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Child Justice Bill: deliberations on clauses 56 to 80

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Justice and Constitutional Development

Meeting Report Information

Date of Meeting:

23 Apr, 2008

Chairperson:

Mr Y Carrim (ANC)

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Summary:

The legal drafters continued to guide the Committee through clauses 56 to 80 of the Bill. In clause 56, it was decided that the words “diversion programmes” should be replaced with “diversion options” because the latter terminology was considered broader. The Committee could not reach any position on clause 57 and resolved to revisit it after formulating their decision on diversion policy. In clause 58, the Committee debated whether the Bill should prescribe a minimum or a maximum diversion period. Additionally, Members voiced concern about the creation of two levels of diversion options in this clause. The Committee agreed that clause 60 needed to be reworded and clause 62 yielded a general discussion on victim-offender mediation. Members discussed the concept “family group conference” in clause 61 and resolved that the clause should be aligned with the Children’s Act. Some submissions had proposed that clause 63 include a provision on the separation of trials in relation to children and adult co-accused. After some deliberation, the Committee rejected this proposal and concluded that the status quo should remain. No resolution was reached on clauses 66 and 67, and they were flagged. Clause 68 would be retained in its current form and the words “where available” be inserted. The Committee might delete the provision for a Victim Impact Statement in Clause 71 but the debate was kept open for the time being. The Department accepted that clauses 72, 73 and 76 needed to be revisited and that most of the proposed amendments would be implemented in the Bill. It was suggested that the obligation in clause 75 to provide some service or benefit should be extended to persons, and not be limited only to community charity and welfare organisations. The Committee flagged the proposals for clause 77. One of these was that the court should be compelled to check on a monthly basis whether a child had been admitted to a residential facility and not wait for the probation officer to present a report on such matters. The majority of submissions on clause 78 maintained that children should be expressly excluded

from the ambit of any minimum sentencing legislation and that there should be a prohibition on the imprisonment of children below the age of 14. It was argued that the Bill should not deal with minimum sentencing because the Constitutional Court was considering the constitutionality of that legislation. The Committee did not take a firm position on this matter, and reiterated that this would be done once Members had interrogated the policy issues surrounding this matter. There were no comments from the public on clauses 59, 64, 65, 69, 74, 79 and 80.

Minutes:

Mr Carrim welcomed all participants and informed them that Members were “loath” to meet during the constituency period and he had to obtain a special dispensation to assemble this meeting. He explained that the aim of the sub-committee was to deliberate further on the Child Justice and get clarity on certain issues. He emphasised that this was phase one in the legislative process and that any amendments could still change at a later stage. Members still had to engage their party political structures on the policy issues arising out of the legislation.

Clause by clause deliberations

Mr Lawrence Bassett, Chief Director: Legislation, Department of Justice (Department and DoJ), explained the contents of each clause before the Committee discussed it:

Clause 56

Dr Anne Skelton, Centre for Child Law, University of Pretoria, said that clause 55 referred to “diversion programmes”, whilst the current clause spoke of “diversion options”. She preferred the latter terminology because it broadened the diversion choices available. By way of example, she explained that an order to stay at home and attend school was an option but not a programme; whereas an order to attend a drug rehabilitation programme was both an option and a programme.

The Department and Committee accepted her preferred terminology.

Clause 57

Mr Bassett noted that the clause needed to be revisited after the Committee had reached its decision on various policy issues.

Ms Jacqui Gallinetti, Coordinator: Child Justice Alliance, contended that the majority of the Non Governmental Organisations (NGOs) opposed this clause. They asserted that the clause should be deleted in its entirety because diversion should always be a possibility for children, subject to the National Prosecuting Authority (NPA) guidelines.

Adv C Johnson (ANC) stated that South African law did not prohibit diversion for adults in sexual offences. Accordingly, she reasoned that this clause amounted to unequal treatment because diversion for children was limited in this instance.

Mr Carrim argued that where diversion was not restricted for adults, it did not necessarily follow that the same should apply for children. He said that, unlike adults, children were afforded many rights and protection in the Bill.

Mr Jeffery insisted that children should not be placed in a worse position than adults. He sought clarity on the NPA’s guidelines regarding diversion.

