

A CRITICAL VIEW OF DIVERSION PROGRAMMES IN CONTEXT OF RESTORATIVE JUSTICE

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ABSTRACT

This article describes the background and purpose of life-skills diversion programmes² for young offenders and then critically explores to what extent they currently endorse the principles of restorative justice to which the new South African child justice system aspires.

Since the advent of the life-skills programmes for youths at risk, the child justice system has evolved into a comprehensive piece of legislation called the Child Justice Bill (Bill 49[2002]). Central to this Bill is the promotion of restorative justice, which seeks to repair damage caused by crime by returning criminal cases to the main players: the victim, the offender and the community. Through a process of negotiation, these players agree on appropriate solutions which include (1) restitution, (2) reconciliation following an acknowledgement of the circumstances around the offence and its impact, and (3) an acceptance of responsibility by the offender leading to reintegration into the community. Diversion options from criminal justice procedures are the key to installing restorative justice for crimes committed by young offenders. To date the most popular form of diversion has been life-skills programmes for youths at risk, but it is not evident to what extent this meets the criteria inherent in the philosophy of restorative justice.

YOUNG OFFENDERS

In the past decade children's rights activists in South Africa have sought more humane, child-friendly ways to deal with young offenders who were historically subject to brutal, demoralising conditions in over-crowded detention facilities. In the early 1990s a pioneering move to find alternatives to these conditions was the piloting of life-skills programmes designed for first-time petty offenders below the age of 18 years. These life-skills programmes helped to divert children away from the formal criminal justice procedures, thereby offering them a second chance whilst they remain with their families and within their communities. The aim of these programmes was to teach children to take responsibility for their actions and to guide them towards making appropriate decisions within ethical social norms, thereby avoiding more serious crime. Following the successful completion of the life-skills diversion programme, the case is closed and the child will not be branded with a criminal record.

Other forms of diversion tested in South Africa so far include: (1) pre-trial community service, whereby the child offender is given a task such as working in a library or helping at a shop for no payment, which serves as community service to repair the harm; (2) wilderness programmes, designed for 'high-risk youths', classified as males between 16–20 years, repeat offenders, more serious offenders, those who have left school, unemployed, come from a dysfunctional family or are traumatised and pained. The programme includes a wilderness component where the youths' survival skills are tested through what is termed 'adventure therapy', including 'rites of passage'.

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² A critique of the content of a life-skills programme will be provided in a forthcoming article.

A reintegration phase and mentorship are longer-term components of this intervention; (3) victim-offender mediation/family group conferencing, which are processes which allow victims and offenders to come together in an attempt to allow the victim to express the impact of the offence on him/her, and the offender a chance to explain the reasons for the event, indicating acceptance of responsibility. The intended outcomes of these conferences are the negotiation of an appropriate response through the process of restitution and reparation to the victim, whilst at the same time hopefully also restoring relationships. These processes are usually conducted and controlled by a neutral mediator.

THE CHILD JUSTICE BILL

In February 2003 public and government submissions were made to the Justice and Constitutional Development Portfolio Committee in the South African parliament to pass the first Child Justice Bill (Bill 49[2002]). The push for the adoption of this Bill comes in part from the South African government's commitment to meeting international standards of child care, following the signing of the Convention on the Rights of the Child in 1995. Articles 37 and 40 relate directly to child justice. Article 40 specifically states in Section 3(b): "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safe guards are fully respected". Section 4 states that "...a variety of dispositions, such as care, guidance and supervision orders; counselling probation; foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence"; Article 12 has to do with child participation in decisions related to their well being.

Although the commitment to international standards was illustrated in various legal amendments in the past decade, such as in the Child Care Act (Act 74[1983]), Probation Services Act (Act 116[1991]), and the Criminal Procedures Act (Act 51[1977]), the Child Justice Bill is an attempt to comprehensively incorporate these currently dispersed laws around the best practice for youths into one focused, detailed and user-friendly document, outlining the roles and responsibilities of all the key players. According to the Bill, key players include the perpetrators, victims, police, magistrates, prosecutors, lawyers, families, communities, civil society organisations, social workers and probation officers. The new Bill aims to "...entrench the notion of restorative justice in respect of children". This endeavour was underscored by making it one of the objects of the draft legislation (Bill 49[2002], S 2.iii). 'Restorative Justice' as defined by the Child Justice Bill is the "...promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, the child's family members, victims and communities" (Bill 49[2002], Definitions). The purpose of restorative justice is to remove cases from the traditional criminal justice system, where judgements are made by the state, and to hand them back to those involved, i.e. the victim, the perpetrator and the community.

