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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

26 March 2003

CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Adv J H de Lange (ANC)

Documents handed out:

[Child Justice Bill \[B 49-2002\]](#)

[Summary of Submissions on the Child Justice Bill](#)

Addendum to Summary of Submissions on the Child Justice Bill (Appendix)

SUMMARY

The Committee continued informal deliberations on the Child Justice Bill. The Committee focused on Chapter 8 of the Bill, "Sentencing". A process for the imposition of a fine was devised in order to ensure that the imposition of a fine did not lead to automatic imprisonment. The Committee sought to explicitly state in the Bill that the imprisonment of a child should be seen as a last resort. The Committee decided to encourage magistrates to afford the victim an opportunity to make a statement on the impact of the offence, but did not make the statement mandatory.

The Committee also discussed community based sentences and sentences involving residential facilities. The Chairperson concluded informal deliberations on the Child Justice Bill and informed the legislative drafters to redraft everything up to and including Chapter 8 of the Bill.

MINUTES

The Committee began by discussing the nature of the imposition of a fine for a child.

Imam G Solomon (ANC) noted that the fines imposed could not be met by most people. For many, a fine was equivalent to imprisonment.

Ms A Skelton, legislative drafter, added that restitution was part of a restorative justice approach that seemed more valuable than paying money to the state. Restitution is one option that the court may consider - an option that is listed in Clause 71 "Penalty in lieu of fine or imprisonment".

Adv de Lange noted that because it was a "may" clause, the qualifier "notwithstanding any other laws," should be removed. In addition, he informed Mr Basset that (a) and (c) required a procedure. Mr Basset agreed.

The Chairperson asked the meaning of Clause 71(d).

Ms Skelton answered that (d) served as qualifier because of the term, "but not imprisonment." The reasoning behind the clause is that presently a magistrate will impose a fine as an automatic alternative to imprisonment and then will not follow up to see if the child has the ability to pay.

Adv de Lange was worried about leaving two options for magistrate's to choose from: either imprisonment or one of a host of other options. Problems will arise if a magistrate does not approve of the other options. The magistrate may see imprisonment as the only viable option. To

combat this, there must be flexible rules regarding fines. The magistrate should have to hold an inquiry to assess the financial position of the child. The magistrate should consider whether the imposition of a fine would lead to the child's imprisonment. This must be stated clearly in the Bill. Judicial officers should read the Bill and realise that imprisonment is meant as a last resort.

If this is not worded properly, a magistrate will review his or her options, conclude that they are not viable, and imprison the child.

Mr S N Swart (ACDP) noted that the payment of restitution was in line with the philosophy of restorative justice. By paying restitution, the child was making good on his acceptance of responsibility.

The Chairperson thought that Clause 69(2) would prohibit restorative justice. He instructed the drafters to remove the clause and add a clause regarding the procedure for an inquiry into the imposition of a fine.

Adv de Lange noted that another clause should be added encouraging magistrates to use a combination of sentences. A convicted child should be able to go to prison and, upon release, participate in /restorative justice programs. This clause would add to the idea that imprisonment is a last resort.

Mr Swart added that this clause would help facilitate the paradigm shift.

Adv de Lange asked the drafters to compare this chapter on sentencing with the chapter on sentencing in the Criminal Procedures Act and report the differences back to the Committee.

With regard to Clause 62, Adv de Lange asserted that a magistrate may dispense with a pre-sentencing report if it is in the best interests of the child.

Mr Swart asked about the concept of the victim-impact statement.

Ms Skelton responded that the Bill has not included a specific provision for the victim-impact statement. In the section dealing with diversion, however, the Bill states that diversion may be postponed in order to find the views of the victim.

The Chairperson thought that any evidence obtained from a victim was a victim-impact statement. He asked if such a statement required a professional.

Ms Skelton did not know. She explained that a study was being conducted regarding victims and its findings could impact the justice system in the future.

Adv de Lange advocated inserting a broad clause to encourage a victim-impact statement in an appropriate case, but the clause should not assign anyone a duty to carry this out. He suggested the following wording as a basis, "where appropriate during sentencing, the magistrate should be encouraged to give an opportunity for the victim to relate the impact of the offence."

The Chairperson stated that Clause 62(5) was unnecessary and should be removed to avoid further bureaucratisation. Subsection (6) was also problematic. Both sections should be removed and a new clause should be drafted dealing with children incorrectly incarcerated.

Adv de Lange asked which organisation was responsible for overseeing this operation.

Ms Skelton answered that Probation Services was responsible; they are also responsible for adults.

