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### JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

26 February 2003

#### CHILD JUSTICE BILL: PUBLIC HEARINGS

**Chairperson:** Adv J H de Lange (ANC)

#### Documents handed out:

CSIR Submission (Appendix 1)

[Presentation by CSIR](#)

[Centre for the Study of Violence and Reconciliation \(CSVR\) submission](#)

[Child Justice Alliance submission](#)

#### SUMMARY

The Committee continued public hearings on the Child Justice Bill. CSIR supported the principles of restorative justice in the Bill and noted that, in order to break the cycle of violence and crime, society must be committed to the idea of restorative justice. They noted that street children posed the biggest challenge for child justice. They favoured One-Stop Centres as delivery mechanisms for child justice.

CSVr briefed the Committee on the victim offender conferencing (VOC), a specific form of restorative justice with which CSVr has been involved. In a successful mediation, an agreement is drawn up and signed by the victim and offender. If the prosecutor is satisfied with the agreement, charges against the offender are sometimes withdrawn.

The Child Justice Alliance submitted that there is a need to implement tracking and recording measures of children passing through the system, particularly with regard to diversions. Concepts in the Bill must be clearly spelt out for legislation to be understandable. The Chairperson acknowledged the strong feeling against the imprisonment of children under fourteen, but felt there should be an exception in the case of children who commit serious crimes.

The Chairperson pointed out that the Constitution provides that every person must have the right to have their dispute heard in a court of law. He was concerned that, should diversions be allowed, this constitutional element would not be satisfied. He asked what would happen should a rape victim insist on challenging a decision to divert. He requested statistics on diversions and thought that there were some serious problems with the SAYSTOP diversion programme.

#### MINUTES

#### CSIR submission

Ms Barbara Holtmann: Senior Management, Crime Prevention Centre (CSIR) expressed support for the principles of restorative justice that were included in the Child Justice Bill. While the principles themselves were valuable, Ms Holtmann argued that these principles needed to be entrenched into South African people and culture. Often, legislation has vaguely called for community participation, but for restorative justice to be successful, community involvement should be specified in the legislation. The state should allocate resources to shift the mindsets of service providers and the South African people from a punitive to restorative bias.

Ms Holtmann noted that 90% of violent offenders first experienced violence as victims or bystanders to violence. To break the cycle of violence and crime South Africans must be committed to the idea of restorative justice, explained Ms Holtmann. Money should have been appropriated in the bill for communication and training towards the understanding of the principles of restorative justice.

Adv de Lange asserted that perhaps the community does not want to be involved. You can not force them. He asked for a practical solution to involving the community in the administration of child justice.

Ms Holtmann acknowledged the challenge of involving the community but maintained that many people were committed to helping with the administration of child justice.

Ms Holtmann stated that "street children", the most disadvantaged children with no homes or family network, posed the most severe problem for child justice. Should the Bill fail to assist the plight of "street children", they could be further marginalised and disadvantaged. The state should be required to appoint an "appropriate adult" to attend various proceedings to foster the child's sense of dignity and worth. Ms Holtmann proposed that 22(6)(b) should read: "If all reasonable efforts to locate a parent or an appropriate adult have failed, the probation officer must appoint an appropriate adult to attend the assessment in support of the child."

Ms Holtmann emphasised the use of "One-Stop Centres" as delivery mechanisms for child justice. One-stop centres should provide children with psychological services, trauma counselling, victim support, remedial assessment, occupational therapy, and other clinical services. CSIR assessed Stepping Stones, a one-stop centre, at the end of 2001. Stepping Stones reduced transport time and costs, the chaos of finding a child and case in the system, the time taken to follow up and chase documentation, and incidence of children "falling through the system". Ms Holtmann stressed the need for one-stop centres to be well maintained and efficiently organised. Their success depends upon the co-operation of several Departments, including the Department of Education, to assist in reintegrating children into schools.

Adv de Lange stated that it was not the Committee's task to organise one-stop centres

Ms Holtmann concluded by stressing the importance of community involvement and a commitment to educating the population about the equity of restorative justice principles.

