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Child Justice Bill: deliberations on clauses 81 to 98

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Created 2008-04-25 16:40

Justice and Constitutional Development

Meeting Report Information

Date of Meeting:

24 Apr, 2008

Chairperson:

Chairpersons: Mr Y Carrim (ANC), Mr J Jeffery (ANC)

Relevant Documents

[Child Justice Bill \[B49-2002\]](#) [1]

[Summary of Comments on Child Justice Bill](#) [2]

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Summary:

The Committee indicated that it had held discussions with the stakeholder departments on the issue of capacity during the morning session, which was closed to the public. The Committee welcomed the moves to integration and coordination amongst the departments, and would be actively monitoring the matter. In its report on the Child Justice Bill, the Committee would raise the possibility of phasing into operation certain clauses over a period of time, and the various departments were to indicate which issues they would be unable to implement by January 2009.

The legal drafters continued to take the Committee through clauses 81 to 98 of the Bill. The concerns around legal representation in relation to clauses 81 and 82 were noted. Preliminary inquiries were new proceedings that were not intended to become adversarial. It was agreed that the word "may" be used in relation to allowing legal representation and that Clause 82 should be reworded to state that nothing would preclude a legal representative from being present at an assessment or preliminary inquiry. The references to choice and own expense would be deleted. Clause 83 would be reworded to clarify that legal aid would be available to those of 16 and 17 years of age, and subclauses (1)(a) to (c) would be deleted. Clause 84 would be amended, to delete the reference to clause 83(1), to clarify that this applied to the Child Justice Court, and to provide that no child would be permitted to waive his or her right to legal representation. Clauses 85 and 86 followed the wording of the Criminal Procedure Act, and the age categories

would need to be amended in line with recent amendments to that Act. It was suggested that the references in those clauses to legal representation should be deleted, so that any child sentenced to imprisonment should have the right to automatic review and automatic appeal. Clause 88 was to be reworded to bring it in line with the Department's current work on expungement of criminal records, and the drafters would consider the submissions in relation to expungement also of certain offences under Schedule 3. The stakeholder Departments would need to consult further on clause 92, in relation to responsibility. The drafters agreed to re-word Clause 94 to make specific reference to the offences under the Children's Amendment Act. In relation to clause 95, there had been comments in regard to data indicators and training, and the drafters would see which of the suggestions could be incorporated. The Committee suggested that some reference be made in the Preamble to crime prevention, and that the references to intersectoral structures should be contained in the main body of the Bill rather than in the regulations. No specific comments were raised in relation to Clauses 87, 89, 90, 91, 93, and 95. The Committee decided that clauses 96 to 98 would be considered once the Schedules had been redrafted, which in turn could only be done once the Committee had made policy decisions in relation to preliminary inquiries, sentencing and diversion. The Department would be asked to return to the Committee once those issues had been finalised.

Minutes:

Child Justice Bill: Continuation of deliberations

Co-Chairperson Mr J Jeffery (ANC) indicated that in a closed session there had been some discussions on assessments for those children entering the court system. It had been generally agreed that there would be assessments for children between 10 and 14. The views expressed would be summarised in writing and distributed. In relation to preliminary enquiries, there were no numbers available, but there did not seem that it would make a substantial difference to capacity if all children were to go through a preliminary enquiry. There was an indication from the National Prosecuting Authority (NPA) that they would prefer preliminary enquiries. On the issue of diversion, no resource issues were raised in detail, although some views were expressed by the NPA in favour of the current situation. The point was made that in the interests of justice diversion may be required for some even very serious cases. The broader political decision on how to deal with diversion would still need to be taken after further discussion. The issue of the time frames was revisited, but more work was needed from the South African Police Service (SAPS).

Co-Chairperson Mr Y Carrim (ANC) felt that certain very serious offences should be excluded from diversion, but that in exceptional circumstances a decision could still be made to allow diversion, that decision to be made by someone other than a prosecutor.

Mr Carrim indicated that the Committee would draft a paper, which would stress the time spent in looking at issues of capacity, and the fact that the Committee had felt that sometimes not enough information was available. The Committee welcomed the moves to integration and coordination, and would be actively monitoring the matter. The success of the system would depend on the willingness of the various departments involved to cooperate. The report would also mention the possibility of phasing-in of the Bill over a period. The departments should approach the Committee in regard to any concerns, and indicate whether any proposals could not be implemented by January 2009.

Clause by clause deliberations

Mr Lawrence Bassett, Chief Director: Legislation, Department of Justice, indicated that he would continue to take the Committee through the various clauses. He would firstly deal with those affecting the Department of Social Development (DSD), so that they could then be released from the meeting.