Adv de Lange explained that the Child Justice Bill was supposed to be an amalgamation of four pieces of legislation. The mechanisms for oversight needed to be in this Bill so that they can be used. The mechanisms must ensure oversight for all sentences and the other Acts can be

amended later. He noted that the drafters would have to engage Social Services in this endeavour.

Turning to Clause 64, "Community-based sentences", Adv de Lange asked why there was a three-year limit for a community-based sentence.

Ms Skelton replied that three years is a long time for children and those who run the program have noted that they have trouble engaging a child for longer than three years.

The Chairperson asked why this option was limited to children greater than fourteen years old.

Ms Skelton explained that community service for children under fourteen years old conflicts with child labour issues. She acknowledged that Clause 64(2) provided that children under fourteen could participate in community service, but that the magistrate must give due consideration to a child's age and development.

Adv de Lange stated that there appeared to be something wrong with the residential facility.

Ms Skelton explained that there was a difference between Clauses 67 and 68. A useful sentence would be a periodic sentence to a residential facility. The idea was to not have a child in a residential facility for a long time, but to have the child go periodically over the course of a year, such as during school holidays. This option would be different than a permanent sentence.

The Chairperson mentioned that the heading of Clause 68 may be inappropriate but it may be reconsidered later. The 21 and 60 night limits should be removed from Clause 68 to allow greater flexibility. The Bill should specify a year limit in total and leave the magistrate the ability to shape the child's time in a residential facility.

Ms Skelton asserted that Social Development could turn some secure-care facilities, or parts of them, into residential facilities. The Department of Education would provide the educational component.

Adv de Lange asked the drafters to rework the residential facility and the residential requirement sections because the line between them was blurry.

Ms Skelton agreed that it was confusing as drafted presently and stated that they would revamp the sections thoroughly.

The Committee examined Clause 70 "Postponement or suspension of passing of sentence", and Adv de Lange asked why the sentence could only be postponed for three years, but suspended for five years. He instructed Ms Skelton to make the limit five years for both postponement and suspension.

The Chairperson stated that he would have liked to finish discussing the rest of the Bill, but that the Committee had given the drafters full instructions through Chapter 8. When the drafters complete the corrections, the Committee would continue with Chapter 9.

He noted that there were little bits and pieces left, but that the conceptualisation was in place. The Committee has attempted to create an efficient process for the child justice system. He instructed the drafters to redraft everything through Chapter 8 and return to the Committee when they are finished.

The meeting was adjourned.

Appendix:

ADDENDUM TO SUMMARY OF COMMENTS ON THE BILL

Comments received after 28 Feb 2003.

CLAUSE 4(3)(a):

CJ 54 (Human Rights Commission)

It is not clear what this provision seeks to achieve. Our reading of this section is that it could potentially stand to jeopardize the spirit of the Bill and the targeted segment of the population that it has set out to protect.

CLAUSE 18(1):

CJ 54 (Human Rights Commission)

The Commission is of the view that separate records for child offenders should be kept.

CHAPTER 4: ASSESSMENT OF CHILD

CJ 54 (Human Rights Commission)

Diversion should be an option at the assessment stage, and not only be available at the preliminary inquiry. This would help with deal with backlogs that currently exist in courts and in addition ensure a more effective flow of cases.

CLAUSE 36(5)(a):

CJ 54 (Human Rights Commission)

The HRC is very concerned about the unduly long periods the child must wait before reappearing in court.

CLAUSE 44: CHILD TO BE CONSIDERED FOR DIVERSION UNDER CERTAIN CIRCUMSTANCES

CJ 56 (Community Law Centre)

In response to a question put by the Chair to Ms. J Gallinetti during her oral submission to the committee the community Law Centre has submitted the following further comment on the question of Are diversion practices constitutional, particularly in the light of Section 34 of the Constitution?

Article 34 of the Constitution states

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

The Community Law Centre points out that according to the case of S v Pennington 1997 (10) BCLR 1413 (CC) that criminal proceedings are not ordinarily referred to as "disputes". In the case Chaskalson P held "The words any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That Section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that Section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted".

It is therefore submit that this section of the Constitution does not affect the constitutionality of diversion and it cannot be argued that diversion is a violation of section 34 of the Constitution. It would appear that section 34 relates primarily to access to court, in that it seeks to ensure citizens a right to due process of law in the context of civil proceedings.

In any event, when looking at all types of offences, the availability of admission of guilt fines can be

likened to diversion as the offender can avoid formal court in trivial matters just as certain minor offences can be diverted from court. In this instance a mechanism in section 57 of the CPA exists, which allows for disputes not being determined in an ordinary court of law.

