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Child Justice Bill: Further Deliberations

Justice and Constitutional Development

Meeting Report Information

Date of Meeting: 18 Jun, 2008

Chairperson: Mr Y Carrim (ANC) and Mr J Jeffery (ANC)

Documents handed out:

[Child Justice Bill: Comments on Changes proposed by the Portfolio Committee](#) [1]

[Comments on the Child Justice Bill by the Department of Social Development](#) [2]

[Tracking changes made to Child Justice Bill at meeting on 17 June 2008](#) [3]

[Department's Response to Comments on the Child Justice Bill, 2002](#) [4]

Audio recording of the meeting:

[Child Justice Bill: Further Deliberations \[Part 2\]](#) [5]

[Child Justice Bill: Further Deliberations \[Part 1\]](#) [6]

Summary:

The Committee continued with its deliberations on the Child Justice Bill, with the Co-Chairperson reporting back to the full Committee on the deliberations and decisions of the sub-Committee that had considered the Bill in detail.

In respect of Clause 26, the difference between a lock up and police cell was explained, and the drafters would give further comments on the use of "appropriate" or "applicable". Under Clause 28 the Committee discussed whether there should be reference to sexual abuse or sexual offences, and it was decided to refer to the Sexual Offences Act. After discussion it was decided to leave the wording as it was for the rest of this clause. In respect of clause 30 there was considerable discussion as to whether previous diversions should be taken into account, and the sub-Committee had considered that previous diversions could well be relevant. The wording of sub-clause 30(2) included both options as the sub-Committee had been anxious to avoid the situation where a child might be held in detention for some time before a decision was taken that he or she could go free because of insufficient evidence. The Deputy Director of Public Prosecutions doubted whether this was necessary and Members agreed to discuss the matter further. Under clause 32 the wording was changed to provide that the Presiding Officer must cause or order the inspection and treatment of the child. Clause 33 reflected that it was highly undesirable to have children transported with adults to court. After considerable discussion it was decided to amend the clause so that the police would have to separate children from adults, unless exceptional circumstances dictated otherwise, in which case these would also have to be explained in court. Clause 34 was made subject to clause 41, allowing the prosecutor to dispense with assessment.

Clause 36 was discussed as to what information could be used in the bail application and in the trial. The wording was then amended to read "during any trial, bail application or sentencing proceedings". It was explained that clause 38 sought to ensure that the parents were, as far as possible, present at an assessment. The clause was however amended, so that the probation officer be allowed to exclude the parent only if it is this was in the interests of justice or the best interests of the child. The wording of Clause 40 would be moved to clause 92, where it was more appropriate. Clause 41 amended the reference to "control prosecutor" simply to "prosecutor" to make the procedure faster and easier. In respect of Clause 43 the Committee noted that there had been criticisms that there was too much overlap between clauses 43 and 47. The drafters however noted that they had been asked to draft the clause in this way, and would assess further if there was an overlap. In respect of clause 44 it was noted that Rapcan had objected that the requirements would divert too much time away from the core functions of probation officers. It was agreed that the wording be changed to "the service provider should be present", but the issue would be further discussed. The wording of clause 45 was changed to be

consistent with clause 36, and the wording of clause 50 was changed to be consistent with the Children's Act. The word "ubuntu" was removed from clause 51 as it was too vague. In Clause 52 the sub-Committee had recommended that the views of the victim should be considered, but that the decision to divert should be taken only by the Director of Public Prosecutions. No final decision was taken on the wording and the Committee would discuss it further. There would also be a new clause added after Clause 52(5) to the effect that if no order for diversion was made then the matter should proceed to the Child Justice Court.

In Clause 53 the wording was considered by some members to be too weak, but others indicated that this was purposely designed to ensure as wide options as possible because diversion orders could be very diverse. In respect of clause 56 it was decided that there must be further consultation with the Department of Social Development. In discussing Clause 63, the Committee reverted to the wording of the preamble and decided to change that wording so that there was greater consistency throughout the Bill.

There was considerable discussion over the wording of Clause 76. The policy adopted was that no child under 14 should be imprisoned. However, the sub-Committee recognised that there might be some cases of such a serious nature that they warranted imprisoning the child after he or she had turned 18, in addition to the time served at the child and youth care centre. Wording had been suggested by one of the commentators which seemed to encapsulate the gravity of the offence and the desirability of this measure. It was suggested that the court must again be approached as the child turned 18 to assess whether this was still desirable or appropriate. A further suggestion had been made by members of the sub committee that the manager of the child and youth care centre must approach the court, and that the time served in the residential facility must be taken into account.

