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Child Justice Bill: further deliberations

Justice and Constitutional Development

Meeting Report Information
Date of Meeting: 20 Jun, 2008
Chairperson: Mr Y Carrim (ANC)
Documents handed out:
Working Draft version of Child Justice Bill (20 June 2008) [1]
Audio recording of the meeting:
Child Justice Bill: further deliberations [2]

Summary:

Only the Chairperson, Members of the sub-Committee and the drafters from the Department of Justice attended the meeting, which took the form of discussions and suggestions for re-drafting, which would be summarised and circulated to the Chairperson and other Members for decisions in the following week. No changes were suggested to Clause 76. There was extensive discussion around clause 77. Independent advice from two evidence and criminal procedure experts had confirmed that it was possible to legislate that rules apply at a specified time other than the time of commission of the offence. This legislation would apply to those committing offences between the ages of 10 and 18. However, a person who had been under 18 at the time of commission of the offence, but who had turned 18 by the time he appeared before the Court, could apply to the NPA to be dealt with in terms of this legislation.

The National Prosecuting Authority representative indicated that she felt that an exception should be inserted in clause 77 in relation to criminal capacity. The suggestion was made that it would not offend any constitutional principle to specify that the total ban on imprisonment would apply to all those who were under 14 at the time of sentencing. However, the equality argument would apply; as a child who was under 14 when committing an offence would be better off if also sentenced while still under 14, as opposed to being caught and sentenced when he or she had turned 15 or 16. This concern would be raised in the Committee report. This clause was likely to be subjected to Court scrutiny. It was suggested that the "institution of proceedings" could be used as a compromise date, and that this should be defined. Clauses 4 (2) and 4(3) would then remain as worded at present, whilst clause 77(1)(a) would replace the words "commission of offence" with whatever wording was finally agreed upon. The same change would be made to Clause 77(3). The Committee would need also to consider clause 77(2) as similar words appeared, although they referred in this subclause to a different Act.

Minor technical amendments were suggested to clause 87. In clause 88 the sub-Committee and Chairperson debated whether it was necessary to insert a time frame for the Rules, although it was pointed out by the drafters that in fact it might not be necessary to make any court rules. Technical changes were suggested to clause 89. There was discussion whether service delivery organisations should not be invited to meetings as well, and the sub-Committee was asked to agree on suggested new wording. It was suggested, in relation to clause 93(2)(b), that the policy framework should be published "for public comment" in the Gazette. A cross reference to section 8 would be inserted in clause 96(4). The general feeling was that clauses 43 and 47 should not be merged. A suggested new wording was given for Clauses 56 2(b)(ii) and (iii). The Committee would debate these suggestions in full on the 23 June.

Minutes:

Child Justice Bill (the Bill): Further deliberations

The Chairperson, Mr Y Carrim (ANC), was the only Member of the Committee able to attend the meeting, although representatives from the drafting team, the sub-Committee (National Prosecuting Authority, Department of Justice, Community Law Centre) and the Parliamentary Researchers and Committee staff were also present. It was therefore decided that the Chairperson would raise any concerns arising from the previous meeting, that those present could discuss them, but that no final decisions would be taken at this meeting. The drafters were asked to summarise the policy issues and any suggested changes separately, and convey these to the Chairperson, who would in turn raise the matters with the other Committee members.

Mr Lawrence Bassett, Chief Director: Legislation, Department of Justice, noted that there was a new version of the Bill, dated 20 June.

Clause 76
The Chairperson referred to Clause 76. He pointed out some stylistic suggestions and suggested that in sub clause (1) the wording should be "referred to" rather than “provided for”.

Ms Bronwyn Pithey, Deputy Director of Public Prosecutions, National Prosecuting Authority (NPA), said that the words "provided for" would usually be used in referring to sections from another Act, and it was in that sense that they were used here.

The Chairperson agreed that the words should be left as they currently appeared.

Mr Hennie Potgieter, Consultant to Department of Justice, said that at the previous evening's meeting it had been suggested that the words "substantial and compelling circumstances" should appear in the main body of the clause. However, that did not work. He pointed out the new wording of clause 76(3)(a)(ii).