Clause 90

Mr Bassett said this clause dealt with the establishment and jurisdiction of the one-stop Child Justice Centres. The objective was to promote cooperation between departments, and provide an effective mechanism for service delivery. Subclause (4) set out what these centres should have available. Subclause (5) provided that the Minister of Justice may define the area of jurisdiction.

The Chairperson asked what services were being spoken of in subclause (3).

Mr Bassett indicated that these should be the services set out in the following subclause (4). He asked SAPS to comment.

Assistant Commissioner Susan Pienaar, Head: Social Crime Prevention, South African Police Service (SAPS), noted that if the child was arrested, it was the responsibility of SAPS to find the family of that child. This was not always possible. There was a suggestion that SAPS should be able to work together with other departments in their attempts to trace the family. This was agreed to.

Mr Carrim asked how correctional supervision would work.

Adv Shireen Said, Chief Director: Promotion of Rights of Vulnerable Groups, Department of Justice, said that there were centres under the jurisdiction of the Department of Correctional Services.

Clause 88

Mr Bassett noted that the DSD was also involved with expungement of records under clause 88, but there was nothing contentious.

Clause 92

Mr Bassett indicated that this clause dealt with the reports going over to DSD. However, it was not just DSD who was involved in this section, as it dealt with provision of education for children held in a residential facility. Mr Bassett said that the Cabinet member responsible for education was also named as having responsibility.

Ms Said noted that the primary responsibility for residential care remained within DSD, and that Department would determine whether the child should stay in the centre whilst completing his or her education. The education issues would reside within the childcare centre.

There was some uncertainty between the department officials as to who would have the responsibility for specific issues, and it was agreed that the departments would discuss the matter further between themselves.

Clause 95(7)

Mr Bassett noted that this clause required the Minister of Social Development to create a policy framework to develop levels of capacity, with programmes suited to the needs of children between 10 and 14, and to ensure that they were accredited in terms of Clause 54. The Director General of Social Development was to keep a register, and the contents of that register were set out in the clause. For the purposes of clause 31 the Director general of DSD must provide information to the Department of Justice.

Ms Connie Nxumalo, Chief Director: Families and Social Crime Prevention, DSD, noted that this clause was fairly self-explanatory.

Officials from the Department of Social Development, the NPA and SAPS were excused from the meeting at this point.

Clause 81

Mr Bassett indicated that this clause set out the requirements for legal representation during the assessment and preliminary enquiry. It provided that a child may appoint a legal representative if the magistrate consented to that, and set out the rights and duties of the legal representative.

In relation to clause 81(2) Mr Bassett indicated that Prof Sloth Nielsen, of UWC, had suggested that the clause could be strengthened by a requirement that any cases of unprofessional conduct be reported to the Legal Aid Board (LAB) or the professional bodies. The Department responded that this could be regulated in the Legal Aid Act and the Attorneys Act if the Committee agreed.

Clause 82 (and reference also back to clause 81)

Ms Jacqui Gallinetti, representative for Child Justice Alliance, noted that the comments on this clause had revolved around the original suggestion that there not be a prerequisite for legal representation at assessment, diversion of preliminary enquiries, as it was felt that this could dilute and formalise what was intended to be an informal system. There had been some concerns about capacity of the LAB, but the Committee had discussed this and there had since been greater expansion and streamlining of the legal aid system.

Mr Bassett said that the Bill gave a discretion to the presiding officer as to whether legal representation should be allowed.

Adv C Johnson (ANC) said that during the previous discussion she had raised a concern that a legal representative was not to be present during the assessment, but that a magistrate would have the right to approve representation at a preliminary enquiry.

Ms Gallinetti thought that the Committee had decided that the legal representative may be present at both.

Mr S Swart (ACDP) noted that the concerns were that a legal representative would be trying to "find a way out" for the child. To his mind, the use of the word "unduly" was critical in clause 81(1)(c), and this seemed to cater for the situation.

Mr Jeffery said that the legal representative had a duty to promote diversion. In order to qualify for diversion, there must be admission of some responsibility by the child. He noted that the preliminary enquiries were new proceedings. There was no doubt that lawyers could lengthen proceedings, and run up costs, and he would like to avoid this situation. He was also of the opinion that the current wording, indicating that a lawyer could only be available if privately funded, was incorrect. The question was rather whether there should be allowance for legal representation.

Adv Johnson said that she would prefer to err on the side of caution. She felt that there was no harm in having a legal representative present.

Ms Gallinetti agreed that the matter should be left open. She suggested that the word "must" should not be used. She indicated that when making decisions at a preliminary enquiry regarding the placement of the child, it could be important that a legal representative assist the child, for instance, in deciding whether a child should be detained in prison.