In South Africa the concept of restorative justice is packaged in its own traditional philosophy of *ubuntu*³, a form of customary law which turned to communities to resolve conflict among the main parties involved (Skelton, 2002:496). According to the Restorative Justice Centre's submission to

3 Promotion of *ubuntu* in the Child Justice Bill is described as-

- i) fostering a sense of the child's dignity and worth;
- ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of the victims and the community;
- iii) supporting reconciliation by means of a restorative justice response; and
- iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children.

the portfolio committee in February 2003, "...the South African way of dealing with the offending children has traditionally included mechanisms that encouraged them to take responsibility for their own actions through apology, restitution and to restore relationships between the offender and the victim." In order to promote this concept restorative justice seeks ways to keep children with their families and within their community. The Child Justice Bill tries to uphold the principles of restorative justice in part through the process of diversion. This essentially means rerouting children below the age of 18 who have broken the law away from the formal justice proceedings, which often result in detention, either awaiting trial or through sentencing. In the draft Child Justice Bill diversion is placed specifically in Chapter 6, as well as an option for alternative sentencing in Chapter 8, in which case a child will have gone through the formal court proceedings and have a criminal record.

Diversion procedures attempt to adhere to the principles of restorative justice by offering child offenders the opportunity to acknowledge responsibility for their actions, understand the harm done to the victim through direct encounters, and to respond to the victim through actual or symbolic restitution with the intent to restore relationships. These actions are aimed at reintegrating the children back into the community, which in turn is responsible for protecting them from negative pressures and guiding them towards being useful citizens. This should contribute to the general safety of the community in the future (Chapter 6, Bill 49[2002]).

LIFE-SKILLS DIVERSION PROGRAMMES FOR YOUTH AT RISK

By far the most popular choice for diversion that has been used in South Africa is the life-skills programme for youths at risk. The original life-skills programmes to be tested were the Youth Empowerment Scheme (YES), started by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) in 1992 in KwaZulu-Natal under the name of Young Offenders Programme (YOP). They were the first official attempt at diversion following concerns about overcrowding and poor treatment of youths in prison, both exacerbated by the high numbers of juveniles awaiting trial. That first year saw approximately 900 children passing through the programme. Since then it has been expanded to all nine provinces and reaches more than 10,000 children per annum, with an increasing number of non-governmental organisations choosing to offer this service.

The purpose of the life-skills programme for youths at risk is to teach children who have strayed into a path of crime to make more responsible choices in an attempt to prevent them from further offending. Van der Sandt and Wessels (1997:24), who developed the manual for the original Youth Offender Programme, see such life-skills programmes as a 'constructive means' to help children take responsibility for their lives and act within 'acceptable societal norms'.

Basic life-skills diversion programmes are intended for first-time petty offenders, although as Lukas Muntingh, deputy executive director of NICRO (1997), points out, participants at the YES programme may have committed a wide range of offences. However, more serious crimes such as "...armed robbery, murder and rape offences are excluded...as are offenders with a long criminal record" (Van der Sandt & Wessels, 1993:5)⁴. In principle the programme tries to offer children who have been caught a second chance, and hopes that they will embrace the opportunity and see it as a way to stop and assess where their lives are going, whilst realising that there are indeed boundaries to their behaviour.

⁴ According to the Child Justice Draft Bill (49) 2001, there are three schedules of offences: Schedule 1 offences are minor offences and are argued to be the ones eligible for diversion for the YES programme. Schedule 3 offences are the more serious crimes including rape, murder and armed robbery.

In the latest manual for YES programme facilitators, 'Mapping the Future', the stated aims are:

- To provide young people with the skills that will help them understand themselves, to relate to others and take responsibility for their actions
- Express ideas, opinions and feelings in a constructive way
- Provide young people with skills to cope with their environment (Rooth, 2000:6).

A variety of methods are used to reach these objectives such as art, role-plays, games and discussions. Fine (1996:17), from the Community Law Centre at the University of the Western Cape, who developed leadership programmes for youths at risk, believes that the life-skills process should be regarded as "...turning away from something and turning towards something else" during a time of discovery, testing and learning for youths. Like Rooth, he compares the process to a map, whereby youths must "...determine the route" themselves (1996:18).

BENEFITS OF LIFE-SKILLS DIVERSION PROGRAMMES

There are a number of benefits to offering life-skill diversion options to first-time petty offenders: they are relatively easy to run, cost effective and can accommodate a large number of children. This alone assists greatly in dealing with some of the problems of overcrowding in prisons, where children are often brutalised in harsh conditions and exposed to hardened criminals, who lure them into worse habits, thereby reducing their chances of reintegration into society. Life-skills diversion programmes also offer an opportunity for positive change in children, whilst allowing them to remain with their families and in their communities where the true challenges for rehabilitation exist. This opportunity for change, coupled with the fact that children who complete these programmes do not receive a criminal record, reduces the stigma which often prevents young offenders from leading normal lives.