### ***Discussion***

Mr S Swart (ACDP) stated that he believed the public has accepted the notion of restorative justice. He asked Ms Holtmann where she has found resistance to the principle.

Ms Holtmann responded that the public is generally afraid of young people. Most people believe that young criminals are not dealt with harshly enough. Service providers, particularly the police, have warned her that they will be vilified in their communities if young men are arrested and then diverted into programs that are perceived to be a "soft option." This is why an extensive program of education needs to be developed.

Adv M Masutha (ANC) explained that South Africa is a multicultural society. Indigenous restorative justice systems exist. Is there any way to harmonise these principles with the one's in the Bill?

Ms Holtmann appeared not to comment on this question.

Adv de Lange asked how an appropriate adult would help, particularly with a street child.

Ms Holtmann stated that the assignment of an appropriate adult would ensure that the most disadvantaged children would not be left behind.

## **Centre for the Study of Violence and Reconciliation (CSV) submission**

Ms Amanda Dissel addressed the Committee concerning victim offender conferencing (VOC), a specific form of restorative justice with which CSV has been involved. Courts referred cases to VOC for mediation. Mediators were selected from the community in which the courts were situated.

Ms Dissel explained that in 2002, 364 cases were mediated at four different sites. A further 65 cases were referred by the courts, but were never mediated. In a successful mediation, an agreement is drawn up and signed by the victim and offender. If the prosecutor is satisfied with the agreement, charges against the offender are sometimes withdrawn. In a minority of cases, the prosecution proceeded with the case despite its successful mediation, because the prosecutor believed that the offence was of such a serious nature that prosecution should proceed. A successful mediation facilitates an acknowledgement of responsibility and the restoration of harmony between the victim and the offender.

She presented the following figures:

- Fifty-one percent of the 364 cases referred to VOC were interpersonal violence cases. In most cases the nature of the offence was not very serious, which was a factor guiding some courts in referring cases.
- In the vast majority of the 364 cases, the offender and victim were socially linked.
- In 31% of the cases, the mediation occurred between romantically or sexually linked couples.
- 20% of the cases involved direct family relations such as parent, child, and sibling
- While another 8% of the cases involved grandparents and other family.
- 17% of the cases involved neighbours and 7% involved friends.
- In only seven of the 364 cases (2%) were the parties strangers. The 364 cases included 440 offenders. The majority (66%) were male. The average age was 32, with a range from eleven to 72 years of age. There were 378 victims, of which 71% were female. The average age was 35 years old with the youngest being nine and the oldest being 79 years of age.

Ms Dissel explained that in the mediation process the victims and the offenders met separately with the mediators. The average time for mediation was one hour ten minutes, with a maximum of ten hours. Upon the completion of mediation, the parties usually formed an agreement, which was signed by both victim and offender. In 7% of the cases, no agreement was reached. Agreements were varied, but could include apology, forgiveness, reparation, and building of mutual respect.

Ms Dissel clarified that fifteen of the offenders and nineteen of the victims were children. Their cases were mediated in the same manner, yet in most cases an adult accompanied the child. She asserted that the mediation process was useful in dealing with youthful offending behaviour because it allowed parties to deal with a broad range of issues relating to the offending behaviour. While more research needs to be conducted concerning re-offence Ms Dissel contended that offenders who have undergone the mediation process would be less likely to re-offend.

### ***Discussion***

Mr S Swart (ACDP) questioned the nature of the agreements between the victim and the offender.

Ms Dissel answered that the agreements were varied. Many times it included an apology and reparations, which often go towards medical expenses.

Ms F Chohan-Kota (ANC) asked about the recidivism rate of offenders who have completed the mediation process. Have studies been conducted that show a lower rate of re-offence?

Ms Dissel answered that sufficient study of recidivism rates has not been conducted in South Africa, but studies in other countries show a lower rate of re-offence for those who have participated in a restorative justice process.

The Chairperson stated that South Africa's situation was different and that those studies were irrelevant.

Ms S Camerer (NNP) asked if the 364 cases had been monitored.

Ms Dissel answered that they have not followed up on the cases, but that anecdotal evidence from the magistrates suggested that those offenders who went through a mediation process did not often re-offend.