Clause 77 stated that a court sentencing a child to imprisonment should use this only as a last resort. The Committee discussed whether previous diversions should be taken into account and the conclusion was that the matter needed to be further discussed, but that imprisonment should not be used on a child of 14 or under at the time of commission of the offence.

The Committee then went through the Schedules to the Bill. Crimes of dishonesty involving amounts below R250 000 were removed from Schedule 3, as this could have unintended consequences in relation to the abuse of children by syndicates. Gang-related crimes were moved from Schedule 2 to Schedule 3. There remained some difficult issues, which would be set out in the Committee's report.

The Committee finally returned to clause 4 and noted that the Bill would apply to all persons under 18 of age at the time of commission of the offence. Those under 10 would be dealt with elsewhere. However, there was an exception, since a person who had been under 18 at the time of commission of the crime, but who was between 18 and 21 at the time of the proceedings being instituted, could approach the Director of Public Prosecutions to have the offences dealt with under this Bill.

Discussions would continue at a subsequent meeting.

Minutes:

Child Justice Bill (the Bill): Continuation of clause by clause deliberations

Co Chairperson Mr J Jeffery (ANC) said he would continue to take the Committee through the Bill, clause by clause.

Clause 26

Mr Jeffery said that this was a roadmap clause dealing with the approach to be followed when considering the placing of a child. The amendments were largely in the nature of re-ordering.

Co-Chairperson Mr Y Carrim (ANC) asked what the difference was between "appropriate" and "applicable" in Clause 26(2)(b).

Mr Lawrence Bassett, Chief Director: Legislation, Department of Justice, said he would flag this and come back to it.

Mr Jeffery pointed out that the roadmap clauses were just outlines which were elaborated on in more detail in other clauses.

Adv L Joubert (DA) asked what the difference was between a police cell and a lock-up facility.

Mr Bassett replied that if the child was not at a police station, then any other facility could be used to detain such child, and this was referred to as a lock-up.

Ms Jacqui Gallinetti, Senior Researcher, Community Law Centre, UWC, pointed out that “presiding office” in sub clause (3) should read “presiding officer”. This change would be made.

Clause 27

Mr Carrim said he was doubtful about the question of lock-ups. The Committee had been informed that it was in police cells and lock-ups that most abuse occurred.

Mr Jeffery pointed out that this clause dealt with children under the age of 14 years, or those aged 14 and over for Schedule 1 and 2 offences, and would be applied only pending the child’s first appearance at a preliminary inquiry.

Mr Carrim said that he was concerned that the place where the child was detained should not be too far from the child’s parents.

Mr Bassett said that was normally the case.

Clause 28

Ms Bronwyn Pithey, Deputy Director of Public Prosecutions, NPA, referred to clause 28(2)(a) (iii), which referred to an allegation of sexual abuse.

She said that sexual abuse was not an offence in the Sexual Offences Legislation and she thought there should be congruence of the wording.

Mr Jeffery noted that the reason this was used was that the definition should be as broad as possible, and he wondered if changing this to “sexual offence” would not be narrowing the definition.

Adv Joubert said that in the Sexual Offences Act, the net was cast very wide and “abuse” was something less than an offence.

Mr Hennie Potgieter, Legal consultant to the Department of Justice (DOJ), read out the definition of sexual abuse in the Children’s Act.

Ms Pithey said the present clause in the Bill should be more specific, and should then speak of an allegation of a sexual offence of any nature.

Mr Bassett suggested that it could read “sexual offence as defined in the Sexual Offences Act”.

Mr Carrim said that Clause 28(1)(c) spoke of visits by parents, but he asked about other family members. He pointed out that the child’s parents may be unable to visit.

Mr Jeffery replied that it was in fact “any appropriate adults” who were being referred to and this could include any member of the child’s family.

Mr Carrim asked whether “trauma” should not be added to “injury” in Clause 28(2)(a)(ii).

Mr Jeffery replied that that would necessitate defining trauma again and that it was obvious from the context and the words “other circumstances” in sub clause (iv) that trauma was included.

Mr Carrim asked whether “as to” in Clause 28(2)(b)(iii) should not be re-inserted. This was agreed upon.

Adv Shireen Said, Chief Director: Promotion of Rights of Vulnerable Groups, Department of Justice, asked whether in Clause 28(2), provision should not be made for other interventions which might be warranted, not as a result of only an injury or trauma. She gave the example of the provision of sanitary towels, which had been denied because there was no budget in the past.

Mr Jeffery said the difficulty was that the section had been limited to injury or severe psychological trauma, and this would be widening it too much and would perhaps make it meaningless.