A recent longitudinal study conducted by NICRO testing the impact of their YES programme shows promising results, in particular with regard to recidivism rates. The study illustrated that among the children they were able to follow up, the rate of re-offending in the first year was 6.7% and 9.8% in the second year (Muntingh, 2001), compared to statistics regarding the recidivism of children who have been in prison, which are estimated at over 50%.

The benefits of the life-skills diversion programmes suggest that when the new Child Justice Bill is promulgated, a number of players responsible for implementing diversion programmes will choose to provide the life-skills option. The question is, though, if restorative justice attempts to restore the balance between the offender, the victim and the community through the process of accepting responsibility and offering restitution, to what extent do life-skills diversion programmes as they are currently conducted meet these criteria?

LIFE-SKILLS *VIS A VIS* RESTORATIVE JUSTICE

Accepting responsibility

A primary component of restorative justice is for the young offender to accept responsibility for his/her actions. According to the Child Justice Bill, in order for a child offender to be diverted, s/he must "...voluntarily acknowledge responsibility for the offence" (S44 (a) Bill 49 [2002]). Therefore, it is virtually impossible for a child not to meet the criteria. By this token, one could argue that every child who is placed in a life-skills programme has indeed accepted responsibility, as this in effect serves as their passport. However, when weighing this acceptance up against the alternative of going through long, drawn-out court processes with the possibility of ending up in jail, Muntingh stated that the young offender "...has only one real option: participating in the diversionary programme" (1997:4). Children will most likely opt for diversion rather than court

proceedings, whether or not they fully understand what it is they are being diverted to. In some cases children will even forfeit their due process right to defend their innocence in court in order to avoid the severity and stigma of the formal criminal procedures. It is therefore difficult to determine to what extent a child has felt and acknowledged his/her responsibility for the offence at the time of agreeing to attend the life-skills diversion programme.

Nevertheless, whether or not the child has a true sense of responsibility at the moment of accepting the diversion option, the life-skills programme is directed towards assisting the children to make the transformation whereby a sense of responsibility does indeed become genuine. This transformation should occur through the process of participation in activities and discussion, and reflection on their actions. Still, from the outside it remains virtually impossible to tell the difference between 'stated responsibility' and 'felt responsibility'. It is also difficult to know what part of the experience has instilled the sense of responsibility, i.e. whether it is through the content and approach of the life-skills programme, or something else, such as the disappointment and shock at getting caught or even the discomfort of perceived sacrifices such as giving up time. Whether children can really demonstrate that they have developed a sense of responsibility through the life-skills process in terms of the offence committed will depend on each child's readiness to capitalise on the opportunity. Their behaviour following the programme serves as a further indicator of success.

Involvement of parents⁵

Most life-skills diversion programmes include a component where parents are encouraged to be present and to participate. This opportunity attempts to provide a forum which can assist in restoring familial relationships that are often already volatile or disrupted prior to the offence. On the one hand, this offers the child a chance to hear the impact their actions have had on their parents, which itself helps to instil their sense of responsibility, and on the other, it allows the child to apologise for the harm caused, to ask for forgiveness and offer a commitment to change in the future. The involvement of parents is an important element of the process of restorative justice that bringing them into the life-skills programme tries to achieve.

However, life-skills programmes are punctuated and time bound. Child-parent relationships have to be worked on and sustained both between sessions and following the programme. Other than ensuring the presence of parents at the required sessions, which itself is not legally binding, there is no requirement for this relationship to be nurtured outside of the context of the programme. Furthermore, greater emphasis is placed on the negative impact that the child's actions have had on their parents and on seeking ways to compensate for this, rather than looking at the mutual roles which may have contributed to the offence. Little time is spent on exploring the parents' responsibilities to assist their child in staying on the 'right track' in the future, unless they volunteer this information. The restoration of familial relationships has to be a two-way process in order to succeed.

Victim Involvement

Central to the goal of restorative justice is the interchange between the offender and the victim. This dialogue gives the victim a chance to describe the personal impact of the offence and discover the context and background around the crime from the offender's perspective. The victim should then be consulted on what consequence or form of restitution would serve to restore the damage. In reality it is unusual that such a platform is offered to victims and offenders from cases

⁵ Parent in this sense refers to the biological parent or any appropriate adult who is responsible for the child as defined by the Child Justice Bill (Bill 49[2002]).

that have been diverted to life-skills programmes. In fact, it is rare that the victim will be informed that the judge has ruled to divert the case to a life-skills programme, or even as to what such programmes include. Neglecting to inform victims of procedures and decisions surrounding the crime is already seen as one of the main gaps in the existing criminal justice system (Naude, 2003).