Mr Kombisa Mbakaza, Senior State Advocate: NPA, clarified that diversion was inappropriate for certain serious offences unless there were exceptional circumstances.

Mr Jeffrey asked if there was anything in that clause that should remain, if the Committee decided to go the route of the NPA guidelines.

Mr Bassett responded that the clause would not remain if the Committee adopted the position that all children should be considered for diversion.

The Committee decided to revisit this clause after thrashing out the policy issues.

Clause 58

Ms Gallinetti objected to the allocation of a maximum time period for diversion options. She motivated that all children did not respond the same to behavioural intervention. Some children took longer to achieve outcomes than others. Instead, she reckoned that the Bill provide for a minimum period for which a child must be in a diversion programme and leave it to the discretion of the courts to extend that period if need be. For that reason, she wondered whether the Bill accommodated a scenario where a service provider indicated that a child required more intervention.

Adv Shireen Said, Chief Director: Vulnerable Groups, DoJ, replied that the latter concern could be accommodated in the policy framework.

Dr Skelton disagreed with the NGO's position and felt that a maximum period was better than a minimum one.

Mr Carrim preferred the prescription of a maximum diversion period.

Mr Jeffery indicated that he was uncomfortable with the prescription of maximum time periods and claimed that this would provide magistrates with an opportunity to allow diversion options of a longer period. The circumstances of a case should determine which diversion options must be followed without setting out (diversion option) levels in the Bill.

Adv Johnson asserted that all children were different and therefore their developmental needs were also different. She could not understand why the Department wanted to be so prescriptive and not leave it in the court's discretion to decide on the diversion period.

Mr Jeffery noted that there was a significant overlap between the level 1 and level 2 diversion options outlined in the clause. Consequently, he asked about the distinction between the two categories.

Mr Bassett remarked that the 2002 version of the Bill had three levels, which were collapsed into two in the current Bill.

Ms Lirette Louw, Researcher: DoJ, indicated that the South African Law Reform Commission's Report had specifically considered the issue of levels of diversion. The main aim of this was to ensure some degree of proportionality so that a first offender of a sexual offence did not attract a disproportionately severe set of conditions and obligations.

Dr Skelton indicated that the Bill had been drafted in a context where diversion was new. It was intended to show magistrates and prosecutors that more cases could be diverted. She supported the idea of having no timeframes because it would be easier to manage on the ground.

Mr Bassett preferred that there should be a maximum time period and that the Department look at the duplication raised by Mr Jeffrey.

Mr Jeffery reminded Members that they were dealing with two issues: should the Bill specify a maximum or minimum diversion period and should there be two levels of diversion options. Personally, he maintained that the two levels should be collapsed into one subclause because the Department was unable to sustain a convincing argument for this.

Mr Carrim believed that the Department's arguments were stronger than what was being reflected in the discussion. Consequently, he instructed the Department to draw up a document, spelling out clearly why there were two levels and expand on the distinction between the two. He personally felt that the two levels should remain provided that it was properly defined and had no significant overlap. He also maintained that there should be a maximum time period set out in clause 58(4)-(6).

The Department agreed with the submission that the phrase "is likely to impose a sentence of imprisonment" in subclause 5 should be replaced with "would consider a custodial sentence".

Clause 59

Adv Johnson advised the Committee to consider whether this clause placed an additional duty/burden on probation officers.

Ms Connie Nxumalo, Chief Director: Families and Social Crime Prevention, DSD, denied that this would be an additional task because there were assistant probation officers, who assisted in the monitoring of the process.

Mr Carrim sought clarification regarding to whom "other suitable person" referred.

Adv Said clarified that this would be someone who was accredited to provide the types of services needed.

No further issues were considered in this clause

Clause 60

Mr Jeffery suggested that this clause should be reviewed so that magistrates and prosecutors had the possibility of imposing a stricter diversion order.

This proposal received support from Committee.

Clause 61

The Committee dismissed the suggestion raised by the Restorative Justice Centre submission.

Mr B Magwanishe (ANC) observed that a family conference had to take place within 21 days. However, subclause 61(4) did not make provision for a time period for such a conference to be re-convened if it failed to take place the first time.

Adv Said responded that there was a similar provision in the Children's Act and this clause would have to be aligned with that legislation.