Mr Jeffery pointed out that Clause 28(1)(d) used the words “including the provision of” which was therefore not exhaustive but was open and allowed for any other interventions such as the provision of sanitary towels.

The Committee agreed to leave the clause as it was.

Clause 29

Mr Jeffery said the Sub-Committee had gone from less serious to most serious and had swapped the wording of prison and child and youth care centres.

Mr Carrim asked about the phrase “called into question” in Clause 29(4), and asked how a person would be aware that something had been called into question. He would have preferred the word “questionable”.

Mr Jeffery replied that the meaning of “called into question” seemed very clear and wondered whether “questionable” would have a legal meaning.

A discussion ensued on the desirability of the different phrases and the Committee decided to leave the wording as it was.

Clause 30

Ms Christine Silkstone, Parliamentary researcher, suggested that “upon conviction” in Clause 30(1)(e) should be changed to “if convicted”.

The Committee agreed.

Mr Carrim asked why the clause excluded children aged 17.

Mr Jeffery said the aim of the clause was to avoid having to put children awaiting trial in prison.

Mr Carrim said he had not realised this applied to children awaiting trial.

Mr Carrim asked for, and received confirmation, that a child of 16 or 17 years old who had been found guilty of a crime in Schedule 2, could be held in prison.

Mr Carrim asked, with regard to Clause 30(3)(c) whether previous diversions were taken into account, as were previous convictions, saying he did not see why they should not be.

Mr Bassett said this issue had been flagged for further discussion.

Mr Jeffery said that considering previous diversions was not the same as considering previous convictions for the purpose of sentence. It was a question of whether, for the purpose of deciding whether to place a child in prison awaiting trial, previous diversions should be considered. He said that the Committee took the view that it was a relevant question and that previous diversions should therefore be taken into account for this purpose.

Ms Gallinetti said she knew that this referred only to the situation pending trial and that it applied only to Schedule 3 offences. However, she asked how the fact that a child had been diverted three years ago on a shoplifting charge could be relevant to the question of whether to detain him or her in prison pending trial.

Mr Jeffery replied that it could be relevant if the child had been diverted on a more serious offence.

Ms Gallinetti asked whether the clause should not then specify “diverted on a Schedule 3 offence”.

Mr Jeffery said the question was whether it was relevant to consider previous diversions and the feeling was that it was indeed relevant.

Mr Carrim asked how “probable period of detention” as referred to in Clause 30(3)(h) would be determined.

Mr Jeffery replied that there would be focus on what the investigating officer in the case said about its seriousness.

Ms Pithey asked about Clause 30 (2) and why the subsection referred to two requirements, namely that the Director of Public Prosecutions (DPP) must confirm an intention to charge the child, as well as the necessity for sufficient evidence to institute a prosecution. She was concerned about introducing the second criterion at this early stage.

Mr Jeffery replied that the problem being addressed was the situation where a person, including a child, was arrested and held in prison, yet at some far future date the DPP declined to prosecute because of a lack of evidence. He said that this clause was intended to preclude charges being brought against a person when a reading of the docket would have revealed that there was insufficient evidence.

Ms Pithey said that deciding to charge a person and saying that there was sufficient evidence were actually one and the same thing.

Mr Jeffery said that the Members did not want a situation where children between 14 and 16 years of age were imprisoned or detained for months, before eventually being allowed to go free because of insufficient evidence. That was why the decision had been taken to "elevate" the requirement from the decision of the "prosecutor" to written confirmation from the DPP that there was sufficient evidence and the matter was likely to proceed.

Ms Pithey said she did not believe that this two-pronged process would counter that, because practically speaking, the decision would have to be made on the morning the person appeared.

Mr Jeffery said the Committee would flag the issue and return to it.

Mr Pithey added that in practice, what she thought would happen was that the DPP would want to rather err on the other side of caution and would say there was not enough evidence to justify the detention of the child.

Clause 32

Advocate Said suggested that Clause 32(e) should be changed to provide that the Presiding Officer would cause or order the inspection and treatment of the child, because he or she would not necessarily do so themselves.

The Committee agreed to change the section to reflect this.

Clause 33

Mr Jeffery said the clause was a difficult one because it was highly undesirable to have children transported to court with adults.

He said that if one made the provision absolute, there was a danger that the South African Police Service (SAPS) would say they could not bring the child separately, and therefore would not bring him to court at all. He therefore proposed the Committee retained "if reasonably possible" in the clause.