On the issue of whether diversion is constitutional from the victim's perspective, particularly in relation to serious offences such as rape and murder, the Community Law Centre makes reference to section 12(1)(c) of the Constitution provides that "everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources." Reference is also made to the Carmichele case which emphasises a victim's right to life, human dignity and freedom and security of the person. On the other hand, the committee's attention is drawn to section 179(2) of the Constitution which states that:

The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

Section 179 has established a single prosecuting authority that is now regulated by the National Prosecuting Authority Act 32 of 1998. It has been stated that "it is the duty of the national director of public prosecutions to see to it that prosecutions are instituted without fear, favour or prejudice that is correctly and with just cause.

Section 20(1) of Act 32 of 1998 sets out the powers, duties and functions of the prosecuting authority and states.

The power as contemplated in section 179(2) and all other relevant sections of the Constitution, to

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

Therefore the national prosecuting authority has a clear discretion and power to direct criminal proceedings and this extends to the decision to either conduct criminal proceedings or discontinue them.

It has been noted by Du Toit et al (commentary to CPA) that the powers of the prosecuting authority are extensive and therefore have to be exercised with care and the highest degree of objectivity and it is only in exceptional cases that a court will interfere.

An example of this occurred in *S v F* 1989 (1) SA 460 (ZH) A where a 10 year old boy was charged with indecent assault of a 8 year old girl. The review court found that the element of wrongfulness had not been adjudicated on and the State had failed to prove its case. In forming this decision, Greenland J held:

Though mindful of the Attorney-General's prerogative in regard to prosecutions, I am compelled to hold it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that such child will not understand or appreciate the proceedings."

It is submitted that the discretion granted to the prosecuting authority by the Constitution envisages that the prosecution must act in the best interests of the State and this entails weighing up the circumstances of the crime, the victim and the accused in making a decision to prosecute. It is further submitted that the prosecution has the discretion to discontinue proceedings in appropriate matters. In light of this it is submitted that any victims rights could be reasonably and justifiably limited by a prosecutorial decision to divert in appropriate circumstances.

On the issue of **whether certain categories of offences should be excluded from diversion**, the CLC proposes that for certain serious types of offences extra checks and balances could be built in such as the need to have the agreement of the victim prior to considering whether to divert such matters, or the use of victim impact statements to guide the preliminary inquiry in deciding on

the diversion of such matters. These special procedures could be spelt out clearly for such cases.

On the issue of **whether diversion exposes the State to liability** the CLC describes the finding of the court in the case of *Carmichele V Minister of Safety and Security and another 2001(10) BCLP 995 (CC)*

In addressing concerns that delictual liability might affect the proper exercise of duties by public servants, the Constitutional Court noted that

"Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents [49]."

With regard to the role of prosecutors the Court stated that they "have always owed a duty to carry out their public functions independently and in the interests of the public" [72]. The Court however cautioned that "care should be taken not to use hindsight as a basis for unfair criticism" [73]. The Court emphasised the role of prosecutors as set out in the United Nations Guidelines on the Role of Prosecutors which has been incorporated in the National Prosecuting Authority Act 32 of 1998 and in terms of which prosecutors shall, in the performance of their duties:

"Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect [73]."

Subsequent to *Carmichele*, the extent of State liability in cases with similar facts, was examined. In the Supreme Court of Appeal case of *Ghia van Eeden V Minister of Safety and Security* (case no. 176/2001, judgement delivered on 27 September 2002), the Court emphasised that an open-ended, flexible approach was used in determining whether a particular omission or act should be held unlawful [22]. The case concerned a woman who was sexually assaulted and raped by a serial rapist who had escaped from police custody. In addressing the respondent's concern about the danger of "limitless liability on public authorities" the Court in this case noted that "[i]n deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability" [22].

This point was also emphasised in the Supreme Court of Appeal case of *Minister of Safety and Security V Dirk van Duivenboden* (Case no 209/2001, judgement delivered on 22 August 2002) where the Appellate Court stated that "the requirements for establishing negligence and a legally causative link, provide considerable practical scope for harnessing liability within acceptable bounds" [19].

In terms of all the above cases therefore, public servants can be held liable where their negligence or misconduct infringes the rights of victims. Liability would then be present, as in the *Carmichele* case, where the prosecutor failed to bring previous similar convictions to the attention of the presiding officer in a bail application, and the accused committed an offence on release from bail.