A common argument for the absence of contact with the victim is that certain offences are considered 'victimless', whereby no direct harm is caused to another person, such as possession of marijuana. However, crimes such as shoplifting, assault without aggravating circumstances, housebreaking and pointing a firearm have clear victims who are still seldom involved in the decision-making process. Therefore most of the children have no direct sense of the harm caused to their victims other than during the sessions when they are required to imagine the impact of their actions on them.

Restitution

Although diversion in general and life-skills programmes in particular try to move away from harsh retributive responses to crime, they do attempt to restore the imbalance stemming from an emphasis on the offence committed. Restitution entails some form of sacrifice from the offender in order to restore the damage and promote reconciliation. Without direct contact with the victim, or in those cases where there is no direct victim, it is hard to determine what aspect of the life-skills programme, if any, offers restitution.

One consequence of attending the life-skills diversion programme which most children consider as their sacrifice is the time, including travelling to the venue, which in some cases can be some distance. As Shapiro (1994) points out, children attending a programme have to forfeit their spare time; so they do in fact give up something precious to them. Whether victims would feel that this is adequate restitution in most cases is unknown, as they are not consulted in the decision-making process or on whether they feel that justice has indeed been restored. In the absence of victim involvement, especially with regard to selecting a method of restitution, life-skills programmes currently seem to aim more at preventing recidivism than on restoring justice.

Community involvement

Youth justice supporters insist that life-skills programmes should not be considered a 'soft option'. They are an attempt to find ways of dealing with young offenders that are more child-centred, humane and less punitive, with the aim of reintegrating the offenders into society (Shapiro, 1994; Karth, 1995; Skelton, 1995; Fine, 1996; Muntingh, 1997; Inter-Ministerial Committee for Youth at Risk, 1998; Rooth, 2000; Sloth-Nielson, 2000; Skelton, 2002; Sloth-Nielson, 2003). However, public perception of crime and its perpetrators is bound to raise a serious challenge to nurturing the attitude required for restorative justice in the community.

In a situation where violent crime has become the order of the day and the state response is too slow or lackadaisical to have any noticeable impact, community members are set on retributive actions and are even turning to cruel and unusual vigilante responses. As one angry citizen told the *Cape Times* after the beating and naked parading of criminals around Khayelitsha in 1998, "These youngsters are terrorising us in every way and they must be taught a lesson for everyone to see". Following a more recent incident in Bramfischerville, where two young men were necklaced with petrol tyres, Minaar indicated that vigilante responses to crime have been on the increase since 1994, when "...vigilante action in townships began to be directed at criminal elements and gangs" (2003).

Stigmatising and rejecting young offenders often serves to reinforce their criminal self-image. Not allowing youths to find a job, receive proper education and training, or even interact in appropriate social circles undermines their chances of fitting into societal norms. Youths stigmatised by their past offences feel that, if they are not accepted in the community, crime is their only option. Communities ultimately put themselves more at risk if they are not sufficiently involved in providing proper guidance for children.

More must be done to inform community members about the purpose of diversion programmes such as the life-skills programme and its attempt to meet the needs of the victim, the offender and the community. Communities in turn should have a say in what these programmes should include which they feel would restore the damage caused by the crime. Their understanding and involvement will help them to develop faith in what the diversion programmes aim to achieve. As a result, they would be more willing to adopt their concurrent roles of protecting and guiding youths who perpetrate crimes in their neighbourhoods. If communities do not understand and accept the principles of restorative justice and the purpose of life-skills diversion options, they will probably continue to respond vehemently, thereby perpetuating the cycle of violence.

CONCLUSION

Whilst diversion as a credible alternative to court procedures and sentencing takes its place in the child justice system in South Africa, the onus lies on the service providers to ensure that the content and delivery of programmes are effective and appropriate in meeting their intended objectives. If life-skills programmes are going to remain the primary diversion option within a framework which aims at promoting restorative justice, more needs to be done to involve the victims in the decision-making process in order for them to feel that the harm has been repaired. This will require victims to understand and trust the content of the life-skills options, which could then represent symbolic restitution. In the meantime, ensuring that children receive opportunities for more individual attention and care will increase their potential for understanding and gaining a sense of responsibility both in light of the offence and within their communities in general. In order to maintain this understanding, programmes should also try to engage parents more profoundly, whereby they may not only feel satisfied with the attempts at reconciliation, but also become aware of their responsibility towards guiding and caring for their children. There is an urgent need to educate and convince community members of the benefits of rehabilitation and reintegration of young offenders and to engage them in this endeavour for restorative justice to succeed.

Given the failure of the existing youth justice system in South Africa to protect both society and young offenders, whilst simultaneously giving youths a chance to develop and contribute to the community in the future, the concept of restorative justice which seeks to find the best solution for the offender, the victim and the community is indispensable. Life-skills programmes must expand their achievements to include all the criteria required for restorative justice.

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