Adv M T Masutha (ANC) propounded that the resistance from communities may come from the growing generation gap. Many citizens presently associate youth culture with criminal culture. Has this been a problem in the mediation process?

Ms Dissel responded that the mediation process has not found resistance from the community because it works closely with the community.

Mr B Magwanishe (ANC) asked whether the process created the perception of being soft on offenders.

Ms Dissel answered that both victims and offenders who have gone through the process say it is not soft on offenders.

Mr Magwanishe asked if offenders commit other crimes after the mediation process.

Ms Dissel answered that the magistrates have commented that offenders who have gone through mediation often do not come back into their court.

Mr Magwanishe responded that they might commit offences in another court's jurisdiction.

Ms Chohan-Kota asked about serious offences, such as murder and rape. Were those offenders likely to re-offend after mediation?

Ms Dissel answered that the project has not focused on the most serious cases. She stated that restorative justice needed to exist alongside the criminal justice system.

The Chairperson asked how many programmes that practice restorative justice exist within the country.

Ms Dissel appeared not to answer this question.

Mr Masutha stated that the victim was given a large role under the mediation system. Did the victim have a choice to participate? What role did the state play in mediation and was that role important enough?

Ms Dissel responded that the agreement depended on victim participation and therefore, if a victim did not participate in the process, the case would go back to court. The state was responsible for referring the case to mediation to begin with. Once an agreement had been reached, the state (through the prosecutor) was responsible for approving the mediation agreement.

### **Child Justice Alliance submission**

Ms Jacqui Gallinetti, Coordinator of the Child Justice Alliance, stated that the Alliance was attempting to bring together members of society who support child justice. Present members of the Alliance include magistrates, prosecutors, and probation officers, in their individual capacities, as well as organisations, NGO's, and CBO's.

Not much research has gone into the occurrence of child sexual offenders so far, and this is an area where she would like to maintain her focus.

There is a need to implement tracking and recording measures of children passing through the system, particularly with regard to diversions. Concepts in the Bill must be clearly spelt out for legislation to be understandable, so that people involved in the practical execution of that

legislation, can have a working understanding of the provisions thereof.

In interaction with various people in the field, Ms Gallinetti has not encountered a single person who has expressed opposition to raising the minimum criminal age capacity to ten. Age assessment was extremely important, so that children over the age of eighteen do not manage to deceive the system, in order to be treated as minors.

With regard to court proceedings, the accreditation of some attorneys were in question, where it was felt that many of them lacked suitable training to enable them to deal with children.

The Chairperson felt that this remark was unsubstantiated.

She mentioned serious concerns regarding the separation of trials, irrespective of the nature of the crime. In response, the Chairperson stated that such a provision, in favour of the separation of children's courts and adults' courts, was not necessitated in the Bill. There was nothing prohibiting a court from operating both as an adults' court, and as a children's court.

Regarding what should happen to children below 14 years of age within the system, Ms Gallinetti stated that secure care centres have the capacity to receive such children. They must be properly set up to do this, providing care facilities for child offenders possibly until the age of eighteen, at which time these cases could be reviewed.

The Chairperson understood the strong feeling against the imprisonment of children under fourteen, but felt there should be an exception in the case of children who commit serious crimes. He was contemplating the idea of implementing complete automatic reviews in all cases where children are sentenced to imprisonment. This would be done by a higher court official, who would finally decide if that sentence should be upheld.

With regard to the treatment of sex offenders, Ms Gallinetti, speaking from her experience with SAYSTOP, said that the diversion programmes were not mere soft options. They were programmes devised by psychologists, where the only evaluation should be to determine if the programmes were suitable for our South African context. She felt it was imperative that the door to diversions be kept open. Although rape offenders should also be included considered for diversions, not all rapists would be diverted.

The Chairperson reminded Ms Gallinetti that the Constitution provides that every person must have the right to have their dispute heard in a court of law. With diversions being allowed, how can the constitutional element be satisfied, since diversion takes that right away? What would happen should a rape victim insist on challenging a decision to divert? Would that diversion be upheld? Only after the constitutional element has been sufficiently dealt with, can one come to the issue of desirability, which then will focus on issues of quantity and quality of diversity.