Mr Bassett noted that this was a first court appearance.

Mr Johnson asked whether there was not a constitutional right to legal representation.

Adv Said noted that where personnel had been trained on restorative justice, the system was working better. She felt that there would need to be training in the system. It was a question of managing and monitoring. She agreed that it should be open.

Mr Jeffery said that he would agree to using the word "may". He suggested that the clause be reworded to state simply that nothing in the Act should preclude a legal representative being present at an assessment or preliminary enquiry.

Mr Swart noted that the requirement that a probation officer should consent to legal representation did not make sense.

He further made the point that further clauses would then need to be added to the preceding clauses, such as clause 45(4), to bring them in line with this clause, and to set out who could be present at the enquiries and assessments.

Mr Jeffery asked why, when the Bill was drafted, the probation officer and magistrate were given the power to refuse the legal representation.

Adv Said recalled that there were perhaps some concerns as to whether allowing legal representation would not change the nature of the proceedings to adversarial proceedings.

Mr Swart noted that clause 81(2) allowed the magistrate to impose any remedial action if there were to be an abuse of the power and disruption of the system.

Adv Johnson noted further that "assessment" must be removed from subclause 81 (1)(d), as it was essentially the preliminary enquiry where a legal representative must be present.

It was agreed that Clause 82 would be amended to read that nothing would preclude legal representative at a preliminary enquiry, but that the references to "a legal representative of his or her choice, at his or her expense" would be removed.

It was further agreed that the consequential amendments would also need to be made to Clause 45(4).

Clause 83

Ms Thandazile Skhosana, State Law Advisor, Office of the Chief State Law Advisor, noted that this clause provided for legal representation by the Legal Aid Board (LAB) in certain circumstances.

Ms Gallinetti indicated that concerns had been expressed that this clause could be interpreted to mean that children aged 16 and 17 were the only age cohort that would potentially not be entitled to legal representation at State expense. This was in contradiction to the power of a Court in every case to consider whether legal aid should be granted to a person appearing before the court, so even those children not stipulated in this clause could still be considered for legal aid. It was worrying that this clause seemed to indicate to the presiding officer that a child of 16 or 17 should not be referred to the Legal Aid Board.

Ms Gallinetti further stated that the reference to section 77 should surely be a reference to Section 78.

Mr Bassett confirmed that there was a typographical error, and that it was Section 78 that was being referred to in subclause (1)(c). He gave some background to the matter. The Legal Aid Act was amended in 1996, and Section 3(b) of that Act provided that a Court had to take into account personal circumstances of the accused, and other matters, before deciding whether the person should be referred to the Legal Aid Board, who in turn would decide whether the person qualified for legal aid. That was the starting point. In terms of the Constitution, every person had the right to a fair trial and to have a legal practitioner from the LAB appointed if there would be substantial prejudice in having no legal representation. In 2003, pursuant to the Constitutional Court judgment in the *Steyn* matter, the appeal mechanism was changed. The categories listed in this clause presently emanated from that judgment. The Presiding Officer would have to refer these categories of people in particular, as they were considered the most vulnerable. However, that was in addition to his or her general discretion to refer a matter for consideration by the LAB.

Adv Said mentioned that she shared Ms Gallinetti's concerns about the drafting. She suggested that this clause be redrafted to clear up the possibility of unintended interpretation.

Mr Jeffery noted that the LAB had indicated that it did have capacity to give legal aid to all children.

It was agreed by the drafters that the categories set out in (a), (b) and (c) could fall away; there was in fact no difficulty with the referral to the LAB. Therefore only the first sentence would remain, up to "expense" and resume with "the presiding officer must refer the child..."

Clause 84

Ms Skhosana noted that this clause relied on the same categories as set out in clause 83. That may therefore need to be amended. Essentially, the clause provided that a child may not waive his or her right to legal representation in certain circumstances.

Mr Bassett suggested that the reference to "a manner set out by the Rules of Court" in subclause (2) should perhaps be substituted by a reference to regulations.

Mr Jeffery said that this clause was inserted because a child might not fully comprehend what was going on in the court. He asked if there was any difference between a 16 and 17-year-old child's understanding. He believed that no child should be permitted to waive his or her right to legal representation.

Mr Swart noted that there was a problem where children were intimidated by gangsters, and that there was indeed a need for this protection. He asked what would happen in the case of assessments and preliminary enquiries. He suggested that if the reference to 83(1) be deleted, there must be reference to the Child Justice Court in this section.