Members queried the use of the term "family group conference".

Dr Skelton indicated that the concept was internationally understood and that in South Africa

the term was used interchangeably with “community conference”.

Mr Jeffery commented that a probation officer must cause the conference to be convened and the conference would be facilitated by a family group conference facilitator. This meant that the probation officer would not have to be at the conference. He stated that this clause was not “particularly well worded”. The clause should make provision that a conference facilitator should determine who an appropriate adult was.

The Committee decided that this clause needed to be aligned with the Children’s Act.

Clause 62

Mr Jeffery commented that it was not clear in the Bill when a Victim-Offender Mediation (VOM) took place. He emphasised that both the victim and the offender should agree to such a process.

Mr Mthetho Mqonci, Deputy Director: Social Crime Prevention, DSD, agreed with Mr Jeffery.

Adv Johnson queried the differences in the procedures between the family group conference and the VOM.

Mr Mqonci clarified that there was no difference between the two processes and that the 21 days time period should also apply to the latter process.

Dr Skelton wondered whether it was necessary to specify when the VOM would take place because she considered both processes as options that would be determined on a case-by-case basis.

Mr Carrim instructed the Department to set out (in writing) when a VOM would take place.

Mr Jeffery requested the Department to look at the jurisdiction of social workers because they had a different area of jurisdiction to the courts.

Clause 63

Ms Gallinetti stated that clause 63(1) needed simplification as it did not make for accessible reading and understanding. In addition, the use of the words “plea and trial” was considered too limiting as this was not the only consequence of a referral to a child justice court. She pointed out that clause 63(2) dealt with the separation or joinder of trials in relation to children and adult co-accused. This was an important measure to ensure that children were protected and not intimidated by adults. She argued that a new subsection, 63(6), should be added that would incorporate the stipulations in section 154 of the Criminal Procedure Act (CPA).

Mr Mbakaza agreed that the Department needed to develop policies and regulations on the joinder or separation of trials involving children and adult co-accused.

Mr Bassett was under the impression that the NPA had a problem with separation as a general rule owing to reasons of costs and delays. The CPA already allowed for the possibility of separation in cases where this was thought necessary.

An NPA official confirmed that the NPA had a directive, which advised that there be a separation in cases involving children used by adults to commit a crime.

Mr Jeffrey felt that the Committee should retain the status quo unless there was a compelling contrary view.

It was also decided that the words 'plea' and 'trial' be deleted as suggested by one of the submissions.

Clauses 64 and 65

Ms Gallinetti proposed that clause 64 be aligned to the Children's Act, which the Committee agreed to. No changes were made to clause 65.

Clause 66

In reply to Mr Jeffery asking what the existing period was for which children could be remanded, Mr Mbakaza said that 14 days was the prescribed time in terms of the Correctional Services Act.

Dr Skelton voiced concern about children in places other than prison. She contended that the Bill should also stipulate a prescribed period for the remand of such children.

Mr Jeffery noted that the current practice (for the postponement of proceedings involving children) was 14 days and could not understand why this should be increased to 30 days as proposed by the Bill.

Mr Mbakaza indicated that difficulties arose in courts that did not have resident police liaison officers to take care of the movement of dockets. This problem would be addressed if police made sure that such individuals were present at all courts.

Mr Carrim noted that in practice, children were remanded in custody for 14 days before they appeared in court. He felt that this period was insufficient, and this period should be increased to 30 days as outlined in the proposal.

Mr Mqonci argued that 30 days was too long for children who committed minor offences. On the other hand, it would be appropriate for those that committed serious offences.

Ms Gallinetti observed that there was no regulation on the length of postponement for children placed in residential facilities. She moved that this be corrected.

Mr Bassett responded that the Department was happy with including residential facilities but was concerned about the financial implications on the state.

The Committee did not reach any resolution on this matter and decided to tag it for further discussion.

Clause 67

Dr Skelton strongly opposed the clause and argued that it had become complicated and useless. If trials were not finalised within six months after plea, then children who were detained in prison or youth care facilities, should be released unless charged with murder, rape or robbery with aggravating circumstances. Lastly, she contended that this clause should be deleted in its entirety if it was going to be retained in its current format (12 months as opposed to the 6 months period in the 2002 version of the Bill) because the Constitution provided a better guarantee of the right to a speedy trial.