Mr Carrim suggested perhaps using the phrase "unless there were exceptional circumstances"

Adv Joubert said the whole purpose of the Bill was to protect children and there should not be any gaps in an area as serious as this.

Ms Gallinetti asked how SAPS intended to protect children in a police van when they were unable to protect adults. She said that the Constitution required that children be separated from adults at all times in the criminal justice system, and that must include during their transportation to court.

Ms Pithey said that perhaps the "exceptional circumstances" phrasing should be adopted, and that it should in addition be stipulated that the SAPS would have to give reasons in court for their failure to comply with the clause.

Mr Bassett suggested that to tighten up the clause even further, it was possible to insert wording such as "unless exceptional circumstances dictate otherwise" or "unless it is virtually impossible".

Mr Jeffery said he thought the "unless exceptional circumstances dictate otherwise" formula was fine. This would ensure that the SAPS would have to separate children from adults, unless exceptional

circumstances dictated otherwise, and these would have to be explained in court.

Clause 34

Mr Jeffery suggested the clause be made subject to Clause 41, allowing the prosecutor to dispense with assessment.

Ms Pithey agreed with the suggestion.

The Committee agreed to the amendment.

Clause 36

Advocate Said suggested that "criminal proceedings" be added to "criminal trial" in Clause 36 (1)(b).

It was agreed that "trial" was more limited than "proceedings" and that if one could not use such information in the trial, this should apply to the bail application as well.

Mr Jeffery asked why one could not use such information in the bail application.

Ms Pithey felt that that would be unduly prejudicial to the child and would defeat the purpose of the clause.

At Mr Bassett's suggestion, the Committee agreed to change the clause to read "during any trial, bail application or sentencing proceedings".

Clause 38

Mr Jeffery said that the thinking behind this clause was that it should be desirable to have the parents to be present at an assessment as much as was possible.

Clause 38(2)(b) created a problem, in his view, because it was very subjective, as the probation officer could exclude the parent if he or she was likely to disrupt the assessment, and it allowed a probation officer to easily exclude a parent from the assessment. He suggested that the probation officer be allowed to exclude the parent only if he or she had already disrupted the assessment.

Ms Pithey agreed, but said the flip side was that it was often in the child's best interest that the parent not be present at such an assessment.

Mr Jeffery said the original intention had been to require the disruption to have already occurred in the past. He cautioned that the probation officer was being given a lot of power, and that he or she could unnecessarily or capriciously prevent the parent from being present.

Adv Joubert said he thought the formula allowing the probation officer to exclude the parent "if it is in the interests of justice" was a good one.

Mr Bassett said that such a formula was used in the context of preliminary inquiries.

The Committee agreed to adhere to the concept that the probation officer could exclude a parent's presence "if it is in the best interests of the child or in the interest of justice" and decide on the precise wording later.

Clause 40

Ms Gallinetti said that one of the purposes of assessment was to determine whether the child had been used by an adult to commit a crime. She suggested that with regard to Clause 40, Clause 92 should come into operation. That clause required a court official to report to the police the fact that he suspected that the child was being used by an adult to commit the crime in question.

Mr Jeffery said that the probation officer was there to assess the child and give a report, for the purpose of determining what happened to the child. If one allowed Clause 92 to apply in this manner, he wondered if this would not be exposing the probation officer to the risk of being called as a witness in a subsequent trial against the adult.

Advocate Said commented that the fact that this was being included in the assessment report placed an obligation on a probation officer to report and this did not mean he or she could later be called as a witness.

The Committee agreed with the Chairperson's suggestion that the provision be placed under Clause 92, where it more properly belonged.

Clause 41

Mr Jeffery noted that this clause had remained essentially the same but had merely been re-worded.

After some discussion, it was agreed to change "control prosecutor" in Clause 41 (5) to "prosecutor" as the procedure envisaged before a preliminary inquiry in respect of Schedule 1 offences had to be quick and easy.

Clause 43

Mr Jeffery raised the fact that the Deputy Minister of Justice had commented that there was too much overlap between Clauses 43 and 47 and that the former perhaps had too many details.

He pointed out that while the former was a mere roadmap, the latter was a more detailed exposition but he asked whether other Members agreed that there was perhaps too much detail in the former clause.

Mr Bassett said that as far as he knew, Clause 47 dealt more with procedure while Clause 43 was about the objectives of a preliminary inquiry. The drafters had specifically been asked to re-insert the objectives because of their prior omission from this clause and the fact that they had been in the 2002 Bill

Mr Jeffery asked Ms Silkstone to look at both clauses and to assess whether there was an overlap and if so, whether certain provisions should be deleted from either of the clauses.

