

Diversion

Diversion is the channelling of children away from the formal court system into reintegrative programmes. As a result of a decision to divert a matter a child accused of committing a certain offence may avoid prosecution and the brutalizing effects of a criminal trial. The concept of diversion is in line with the Convention on the Rights of the Child which requires State Parties to promote and establish laws or procedures and make available programmes and other alternatives to institutional care for children in trouble with the law.

There is no current legal framework for diversion practised in South Africa. However, courts have recognised and pronounced on the issue of diversion for young offenders. In *S v D* 1997 (2) SACR 673 (C) the court recognised that where youth are involved in minor offences such cases should be dealt with outside the criminal justice system where possible. In *S v Z en vier andere sake* 1999 (1) SACR 427 (E) the court considered diversion as a sentencing option in the matters before it and in *M v The Senior Public Prosecutor, Randburg and another* (Case 3284/00 WLD, unreported) the focus was on the prosecutorial discretion to divert matters.

According to the NPA's 1997 National Policy Directive, diversion is inappropriate for serious offences such as murder, rape or robbery with aggravating circumstances and offenders with previous records or who have already been diverted before will only be diverted again in exceptional circumstances. The guidelines which apply to diversion in terms of criminal procedure is that the child must freely acknowledge responsibility for the alleged offence and consent to diversion, there should be a prima facie case against the child and there should be no risk of infringement of the child's procedural rights, in the event of future prosecution.

If a child is identified as a candidate for diversion, he or she will be assessed by a probation officer to determine the suitability of the child for a diversion programme. The probation officer will then advise the prosecutor on the child's suitability but the final decision lies with the Prosecutor. If a probation officer is not available the prosecutor still has the discretion to divert the

matter. A legal representative can also ask the prosecutor to consider diversion, but this must be done prior to plea. Only once the child has successfully completed the programme will the charges against the child be withdrawn. Thus, diversion is in effect a withdrawal of charges, on condition that the child complies with a plan or programme.

In some parts of the country, diversion programmes are offered by the Department of Social Development. However, most diversion programmes are run by non-governmental organisations such as NICRO, Khulisa, The Restorative Justice Centre and YDO. If you are uncertain about diversion programmes on offer in your area, ask the prosecutor or the probation officer. It is also possible to devise an individual plan for a child as a diversion, instead of referring him or her to a programme. For example, one can enter into an agreement that the child will pay for the damage and do some hours of community service.

So although diversion is not formally regulated in terms of statutes it can be said to be officially recognised by South African law. At the moment however, diversion is done at the sole discretion of the prosecutor. The Child Justice Bill will create a proper legal framework for diversion, and we can expect diversion to be used more widely in the future.

For more information regarding diversion and diversion programmes see the Child Law Manual for Judicial Officers (2004), the Child Justice Alliance 2006 Conference Report on Child Justice in South Africa and their 2007 baseline study of children in the criminal justice system in 3 magisterial districts., visit www.childjustice.org.za. You can also visit the South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) website at www.nicro.org.za..