It was agreed that the cross-reference to section 83(1) would fall away, and that the clause would therefore indicate that no child appearing before a Child Justice Court may waive his or her right to legal representation. There would be no mention of the age categories.

Clause 85

Ms Skhosana noted that this clause set out the procedure in relation to appeals. Once again there was reference to the categories set out in Section 83, and this would need to be looked at again.

Mr Swart asked how it was possible that a child could have appeared in the Regional Court or High Court without legal representation.

Mr Bassett noted that this wording followed the wording of the Criminal Procedure Act (CPA). He agreed that it was highly unlikely, but covered the possibility that rights may have been waived.

He also noted that since this clause had been drafted, the Criminal Procedure Act had been amended, and that the age of 14 had now risen to 16, and the age of 16 had increased to 18. That would need to be reflected here.

Clause 86

Mr Bassett indicated that this clause dealt with automatic review of decisions from the lower courts in certain circumstances. The wording of this clause also reflected the provisions of the CPA, and the same comments applied in regard to the ages.

Ms Gallinetti asked whether this clause was more regressive than section 302 of the CPA, as the latter did not have any restrictions in regard to age.

Mr Jeffery noted that the input was concerned with custodial sentences. All custodial sentences were automatically reviewed. Any sentence on a child below 16 was reviewed automatically, as well as the imposition on any child of any custodial sentence that was not wholly suspended. A 17 year old who received a reprimand would not have his case automatically reviewed. However, he did not think that there would be any substantial injustice in not reviewing such a case.

Mr Bassett said that section 302 of the CPA did not contain any references to age. This section dealt with cases that went on automatic review. If a Magistrate's Court imposed more than a three-month sentence, and if the judicial officer had less than 7 years experience, the case would go on review. However, that dealt only with imprisonment sentences. These sentences were already covered automatically in this clause.

Mr Jeffery thought that clause 86 therefore seemed to go further than section 302 of the CPA.

Mr Swart commented that it seemed that clauses 84, 85, and 86 were inconsistent. A child could not waive his right to legal representation in the Child Justice Court, but apparently could do so in a higher court and in relation to a more serious offence.

Mr Jeffery responded that every child would be represented in a Child Justice Court. Clauses 85 and 86 related to children who had not been represented in a Regional or high Court. In principle, he asked why the child was allowed to waive his rights in those courts.

Ms Gallinetti said that in the original draft of the Bill, there was reference to the fact that any Court which was holding a sitting involving children, must sit as a Child Justice Court. If this was so, then no child could waive his or her right to legal representation. Furthermore clause 86 made reference to 16-year-old children who did not have legal representation. She pointed out that there were a number of cases where, despite the fact that the children did have legal representation, their sentences were overturned on review. She did not think that the presence or absence of legal representation should be a deciding factor.

Mr Jeffery said that Section 302 of the CPA applied to everyone. He wondered if the reference to legal representative should not be taken out altogether. He felt that any child sentenced to imprisonment should have a right to automatic review and automatic appeal, regardless of legal representation.

Mr Bassett said that on principle he could not see any objection to this, but he would research

the matter further and revert to the Committee.

Mr Jeffery asked if there was an equivalent of Section 302 relating to appeals.

Mr Bassett said that Clause 85 was similar to Section 309 of the CPA.

Clause 87

Ms Skhosana noted that this clause dealt with release on bail pending review or appeal. The provisions of Clause 25 of this Bill would apply. There had been no comments and it was not necessary to deal with the clause in any further detail at this stage.

Clause 88

Mr Bassett noted that expungement of records, resulting in the conviction being deemed to fall away, would only occur for Schedule 1 and 2 offences, respectively after five and ten years after imposition of the sentence. There were certain provisions in relation to expungement of records for those below 14, when the record would be expunged when the child turned 18, and for those over 14 the record would be expunged when the child turned 21. Expungement would not occur if during the five or ten-year period the child committed a similar or more serious offence. Subclause (5) gave the Minister the discretion to expunge at an earlier date if there were sufficient reasons. The record of diversion orders would be expunged when the child reached 21 years of age.

Comments had been received that there should be expungement allowed also for some of the offences in Schedule 3.

Mr Bassett noted that the Department of Justice was currently working on a re-wording of expungement of criminal records in general. He asked permission for re-wording of this clause to bring it in line with the proposed Criminal Procedure Amendment Bill. He confirmed that the principles would remain the same, but there was to be a change in wording.

Mr Jeffery agreed that it made sense for this clause to stand over, and that it should be re-considered when the Schedules were ready for discussion and consideration.

Clause 89

Ms Skhosana noted that this clause dealt with the making of Rules in respect of the procedures set out once the Act was passed, including procedural rules.