Mr Carrim said he liked Clause 43 as it was and suggested that the Committee look only at Clause 47.

Clause 44

Ms Gallinetti said that the NGO Rapcan had objected to the fact that the clause allowed a probation officer to identify a diversion service provider who should be present at the preliminary inquiry. Rapcan had suggested that this would divert too much time from the core function of the probation officer, which was to offer diversion services to children.

After discussion, it was agreed that Clause 44 (2) be changed to read that "a diversion service provider identified by the probation officer *may* be present at the preliminary inquiry".

Mr Carrim said he did not agree with this NGO's objection. The aim of having them present at the preliminary inquiry was so that the court could get a sense of the person that they were going to assist.

Mr Carrim also said that level two diversion was really a sham because it was really equivalent to level one and would mean that a 17-year old who had committed a serious offence would receive a mere slap on the wrist. He felt that it was imperative that two or more level 2 options for diversion which were more severe, be provided.

Mr Jeffery said that it was a question of degree. Some service providers were saying that they should be required to attend "if practicable" but he really did not think the exact wording should be such a big issue.

It was agreed that the service provider *should* be present but that it should not be made compulsory.

Mr Jeffery asked if it would not be preferable for the service provider to be present at the preliminary inquiry of the person whose diversion was to be handled.

Mr Carrim said he did not see why the service provider should not be compelled to attend, because if not he did not see how they could be expected to provide a long-term diversion for a 15-year old boy.

The Committee finally agreed to keep the wording as "should" so that the service provider would not be compelled to attend.

The Committee flagged the issue for further discussion in any event.

Clause 45

After a brief discussion, the Committee agreed to change the wording of Clause 45(2) to read "No

information.....in any trial, bail application or sentencing proceedings” to be consistent with Clause 36.

Clause 50

Mr Potgieter suggested that the words “and protection” be added to “child in need of care...” in Clause 50(i) to make it consistent with the Children’s Act.

The Committee agreed.

Clause 51

The Committee agreed to remove the word “ubuntu” from Clause 51(k) because it was too vague and admitted of a range of interpretations.

Clause 52

This clause dealt with the prosecutor’s right to ask for the diversion of a matter. Mr Jeffery explained that after a discussion in the Sub-Committee, it had been decided to insert the phrases “where possible, considered the views of the victim...” in Clause 52(2)(a) and “considered the views of the victim...” in 52 (3)(b)(i). These phrases required the prosecutor or the DPP, as the case might be, to first consult the victim or any party with a direct interest in his or her affairs, before indicating that the matter be diverted.

It was pointed out that with regard to Schedule 1 offences, it was required to consider the views of the victim, “where possible” whereas with regard to Schedule 3 offences the views of the victim or his family *had* to be considered.

Mr Jeffery explained that it had been decided to use the phrase “considered the views of...” rather than give the victim or his family or representatives a complete veto.

Mr Jeffery also said that as it stood, the clause required that the decision to divert be taken by a DPP. The sub committee had not wanted that decision to be taken by anyone below the seniority of the DPP. The question was then whether to require the victim’s views to be taken into account or that the victim have the chance of a veto, in which case there could be irrational refusal. It was unlikely that a DPP would decide to divert a matter if a victim were vehemently opposed, because the DPP would then have to justify such a decision. He considered this to be a better option.

Mr Carrim pointed out that if one gave the victim a veto, thus requiring the victim’s consent, it became too subjective and led to unevenness of application. For instance, in one case of a severe assault, the victim’s family might agree to diversion, whereas in another far less serious case, the family of the victim might vehemently oppose diversion. The Bill was very victim-centred and the Committee had even decided to insert a Victim Charter into the Bill and a section in the preamble.

Mr Carrim said that as drafted, there was no obligation on the State to canvass the views of the victim. He asked the Committee to consider whether there should not perhaps be such an obligation.

Secondly, Mr Carrim pointed out that in terms of the Bill, even where a prosecutor asked for diversion, the magistrate was not obliged to accede under clause 52(5), and this ensured the presence of a system of checks and balances.

Mr Jeffery said that although the previous version of the Bill had said that where the prosecutor indicated that the matter should be diverted, the magistrate was obliged to accede, but the sub-Committee had felt that this made the magistrate a mere rubber stamp of the State. The sub-Committee had wanted the prosecutor and the presiding officer to “agree collectively”. If the wording was to be accepted in line with the suggestions, then the presiding officer could refuse to divert and if he did so, the prosecutor could decide to withdraw. That created an informal form of checks and balances between them. He said that the point had been raised as to whether it should not be stated that if the matter were not diverted, it would go to trial. However, he thought that was implied. There would be no point to the preliminary enquiry if the magistrate were merely to act as a rubber stamp.