Mr Magwanishe expressed concern that a child, in terms of subclause 67(2)(ii), could be blamed for the behaviour and mistake of their legal representative.

Mr Basset conceded that the Department needed to revise the wording of this subclause.

Adv Said remarked that Members should be mindful of the reason why children were detained in the first place and should not simply release them if their cases had not been finalised within a specific period.

Adv Johnson liked the idea of putting pressure on the police and prosecutor to deal expeditiously with cases involving children. She also raised doubts about the practical realities of releasing children whose matters were not finalised in terms of the six months' deadline.

Ms Louw reckoned that six months was too short and that two years was too long.

Dr Skelton insisted that she would rather see the courts develop jurisprudence on this matter (the right to a speedy trial).

The Committee decided to retain the clause provisionally and discuss it further at their study group. Members also indicated that it was a tricky clause from the public perspective.

Clause 68

Mr Carrim wondered what would happen if there was a disagreement between the parent and a child regarding diversion and the diversion option.

Adv Said surmised that the child would have the final decision as was the case with the Termination of Pregnancy Act.

Mr Jeffrey expressed concern that parents would be excluded from making the decision. In addition, he wondered whether the "appropriate adult" should have the same right as parents. He suggest that the phrase "legal guardian" should replace "appropriate adult" and the words "where available" should be inserted in the clause.

Mr Carrim felt that both the adult and the child should agree to this process, and not only the child. He advised that the clause be retained in its current form and the words "where available" be inserted.

Clause 69

There were no disagreements on this clause and no amendments were made.

Clause 70

Ms Gallinetti outlined the submissions presented by CSPRI, GSL and RAPCAN. They indicated that the court should consider additional factors when imposing a sentence of detention. These included the proximity of the designated facility or prison to the child's parents or community and the prevailing conditions at such facilities or prison.

Mr Bassett stated that such details could be better dealt with in clause 77 of the Bill. The Department accepted the proposal of Prof Terblanche to expand on the "seriousness of the offence".

Clause 71

Ms Gallinetti indicated that Prof Terblanche was the only submission that supported the Victim Impact Statement (VIS). The remainder of submissions opposed the clause because VISs were not used in the case of adults and had been rejected in the Sexual Offences Bill.

Ms Louw clarified that VISs were not entirely left out of the Sexual Offences Bill, and highlighted that in section 66 of that legislation, it is required that information on the impact of

the sexual offence on the complainant must be placed before the prosecutor. She added that the inclusion of a VIS in this version of the Bill was based on the decision of the previous Committee.

Adv Johnson was not convinced that a VIS would add any value and argued that the prosecutor would in any case articulate the harm done to the victim.

Mr Carrim commented that he was teetering towards dropping the clause, but he was willing to keep the debate open.

Clause 72

Mr Carrim asked what was meant by “other suitable persons” because DSD had claimed that they had sufficient probation officers.

Ms Nxumalo expressed surprise at the inclusion of those words.

The Committee responded by removing those words from the clause.

Ms Nxumalo contended that the requirement of a sworn statement or a facsimile copy thereof would make it difficult for DSD because the facility manager would have to be physically present at the court. Instead, she suggested that it should rather require proof of such a document.

There was no opposition to this suggestion.

Ms Gallinetti suggested that assessment reports for children who were in detention should be completed within 20 working days, whereas reports for children who were not detained should be completed within six weeks.

The Committee endorsed this recommendation.

Clause 73

Mr Bassett noted and acceded to Prof Terblanche’s submission that the reference to clause 56 (2) should be deleted since all it did was refer to clauses 58(3) and (5).

Ms Gallinetti highlighted the other concerns raised in Prof Terblanche’s submission. He argued that the wording of clause 58(5) should be reconsidered, or a different cross-reference method should be found for section 73(1). He also proposed that, in the interest of clarity, the words “performance without remuneration” be replaced with “community service”.

The Department agreed to both proposals.

Mr Magwanishe asked if probation officers had the capacity to provide regular reports to the courts.

Mr Carrim commended the Member for raising a “good point”, and indicated that this issue would be discussed the following day.

Clause 74

Members accepted the clause and made no changes to it.