Ms Gallinetti suggested that diversion should be made to fit the crime. She mentioned that the possibility of plea bargaining could serve as an alternative to diversions.

The Chairperson wanted to know where to draw the line. The Committee could not pass a law that might cause legal and constitutional problems.

Ms Gallinetti then provided the Committee with statistical details of a study done by the Alliance on sexual offenders from 1998 to 2001:

- The total number of children arrested for this period did not exceed 700.
- Less than 4% of the sentenced sex offenders were children.
- Just under half the children arrested for rape were prosecuted.
- The rest were diverted.

For the period studied, Ms Gallinetti provided statistics on the number of arrests per year, how many of those arrests led to prosecution, and how many were withdrawn. The Chairperson

commented that he would be interested to know, in those cases where there were convictions, what sort of sentencing had been handed down.

In the Eastern Metropole, for the period April 2000 to January 2002, about one-quarter of all sex offences are committed by children. The largest group of sex offenders is between the ages of eighteen and thirty years.

Of all the referrals, she could report that only a minority is for rapists.

The Chairperson commented that the figures supplied by the Child Justice Alliance did not correlate with those supplied by NICRO. It would be useful if the two organisations could get together to work out the discrepancies. He thanked the Child Justice Alliance for their submission.

The Chairperson stated that he would like to hear statistics on diversions. He added that there were some serious problems with the SAYSTOP diversion programme. For instance, providing a ten-week course of two lectures per week for rapists is unacceptable. Should the public come to hear of this course as a diversion programme, they might respond in outrage. Children in this country have been traumatised more than in any other country and many children break the law for reasons related to that trauma. They have themselves been victims, and therefore diversion programmes should be far more in-depth than a mere ten-week course.

### ***Discussion***

Ms S Camerer asked Ms Gallinetti to comment on the fact that the Convention on the Rights of the Child did not determine minimum criminal age capacity of children.

Mr J Jeffrey suggested that, in a situation where a victim was unwilling to accept the diversion of the offender, private prosecution might be entered into, pending agreement for such action by both victim and offender.

The Chairperson thanked the Child Justice Alliance for their submission, saying that he appreciated all the work that had gone into the preparation of all the submissions to the Committee. They could only perform the work of legislation because of the information supplied by, and with the guidance of, the various bodies.

### **Creative Education (CRED) submission**

The Chairperson asked for the indulgence of Members. Although public hearings were scheduled which would allow submissions by children, he wanted to make an exception by allowing such a submission from Creative Education (CRED), at these hearings.

Mr S Fleurs, a participant in a programme offered by the organisation, addressed the Committee. He said that although there had been a great deal of input from various sectors, the youth had no voice. He made an impassioned plea for adults to hear the cries of the young people of South Africa, and to "give them a helping hand", to give them hope.

Mr Fleurs confidently reported that yes, diversion programmes do work. He had become involved in a prison intervention programme offered by CRED to prison inmates of Pollsmoor Prison, when he was himself a prisoner there. The programme helped him to re-evaluate his life, and to see how things could change for him. Having been released from prison, he is still a participant in the programme, going on roadshows, and facilitating in community awareness programmes. He made the point that child offenders "just do not have the insight that most people have", adding that "a child is still a child, and can get intimidated by anyone".

Ms Valda Lucas (CRED) emphasised that CRED is not a diversion programme, but a prison intervention programme, which is art-based, offering life-skills, and providing child offenders with opportunities to engage in technical skills programmes. She felt more programmes should be made available to awaiting-trial prisoners, and also mentioned that there are no programmes available to those children who re-offend. The organisation is sponsored by the Provincial

## Department of Social Welfare.

Mr Jeffrey asked Mr Fleurs what elements he thought any diversion programme should have, in order to help children not to re-offend.

By way of response, Mr Fleurs responded that upon release from prison, most children return to their communities. Some experience accommodation problems, as he did. There are other burdens, such as not having someone to talk to, problems with access to educational facilities, and so forth.