Mr Jeffery noted that there had been a suggestion from the Centre for Child Law that there should also be a requirement to consult the police only where possible. He did not agree with this. He felt that the investigating officer needed to be kept in the loop by the prosecutor at all times.

Mr Carrim asked whether it would not be preferable to state that the prosecutor “must” and not only “may” consider the views of the victim in Clause 52. This would place an obligation on him to do so in the case of Schedule 1 and 2 offences.

Mr Jeffery reminded the Committee that previously there had been no reference to the victim, but the Committee had added it. There was a long debate on what wording to use – perhaps “consider the views of the victim *unless not reasonably possible to do so*” but the Committee decided to flag the issue and revisit it.

Mr Jeffery explained that there was a two-stage process. First, the prosecutor would tell the preliminary inquiry that the matter should be diverted and secondly the prosecutor would request the presiding officer to make an order to this effect.

The Committee had a protracted discussion on the procedure with regard to diversion and whether the prosecutor should have the final say

Ms Pithey noted that in practice, if the prosecutor decided that the matter should be diverted and the presiding officer did not agree, there was never any real discussion and a prosecutor would never threaten to then withdraw. Although it was a good idea, because it provided a checks and balance on the question of diversion, the prosecutor, as *dominus litis*, should have the say on the question of diversion.

Mr Jeffery said that perhaps there should be a new clause inserted after Clause 52(5), stating that if the presiding officer did not make an order for diversion, then the matter should proceed to the Child Justice Court for trial.

The Committee agreed to do this.

Clause 53

Mr Carrim commented that the level 2 diversion option providing for “compulsory attendance at a specified centre....for a specified vocational, educational or therapeutic purpose, which may include a period of temporary residence” was weak and that there should be a diversion option that was commensurate with the gravity of the offence, as was the case in the UK and in many other countries.

He said that this was particularly important because of the current climate, with high crime levels including crimes perpetrated by children, as well as the public perception that the State needed to be tougher on crime, resulting from years of the public suffering the effects of crime.

Mr Jeffery responded that this was a new law and that the clause stated that the options *may* include certain matters. Diversion was entirely discretionary and it was not sensible to legislate that if a child committed a serious offence, there would be only one specific diversion option. There was a range of options. At the end of the day, it was up to the prosecutor and the magistrate to decide on an appropriate diversion option, he said. He pointed out that diversion would only be possible to an accredited diversion programme with an accredited service provider.

Mr Carrim asked Ms Gallinetti to research the matter, especially with regard to overseas jurisdictions and to report back to the Committee.

Ms Gallinetti pointed out that diversion options were by their nature, very diverse. There was usually a programme designed to intervene with the child’s life. This programme would have specific activities and outcomes in mind, to make the child realise the seriousness of the offence and provide him with the skills to ensure that he did not repeat the crimes. Most programmes took place within the child’s community so as to re-integrate the child into the community but some programmes involved a residential component.

She said she was not aware of any programmes that were more onerous and said that the options in the proposal of the Centre for Child Law covered most of those used in overseas jurisdictions.

She also pointed out that the time periods provided for were much longer – for level 2 diversions, up to four years – something that was new in South Africa, where in the past the maximum time period for a diversion programme had been one year.

Ms Gallinetti referred to a submission by Rapcan that the time period should include monitoring and follow-up, and said that she thought there was merit in the submission because at present, monitoring and follow-up was not included in the diversion programme, although it should be. Even magistrates recognised this.

Mr Potgieter pointed out that these level 2 diversion options were not so novel to South African law. Section 297 of the Criminal Procedure Act (CPA) provided for the postponement of sentence on certain conditions, which were similar to diversion options.

Clause 55

Mr Jeffery noted that the main intention here was not to have the accused child working in the same place as the complainant during the diversion programme.

Clause 56

Mr Jeffery pointed out that both the diversion service provider as well as the diversion programme should be accredited. There was a discussion on whether, as provided in Clause 56 (2) (a) (iii), the Department of Social Development "must" assist with financial and technical support. Whilst the original wording had been stated as "may" it was felt that "must" was stronger. His own view was that if good and thorough diversion programme were required, then the clause should make financial backing obligatory.

Ms Gallinetti said that even at the moment, some diversion programmes had closed down because they received insufficient support from the Department of Social Development.

Mr Carrim pointed out that one department could not impose a financial obligation on another unless they agreed.