Clause 75

Mr Jeffery considered clause 75(2)(c), and advised that the obligation to provide services or

benefits should be extended to persons and not be limited only to community charity and welfare organisations.

Ms Gallinetti cautioned that an age limit should be determined in accordance with labour relations.

Adv Said suggested that the Department develop a general clause so that the court would not be limited to those specific options listed in the Bill.

Clause 76

Mr Bassett said that the Department had noted and adopted Prof Terblanche's recommendation on this clause. In his comments, he informed the Committee that clause 76(b) should be deleted, as should the age limitation in clause 76 (a). He reasoned that courts already had the authority to impose imprisonment in terms of section 276(1)(i) under clause 78 of the Bill. No further discussion was held on this clause.

Clause 77

Ms Gallinetti articulated the view of Prof Sloth-Nielsen that the wording of this section needed to be brought in line with the Children's Act 2005.

The Committee endorsed this recommendation.

In addition, Ms Gallinetti expanded on the issue raised by Prof Terblanche that sentencers be provided with indications as to when a sentence of compulsory residence in residential facility should be considered appropriate. It was motivated that inexperienced sentencers would not know when to impose this kind of sentence and that unless an authoritative judgment was given; there would be differences of opinion as to when this opinion would be appropriate.

Moreover, Ms Gallinetti suggested that a court should be compelled to check on a monthly basis whether a child had been admitted to a residential facility and not wait for the probation officer to present a report on such matters.

The Department deemed that the suggestions were "sensible".

Mr Carrim enquired which parliamentary committee would have to deal with the policy framework contemplated in clause 77(4)(e).

Mr Bassett replied that the envisaged policy framework would have to be tabled before the Social Development Portfolio Committee.

Clause 78

Ms Gallinetti listed the comments provided during the public hearings on minimum sentencing. The thrust of all the submissions was that children should be expressly precluded from the ambit of any minimum sentencing legislation and that there should be a prohibition on the imprisonment of children below the age of 14. Quoting Prof Terblanche, she urged the Committee to reconsider subclause 78(4) because the provision was undecipherable in its current format.

Moreover, Ms Gallinetti proposed that any sentence imposed on a child should not exceed that of the child's age. There was currently legal precedent that took this into account. She cited several countries that capped the number of years that children can be sentenced.

Ms Louw countered that there was an equal number of countries that developed a stricter

approach and increased the sentence period for children. She maintained that 25 years was appropriate because it sent a strong message. Finally, she stated that the Committee needed to take a policy decision on this issue.

Mr Carrim agreed that 25 years would send the correct public message and that it would apply only in severe cases. In conclusion, he felt that it should stay at 25 years, but that he was open to persuasion.

Mr Jeffrey asked if children between the ages of 10 and 14 years old could be imprisoned. He also asked about international norms in developing and developed countries for the sentencing of children.

Mr Bassett replied that children between the ages of 10 and 14 years old could be imprisoned.

Ms Louw indicated that Canada and the UK provided sentences of life imprisonment for children with the option of early release.

Mr Carrim asked the Department to clarify 78(2).

Mr Bassett clarified that this clause gave effect to the UN Convention on the Rights of a Child, which only prohibited life imprisonment without the option of parole.

Mr Carrim claimed that magistrates had too much latitude to decide on whether to imprison children. He added that this issue should be flagged for debate.

Ms Gallinetti believed that this Bill should not deal with minimum sentencing because the Constitutional Court was considering the constitutionality of that legislation.

Mr Magwanishe and Mr Carrim indicated that the ANC still had to develop a position on the imprisonment of children under the age of 14 years.

Ms Christine Silkstone, Researcher, Parliamentary Research Unit, asked the Department of Correctional Services (DCS) whether it had a position on the imprisonment of children under the age of 14.

Mr Willem Damons, Deputy Commissioner: Remand Detention, DCS, explained that DCS did not have a choice whether to detain such a child and was compelled to implement the order of a magistrate.

Mr Johan Le Grange, Regional Head: Corrections, Western Cape, DCS, indicated that in terms of its White Paper, DCS did not want to imprison such children even if a magistrate made such an order.

Clause 79 and 80

No submissions had been received on these clauses and the Committee endorsed them.

The meeting was adjourned.

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