Mr Jeffery noted that this clause stated clearly that the Rules Board would put forward proposals, to be considered by the Minister, who would then make and implement the rules.

Clause 91

Mr Bassett said this clause was straightforward and self-explanatory, dealing with referral of information concerning age to the Department of Home Affairs.

Clause 93

Mr Bassett indicated that once again this clause made reference to the CPA. Section 297A of that Act set out what would happen if there was any patrimonial loss arising from performance of community service orders.

Clause 94

Ms Gallinetti noted Prof Sloth Nielsen had made a comment that this clause should be deleted, as she considered it an infringement of the prohibition against double jeopardy (double punishment for the same offence). She had pointed out that this offence was already created

under the Children's Amendment Act. However, Ms Gallinetti, with respect, did not agree with the assertions of Prof Sloth Nielsen. This clause was not concerned with sentencing or an offence. The Child Justice Alliance had pointed out that children being used by adults to commit crime were in need of interventions, and believed that this clause supported its contentions that all children should be included in the processes of the Bill such as assessment, preliminary enquiry and diversion.

Mr Jeffery noted that the clause contained in the Children's Amendment Act, stating that it was an offence in itself to involve in the commission of crimes, should perhaps also be repeated or referred to in this Bill.

Ms Gallinetti noted that similar wording had been included in the South African Law Reform Commission draft of this Bill. However, it was later removed, and instead this clause was inserted, noting that involving children in crime would be regarded as an aggravating factor in sentencing, because it was felt that it was possible to rely upon incitement or conspiracy.

Mr Jeffery felt that it would be easier to include a cross reference to the main offence.

Ms Gallinetti said that this could be done, but said that the offence of involving children was contained in a broad category which included other offences such as using child labour.

Mr Bassett agreed that reference could be made to the specific offence, and that he would work on a draft wording.

Clause 95

Mr Bassett indicated that this clause related to regulations, directives, national instructions, policy framework and register.

Ms Gallinetti noted that the main comments in relation to this clause had centred on the training issues, and the indicators. UNICEF had developed a standardised measurement for child justice data collection and it was suggested that this be aligned with the indicators set out in subclause (2)(c). However, she realised that this Bill may have been drafted having specific regard to what was available, and this was merely a suggestion.

In relation to training, there had been a suggestion that there should be a national policy concerning training and specialisation, to be gazetted every five years, and that this policy include training of members of the legal profession. There should be prosecutorial guidelines in relation to diversion. There had been reference by the Centre for Scientific and Industrial Research to a crime prevention strategy, but this was not apparent in the clauses of this Bill. That should also be addressed in this clause.

Mr Bassett indicated that he would look at all suggestions and see which could be incorporated.

Mr Carrim wondered if there should not be some reference in the preamble to crime prevention

Mr Bassett felt that the intersectoral structures could be put into the body of the Bill rather than hidden in the Regulations.

Mr Carrim made a suggestion as to the wording, asking whether children were in detention "at a court" or "in a court" in subclause (6)(a)(vi).

Mr Carrim asked what Parliament would have to do in relation to any national instructions

submitted under subclause 6(b).

Mr Jeffery indicated that this would provide the opportunity to Parliament to comment prior to the publication of the instructions.

Clauses 96, 97 and 98

Mr Jeffery indicated that these clauses dealt, respectively, with transitional arrangements, the repeal or amendment of the laws specified in the Schedules and the date of commencement. As already discussed, certain clauses may come into effect before others once the Bill was enacted.

Mr Carrim said that the Committee would have to take a decision on principle on policy issues before considering the Schedules. If there was to be the opportunity for all children to go through a preliminary inquiry, then the issues of sentencing and diversion would need careful consideration. It would be a complex issue. He asked why it had been decided not simply to repeat the Schedules to the CPA.

Mr Bassett said that there would not be sufficient correlation if these were to be used.

Mr Jeffery noted that these Schedules of the CPA had categorised serious and less serious crimes. He wondered why there should be a dual system created by the two pieces of legislation.

Mr Bassett said that further consideration would be given to how to draft the Schedules.

The Committee agreed that Schedules 1 to 5 would have to be dealt with after policy decisions had been taken.

Mr Bassett suggested that at this stage there would be little point in dealing with Schedule 6, as there would be further changes to it. Most would be consequential amendments, but he would recommend that the consideration of this Schedule stand over until all other issues had been finalised.

Mr Carrim noted that the Department would be redrafting the Bill, following the discussions to date. He reminded the Department that once there was clarity on the policy issues, the Bill must be expedited, and that the Department would be answerable to Parliament for progress on the Bill.

The meeting was adjourned.

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