The Committee decided there should be further consultation with the Department of Social Development in this regard.

Mr Jeffery asked Ms Cordelia Kok, Deputy Director, DoJ to go back to the Department and discuss the issue.

Clause 57

Mr Jeffery said that the sub-Committee had discussed how the Court would ensure the child's compliance with the diversion order. The clause required the probation officer to report to the presiding officer on the child's compliance. Sub clause (5) now provided that once the child had completed the diversion programme, the probation officer had to submit a report to that effect to the prosecutor, who then in turn had to submit the details to the Director General of Social Development for entry into the register.

The Committee agreed that the clause should stand as it was.

Clause 63

Mr Jeffery noted that the sub-Committee had discussed the preamble to the Bill, which talked of "creating" Child Justice Courts, and discussed whether it should not have talked of converting existing courts. After discussing different wording options, the Committee decided to change the wording in the preamble to "*providing for* child justice courts to adjudicate matters involving children, which are not diverted".

The definition of a Child Justice Court was changed to read "a court contemplated in the Criminal Procedure Act, dealing with the plea, trial and sentencing of a child".

Clause 76

Mr Jeffery noted that the Committee had dealt at length with Clause 76(3), which provided that a Child Justice Court could, in exceptional circumstances or if compelling reasons existed, impose a sentence of compulsory residence at a child and youth care centre as well as a sentence of imprisonment to be served once the child turned 18.

The Committee received several submissions from various parties who were very much averse to this clause. The rationale behind it was that although, as a matter of policy, children under 14 should not be imprisoned, there might yet be cases which were so serious that they warranted imprisoning the child once he or she had turned 18, rather than allowing him or her to go free. An objection was expressed to the idea of rehabilitating a child and then sending him back to the prison environment.

Mr Jeffery said he felt it was generally agreed that it was not desirable, for very serious crimes, simply to allow the child to go free once he or she had turned 18.

The sub-committee had agreed to adopt the wording suggested by one academic so as to read: "A child who has been convicted of an offence (1) referred to in Schedule 3, (2) that is exceptionally serious (to the extent that it would justify a long term of imprisonment if the offender were an adult person)...may, under circumstances where it would be impermissible and inappropriate to sentence the child to imprisonment directly...(4) in addition to a sentence provided for in this section.... be sentenced by a child justice court to a term of imprisonment, which is to be served once the child has been released from the child and youth care centre". He felt that this wording was more clear.

Mr Jeffery said that although the aim was, in serious cases, to sentence the child to compulsory residence in a youth care centre, as well as to imprisonment once he turned 18, there was also a recognition that one did not want to deprive the offender of all hope.

The submission also contained a suggestion that the court be approached before the child started serving the prison sentence so as to re-evaluate the necessity or desirability of the child being sent to prison.

Mr S Swart (ACDP) agreed that the new wording suggested would at least give the child some hope.

Mr Jeffery emphasised that this applied to children under the age of 14.

Ms Gallinetti said it should be mandatory for the manager of the child and youth care centre to approach the court for this purpose, as the manager would be the one person best equipped to judge the child after those years, and give a report whether the child had responded well to the first sentence.

She suggested that where the child was sent to prison on reaching the age of 18, the time served in the residential facility should be taken into consideration as time served for the purpose of parole in terms of Section 39 of the Correctional Services Act.

Clause 77

The clause stated that a court sentencing a child to imprisonment must do so only as a measure of last resort and for the shortest appropriate period of time.

There was a discussion after Mr Carrim mentioned that this clause repeated what was stated in Clause 69(1)(e), but Mr Jeffery felt that it was a good idea to repeat the idea in a self-contained and separate clause to give extra clarity to the presiding officer.

The Committee then discussed Clause 77(2)(iii) and the question of whether previous diversions (in addition to convictions) should be considered for the purpose of deciding whether to send the child who had committed a Schedule 1 offence to prison.

Mr Jeffery reminded Committee Members that they had previously decided that diversions should not be treated as convictions.

Mr Carrim said he believed that diversions should be considered in this context.

Ms Gallinetti said it seemed unfair that, if a child had complied with the provisions for diversion and had to all intents and purposes been rehabilitated, that the diversion should still count against him or her in this context.

She further noted that if it should be considered, then why should it apply only to Schedule 1 offences and not Schedule 2 and 3 offences.

Mr Carrim reminded the Committee that what was being suggested was not that the previous diversions should justify a stiffer sentence but merely that they should be taken into account.

Mr Swart suggested that since everyone seemed to be struggling with the issue of diversions, the Committee should flag the issue for further reconsideration.