The Chairperson acknowledged that South Africa had not in the past developed a system whereby children could be heard. CRED's valuable contribution would be considered. He wished the organisation well, saying that the country needed more programmes and structures like theirs.

The hearings were adjourned for the day.

### **Appendix 1: CSIR CRIME PREVENTION CENTRE SUBMISSION ON THE CHILD JUSTICE BILL**

The CSIR Crime Prevention Centre (CPC) is represented on the Child Justice Alliance driver and reference groups. We fully endorse the contents of the Child Justice Alliance submission and this submission deals only with issues that we feel bear further articulation.

#### **PART 1: GENERAL SUPPORT FOR THE BILL**

##### **General Comment**

We support the principles of the Child Justice Bill, which originated to establish a criminal justice process for children accused of committing offences that would protect their rights in accordance with the Constitution and international instruments. Once enacted by the Parliament of the Republic of South Africa, the Act is designed to promote *ubuntu* in the child justice system by:

- Fostering children's sense of dignity and worth
- Reinforcing children's respect for human rights and the fundamental freedom of others by holding children accountable for their actions and safe guarding the interests of victims and the community
- Supporting reconciliation by means of a restorative justice response
- Involving parents, families, victims and communities in the child justice process in order to encourage the reintegration of children who are subject to the provisions of the Bill.

It is submitted that extensive attention be given to the communication of the principles of the Bill, both to service providers and to communities. South Africans angry and often badly affected by crime will need to understand the notion of restorative justice if they are to support these principles, the benefits of which are not always immediately apparent.

#### **PART 2**

The submission now deals with specific aspects of the Bill in relation to concern that the Bill does not specifically ensure that children already disadvantaged through their status as so called "street children" are not excluded from the benefits of the Bill.

##### **Introduction**

Street children are the casualties of economic growth, war, poverty, loss of traditional values, domestic violence, physical and mental abuse. Every street child has a reason for being on the streets. While some children are lured by the promise of excitement and freedom, the majority is pushed onto the street by desperation and a realisation that they have nowhere else to go. In many countries, street children are named after their main survival activities. What is obvious is

that street children are poverty-stricken and their needs and problems are a result of wanting to meet basic needs for survival. Street children go through the struggle of providing themselves with basic things such as food, shelter, health and clothing. Providing targeted interventions that meet the needs of street children requires an understanding of who they are, what they need, what they do and how they can be identified. 3

According to research undertaken by the Human Rights Watch, attention to street children has focused largely on their pressing economic and social plight - poverty, lack of shelter, denial of education, AIDS, prostitution, and substance. Civil and political rights violations against street children have been overlooked, symptomatic of the larger failure to take seriously the full scope of children's rights (in particular articles 37 and 20) enshrined in the Convention on the Rights of the Child.

Few advocates, let alone lawyers or prosecutors, speak up for these children, and street children rarely have family members or other concerned adults able to intervene on their behalf. Family members are often not informed of their children's arrest and detention in the first place. Contrary to popular belief, many street children actually have family members and homes to which they might return periodically, and are not orphans. 4

### **Chapter 3: Methods of securing attendance of child at Preliminary Inquiry**

The constant mention of the " child's parent or an appropriate adult" is potentially problematic in the case of street children. It is submitted that alternative provision should be made to address the special circumstance of these children, specially in regard to section 11 (1)(b) and 11 (2)(b)(iii) that specify that a child may be released from police custody on condition that the child resides at a particular address.

### **Chapter 4: Assessment of Child**

The problem again in this chapter section 21 (3) is the issue of the persons that may attend the assessment, it is submitted that provision should be made to include for example the shelter caretaker of the child or person, or a representative from a diversion programme in the case of street children.

### **Chapter 6: Diversion**

Central to the Act is the incorporation of diverting children away from formal court procedures.

#### **Purposes of Diversion**

According to the Child Justice Bill (chapter 6: section 44), the basic purposes of diversion are to encourage the child to be accountable for the harm caused, reintegrate the child back into the family and community as well as provide an opportunity for victims to express their views on its impact on them.

#### **Section 44**

For completeness and clarity it is submitted that within the Bill's framework, strategies must also include some type of restitution to the victim and promote reconciliation between the child and the person(s) or community affected by the harm caused.

