmes for children with serious emotional, behavioural and mental health related problems;
- treatment and counselling for children who have committed sexual offences (Child Line in Durban and SAYStOP in Cape Town are good examples but no similar programmes are available in other parts of the country);
- vocational skills development for children over the age of 14 years (many existing programmes offering vocational skills training target youth over 18 years);
- alternative educational programmes for older children who left school in lower grades;
- programmes with a residential component that can be used for level three diversion;
- restorative justice programmes, with a particular focus on quality assurance as well as training – especially of court personnel – to understand, support and use restorative justice options.

Standards for diversion

The Bill provides that diversion programmes offered either by government or non-governmental organisations should be registered in terms of the regulations that will follow the passing of the legislation. In detailing the standards for diversion, the regulations should avoid curbing the creativity of programmes or the development of indigenous models based on local contexts and available resources. The process of developing regulations should be consultative and inclusive.

Assessing the impact of diversion

Research has shown that recidivism rates are lower for children that have participated in diversion programmes.⁷⁹ It is also likely that reducing the flow of cases involving children to criminal courts will significantly reduce the pressure on the system. This will assist in reducing existing backlogs and ensure a more efficient and effective service generally. The positive impact for the entire criminal justice system and for society as whole is likely to be substantial.

Nevertheless, research on the effectiveness of new and innovative diversion models is necessary. There are many anecdotal accounts of success in South

Africa that need to be properly documented. Since diversion is growing fast and attracting new role players, there is a need to document and properly evaluate the impact of new and emerging models. A tracking system that traces the whereabouts and activities of children after diversion is necessary. Documentation of stories and progress of children who have been diverted will help to build confidence in diversion. In essence, there is a need for dedicated research on the effectiveness and impact of diversion in South Africa.

Quality, efficiency and effectiveness

To ensure that diversion services are effective and of a high quality, realistic standards that are based on restorative justice principles need to be set, registration procedures established, and training offered for practitioners involved in diversion. Without this, the danger exists that diversion will become associated with bad practice which will damage the credibility and value of the approach.

Finances and resources

The availability of resources is a critical factor for developing effective diversion options. Not all programmes require substantial resources, however. For example, the diversion of petty offenders would mostly involve level one programmes that do not typically require sophisticated infrastructure. As indicated earlier in this chapter, level one diversion can be effected through a range of orders that can be supervised by family members, relatives and community leaders.

By contrast, level two and three diversion options do require well resourced programmes and highly trained staff to render intensive services that address specific needs of children. Efforts need to be made at all levels to ensure proper planning, budgeting and channelling of resources. Budgets should be based on a thorough analysis and projection of arrest rates and likely problem areas in the delivery of the services.

Although funding is important, creative alternatives can be found for providing diversion options. Many relevant programmes are operating in South Africa that may not be focused on children in the criminal justice system. These could be adapted to provide diversion services. General crime prevention projects, for example, could upon closer examination be meeting the standards set out for diversion. With little or no adaptation, they could be used for diversion.

In developing diversion options, the intention is not to reinvent the wheel but to build on existing strengths and capacities. Although this chapter has not focused on using community based programmes for alternative sentencing, such programmes could be adapted for use in non-custodial sentencing or as reintegrative models for children who have been exposed to the criminal justice system. Programmes should aim to be creative, versatile and flexible without compromising quality.

Intersectoral and comprehensive approach

The successful implementation of diversion requires healthy collaboration among the key partners of the criminal justice system. There must be a common understanding and acceptance of diversion from the point at which children enter the system to the end. All practitioners involved need to operate from a similar philosophical approach to dealing with children in the justice system. The basic philosophy of restorative justice should be a common thread that binds all the partners together.

Collaboration also implies the sharing of resources. Other government departments outside the criminal justice system also have a range of programmes that can be used for diversion. The Department of Environmental Affairs, for instance, has resources such as camping sites that can be used for adventure programmes, and municipalities have parks and recreational centres where children can do their community service under supervision of municipal staff. The Department of Health has counselling services in its mental health department and some attached to local health centres can be used for children in the system.

Many such opportunities need to be explored and coordinated for use in the area of diversion. The Bill does allow other government departments to deliver diversion provided that these options are recognised and registered by the Department of Social Development, which has the responsibility to register programmes and maintain minimum standards for diversion.

Family and community involvement

Communities are crucial to the successful implementation of diversion, as this is where most programmes take place. Many communities have negative experiences and perceptions about people who commit crime. Elements of South African society have adopted a 'zero-tolerance' approach, and children are easy targets of community anger when they are suspected of having

committed crime. During the year 2000 at least four cases were reported in which children accused of offences were assaulted, degraded and in one instance, killed by community members taking the law into their own hands.⁸⁰

Parents, guardians and families also play an important role, and their active involvement is one of the factors taken into consideration when a decision on whether to divert or not is taken. The lack of cooperation from parents and guardians often becomes a barrier to successful implementation of diversion even in cases when it would have been an appropriate option.

The entry of new partners in the delivery of diversion services

In order to increase the availability and use of diversion options, it is important to include other partners and community based entities that have not previously serviced the criminal justice system. This is a wise move as there are many innovative programmes that can assist in the delivery of diversion services.

However, this approach has its own challenges, such as ensuring that the new partners understand the criminal justice system and what courts require or expect from a diversion service provider. New partners should have clearly defined programmes, a good track record of service delivery, programmes that include a restorative justice component, and clear accountability mechanisms and procedures that satisfy the courts. In essence, the courts and other important partners in the criminal justice system should have confidence in the programme.

Communities must also have confidence in the programme to avoid the incorrect perception that diversion is a 'soft option'. Training for communities and other partners is therefore key to success.

Training and attitude change for criminal justice professionals

When it comes to decisions to divert, prosecutors are *dominis litis*, meaning that they decide which cases to divert or to prosecute. In making this decision they have to take into account a range of factors such as the circumstances of the child, the safety of the child and the community, and protecting the rights of the victim, to mention a few. It is important therefore that prosecutors know and understand the practice of diversion as well as the value of diversion to children, their families, their communities and society at large. Although major strides have been made in this regard, negative perceptions still block

the use of diversion programmes in some cases. It is important that all professionals in the criminal justice system are trained and engaged in attitude-changing strategies.

Conclusion

There is no doubt that diversion is an embodiment of, and vehicle for, restorative justice. South Africa is rich with a range of innovative models that can successfully promote a sense of accountability and responsibility in children. Although some individuals may have negative perceptions about diversion, more education and involvement of communities in offering and supervising diversion options will ensure a widespread understanding and acceptance of restorative justice.

The challenge is to ensure that court personnel and people dealing directly with child offenders recognise the value of diversion and also make use of the diversion opportunities available at every level. Programmes should be seen and used in a holistic sense – as prevention, early intervention, diversion, alternative sentencing as well as for reintegration into family and community.

Diversion has taken root in South Africa and is developing rapidly. Considering that the approach has been used without any legislative backup, the future for diversion is very positive.