Mr Jeffery stressed that there could be the situation where the child committed a minor offence under Schedule 1 and was sent for diversion, but then afterwards committed another offence. He asked whether in this case it was felt that the previous diversion should be taken into account.

There was furthermore the danger that a magistrate who was unreasonable or motivated by malice

could use the provision to send a child to jail.

He said that either the wording should go into the clause dealing with the legal consequences of diversion and was a factor to be considered for sentencing, thus changing the law dramatically, or it should be deleted from this section too.

Ms Gallinetti said that it would be acceptable that the court looked at the fact of previous diversions in order to come to the conclusion that it had no alternative but to sentence the child to jail.

Mr Jeffery said that Ms Gallinetti's argument was a strong one. However, he reminded the Committee that the principle had been that a child could not be treated more harshly than an adult. He found it difficult to reconcile this principle with retention of this clause, and he felt that it should be removed. He suggested that the Committee should flag the issue and put on hold the question as to whether it should be included in the legal consequences of diversions as a factor to be considered for sentencing purposes.

Mr Swart suggested that on this issue the Committee should be guided by what the department and the prosecutors felt was desirable.

Mr Jeffery referred to the submission by Professor Terblanche that there be a ban on children under the age of 14 being sentenced to imprisonment (Clause 77 referred only to children of 14 years or older). The sub-Committee seemed to agree that children under the age of 14 at the time of the commission of the offence, should not be in prison. He therefore suggested that Clause 77(3) be changed so as to provide that a sentence of imprisonment should not be imposed unless the child was 14 years or older at the time of the commission of the offence.

Schedules to the Bill

Mr Jeffery referred to the fact that the Committee had decided to remove dishonesty crimes where the amount involved was below R250 000 from Schedule 3, as this could have unintended consequences in relation to the abuse of children by syndicates for the purpose of committing a crime.

Gang-related crimes were moved from Schedule 2 to Schedule 3.

He said that the sub-Committee had felt that values of money were not particularly relevant when it came to children as a child could steal something without realising its real value. However, the sub-Committee had felt that there should be a distinction between Schedule 1 and 2, with Schedule 1 including, for example, theft where the amount involved did not exceed R2 500.

He pointed out that Schedule 2 offences did not have to be leniently treated and if there was evidence that a gang or syndicate was involved, the prosecutor and court would bear this in mind.

Mr Swart said he was concerned about adults using children for the commission of offences, a matter which had been the subject of an ongoing debate among the Committee for the last eight years. He also reminded Members that this Committee had introduced a statutory crime of adults using children.

Mr Jeffery said this schedule was talking about the economic crimes such as theft and fraud, where the amounts in question exceeded R250 000. He noted that if these did not fall under Schedule 3, it was far more difficult to avoid a prison sentence, but the sub-Committee had not wanted to put any of the economic crimes in Schedule 3. His concern was that as much as the intention was to target children who were used by syndicates, it would also thereby be "catching" everyone else.

With regard to the fraud crimes, Mr Jeffery said he was particularly mindful of computer fraud where a child stole a large amount of money without realising the gravity of the offence. The sub-Committee did not want such offences to fall under Schedule 3.

Mr Swart suggested that some of these more difficult issues be mentioned in the Committee's report.

Mr Jeffery said that when it came to the amount involved in the crime, obviously the court would consider this when it came to sentencing. However, the concern was that Schedule 3 applied to much more than just sentencing and one did not want to widen the net to such an extent that people would inappropriately be caught by Schedule 3. In any event, a prosecutor looking at a Schedule 2 offence could always pick up that this was a syndicate-related crime and deal with it accordingly.

The Committee then dealt with several of the earlier clauses in the Bill.

Clause 4

Mr Jeffery reminded the Committee that the first issue here was whether the Bill should apply to persons who were 10 or older but under 18 years of age, and that the under 10s and over 18 to 21s were an extension which applied later in the Bill.

The sub-Committee had decided that the Bill should be applied to all persons who were under 18 years of age at the time of the commission of the offence, because they had felt that the under-10s were covered elsewhere.

The more substantial issue was with regard to those between the age of 18 and 21.

The general intention had been that these matters would be dealt with under this Bill if the offence had been committed when the person was under 18. However, a person charged with an offence could approach the NDPP to have matters dealt with under this Bill if, at the time when proceedings were instituted, such person was between 18 and 21 years of age. The intention was not that the Bill could apply to those who were 19 at the time of the commission of the offence. This was to avoid opening the floodgates to those who were between 18 and 21 at the time of the commission of the offence.

The Committee would deal again with the Bill on the following day.

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