Benefits of diversion include preventing the child from having a criminal record as well as potentially preventing harmful stigmatisation of child offenders and the negative developmental consequences that often occur because of their contact with the criminal justice system. Within the Child Justice Bill, diversion options may include a range of programmes and/or a restorative justice approach such as family group conferencing and victim-offender mediation.

### **Chapter 7: Child Justice Court**

#### **Section 51**

The areas identified in the Bill that will impact on the components and affect the functioning of "One-Stop Child Justice Centre is:

- Preliminary inquiries
- Information management system for monitoring and evaluation
- The establishment of a monitoring structure as proposed in the final Bill (currently proposed as a district child justice committee)

The impact ~ the preliminary inquiry will require a second magistrate for trials. The magistrate will need the experience and maturity to deal with preliminary inquiries and if understands diversion, will be able to make the appropriate decision regarding the case and the individual. It is submitted that in practice the Magistrate will chair the preliminary inquiry and believe that this is appropriate.

With the promulgation of the Child Justice Bill, there will be a need to establish a communication and support forum for magistrates to be able to share information, experience, co-ordinate approaches and diversion options.

When the Child Justice Bill is in place, it is submitted that it will be more applicable for a Department of Justice member to chair the steering committee and to be involved in the proposed Child Justice Committees as many of the decisions will be legislative based. It is proposed that a "Child Justice Committee at district level" or a monitoring structure be established, and this will need to be established once the Bill is passed. This is likely to involve monthly meetings at district level with stakeholders to address policy and service issues, and to provide a monitoring mechanism.

The Department of Justice and Constitutional Development will have an important role in communicating and awareness and training for Magistrates not only at the new centres, but: also in the outlying districts and court. In addition, minimum standards should be available to discuss with the Chief Magistrates. Experience has shown that in the smaller areas, there is much resistance to change and magistrates are suspicious. Unless they are engaged, they are less likely to take it forward. Magistrates for One-stop Child Justice Centres need to be identified as soon as possible in order for them to be geared to understand, accept and implement the Bill; and to set up the required infrastructure.

There is clearly a need to identify the purpose of the centre and determine the minimum core services and functions of a One-Stop Child Justice Centre. This will impact directly on the infrastructure and capacity of the centre. It is submitted that the capacity and design of the centre will need to be determined through research to determine the number of youth and potential number of children the centre will serve. The basic requirement is that all four components work together in the same place. This is particularly important for the police and court. The basic infrastructure elements to ensure this service is a building and accommodation; resources such as vehicles and furniture; professional capacity that has been trained to meet the service requirements (and a translator for court); a network of support and diversion programmes; and the establishment of financial contracts for example with Telkom because much of the diversion and probationary services relies heavily on telephonic communication.

**Participatory management** and shared responsibility for decisions requires infrastructure to be able to support this approach, and the model of One-Stop Child Justice Centres should accommodate this. For example, 'work stations' that are open for people to use, access computers and use the internet for research and discussion forums would encourage improved report writing, reflection on work and developing greater understanding of the services. This includes developing fair procedures for the allocation and use of **centre resources**, especially vehicles and computers.

On reflecting on the process and difficulties of establishing an integrated service, it is submitted that **guidelines, protocols and service agreements** are put in place at the beginning to prevent conflicts and differences that impacted negatively on the service delivery. These would need to outline clear parameters of work and how to interface with other departments; clear roles and functions for centre management; accountability and reporting of components and the centre; and to clearly state provincial, regional and district level operations and support. Furthermore, a

detailed and open induction programme is imperative for new people, and clear **appointment process** of people is required to ensure fairness. This process must include screening, training, motivation and building capacity.

The **Department of Correctional Services** is also part of the child justice process but a-e often left out of the One-Stop Child Justice Centre model. It is therefore important for the development of the model to engage with the Department of Correctional Services to ensure that their services are integrated with the delivery process. Ideally, one prison in an area should provide facilities and services for young people, rather than having a few children in all prisons. In addition, Correctional Supervisors could have an office at the centre to improve co-ordination and delivery of child justice practice.

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