It is submitted that liability does not extend to cases where subsequent offences were committed, either after diversion, a suspended sentence withdrawal of charges or parole, except where evidence indicates that the prosecutors, police or judicial officers neglected their duties, did not apply their minds to the facts of the case and did not pay due consideration to factors which would indicate the likelihood of further offences.

Various checks and balances are applied before a case is diverted from the criminal justice system. Firstly, a probation officer will make an assessment of the child and his or her circumstances and whether the case should be diverted in the circumstances and with due consideration of the impact on victims and the community. Secondly, a probation officer in charge of the diversion programme to which a child might potentially be referred, will make an assessment of the appropriateness of the referral after interviewing the child and considering all surrounding circumstances. Finally the prosecutor will apply his or her mind to the matter of whether diversion

is a suitable option. The prosecutor should take the views of the victim into consideration when deciding whether to make a recommendation for diversion. If all the above parties, after applying their minds and finding diversion the most suitable manner of dealing with the offence, and the child commits a subsequent offence, it is submitted that the State cannot be held liable.

Section 297A

Another option to consider when looking at State liability in relation to diversion is the provisions of section 297 A of the CPA. These state that:

"(1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him in the performance of community services in terms of section 297, that loss may, subject to subsection (3), be recovered from the State.

(2) Subsection (1) shall not be construed as precluding the State from obtaining indemnification against the liability in terms of subsection (1) by means of insurance or otherwise.

(3) The patrimonial loss which may be recovered from the State in terms of subsection (1) shall be reduced by the amount from any other source to which the injured person is entitled by reason of the patrimonial loss suffered by him.

(4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the accused shall pass to the State.

(5) If any person as a result of the performance of community service in terms of section 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director General Justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he may deem reasonable to that person."

It is submitted that these provisions can also be made applicable to instances of diversion. In addition it is submitted that, in any event, it might be expedient for it to be mandatory that the relevant State departments indemnify themselves through insurance, against potential delicts suffered by persons on account of actions by an accused undertaking a diversion programme.

CLAUSE 58: TIME LIMITS RELATING TO CONCLUSION OF TRIALS

CJ 56 (Community Law Centre)

It must first be noted that the 6 month time limit only operates from plea. This allows the police and prosecution to co-ordinate their efforts to ensure that all preparatory work is done before putting the charge to the accused for plea purposes and thereby ensuring that a trial can reasonably occur within a six month time period.

It is submitted that in certain instances the interests of justice might require a child offender to be held for longer than 6 months. Provision is already made for this in that the crimes of murder rape and robbery with aggravating circumstances are excluded from the time period. It is acknowledged that items 6 (b) and 7(a) of schedule 3 are of also such a serious nature that the 6 month time period might not justifiably apply. However it is submitted that the remaining items in schedule 3 are not worthy of excluding the time limit and therefore the time period limit should still apply.

As far as limiting section 58(3) on account of fault for the delay on the part of the accused is concerned, it is submitted that this is in order only in so far as circumstances where the child accused might have escaped or refused to attend court. This would clearly be willful default on the part of the accused. However, in so far as delays on the part of the child's legal representative are

concerned, this would only be a possible exception to the time limit if the child offender refused to instruct the attorney properly and should not be an exception if the delay was occasioned by fault of the legal representative himself or herself. Therefore a condition to the time limitation might be deliberate delaying tactics solely attributable to the child accused.

CLAUSE 69(1):

CJ 56 (Community Law Centre)

Community Law Centre is firmly of the view that there should be a blanket prohibition on imprisonment under the age of 14 years of age. In the course of the public hearings questions were raised regarding comparable jurisdictions. The Community Law Centre has provided an overview of sentencing practices in various countries that indicate that life imprisonment is not applied and in fact a maximum capped sentence is often applied to children found guilty of offences. In addition in countries where the minimum age of criminal capacity is above **14 this automatically means that there is no imprisonment for** children below that age. Where the age of criminal capacity is younger than 14, most of the jurisdictions examined provide for alternative residential care other than imprisonment, such as in England where secure care is used, and Australia where training centres are used. Uganda, which has a minimum age of criminal capacity of 12 does not allow children younger than 16 to be held in a prison, and the length of sentence does not exceed 3 years.

CLAUSE 72(1):

CJ 56 (Community Law Centre)

The Community Law Centre is of the view that it is very important to have a ban on life imprisonment for children. They provide international comparative information to show that most countries do not have life imprisonment and in fact many limit imprisonment to a specific number of years such as, 3 years (Uganda), 6 years (Netherlands) and 10 years (Russia, Hungary, Austria and Germany).

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