The Chairperson said, in relation to Clause 76(3), that an adult could have received a sentence of more than ten years for a particular offence. A child offender could be sentenced to a certain number of years in a child and youth care centre, then transferred to a prison, unless another Order was given. He confirmed that there was no possibility of increasing the sentence once the offender moved to the prison.

The Chairperson asked, in relation to clause 76(4)(f) whether the words "for the appropriate authority to consider” should be used in line 3.

Mr Potgieter said that "with a view" had been taken out and the new wording was "to take appropriate action"

The Chairperson agreed that this wording was stronger.

No changes were therefore made to this clause.

Clause 77
Mr J Jeffery (ANC) phoned in to the Committee to advise that he had consulted with two evidence and criminal law experts from University of Cape Town and University of Stellenbosch on the application of Clause 77. Both had independently expressed the view that although the general law of evidence would apply at the time of commission of the offence, it was possible to legislate for this rule to apply at the time of institution of proceedings, or arrest, or summons to appear at the preliminary enquiry. Therefore Clause 2 would remain as the exception to the general rule. A person who had been under 18 at the time of commission of the offence, but who had turned 18 by the time he appeared before the Court, could apply to the NPA to be dealt with in terms of this legislation. Dr Ann Skelton, who was also consulted, said that she did not see that this would affect any Constitutional principle.

Ms Bronwyn Pithey agreed that she did not have a problem with that suggestion. She was concerned about the application of section 77, relating to the sentencing of offenders under 14. Those at the meeting had discussed it before, but she felt very strongly that there should be an exception in relation to clause 77 in relation to criminal capacity.

Mr Jeffery agreed. However, he would also like to cover the issue of under 14s. The academics he had consulted felt that it would not offend any Constitutional principle to say that the total ban on imprisonment would apply to those under 14 *at the time of sentencing*. The intention was to keep all those under 14 out of prison, and this was a point also raised by Dr Skelton and other stakeholders

during the public hearings.

Ms Pithey was not quite in agreement with that. Whilst she agreed with the general principle that no child under 14 should be imprisoned, she thought that the punishment imposed should be reflective of the age at which the punishment was imposed. However, she had no doubt that the principle would be questioned at some stage.

Mr Jeffery reiterated that the sub-Committee had felt very strongly that all those under 14 should not be imprisoned. However, the fact that the child, being sentenced when he was over 14, had committed the offence when he was under 14 was something that the Court could look at and take into consideration.

Ms Pithey said that she was concerned that this could be applied in an arbitrary way. A child who committed the offence when he was under 14, would be in a more fortunate position if he was caught and sentenced at the age of 14. A child who had committed the offence at the age of 14, but was only being sentenced when he was 15 or 16, could be sent to prison. That offended against the equality principle.

Mr Jeffery said that the intention of the ban was simply that prisons were not appropriate places for 14 year olds; the equality principle had not necessarily been considered in depth.

The Chairperson thought that perhaps this did not need to be legislated for in detail, but the concerns could be raised in the Committee's Report.

Mr Jeffery summarised that there were three main clauses that would apply. Clause 4 , dealing with the application of the Act, would apply to all those who were under 18 at the time of institution of proceedings. The "institution of proceedings" would have to be defined. The intention was clearly to keep children out of prison, particularly those under 14.

Clause 4(2) would then apply as an exception to a child who was under 18 at the time of commission of the offence, but was between 18 and 21 at the time of institution of proceedings.

Clause 77 would be read with these.

Mr Jeffery noted that Ms Pithey's point of equality would need to be looked at further, and the agreement to limit the application would also need to be addressed. However, he agreed with her that the clause was likely to come under examination by the courts, and prior to that it would also need to be passed by the NCOP. However, he reiterated that the intention was clearly that those under 14 at the time of sentencing should not be imprisoned.

The Chairperson said that perhaps the date of arrest or institution of proceedings could be taken as the appropriate date.

Ms Pithey said that if "the institution of proceedings" was used, that would be preferable to the time of sentencing, as it was closer to the time of commission of the offence.

Mr Bassett agreed that this would be a good compromise.

Mr Potgieter noted that Clause 4 (1) would therefore delete "commission of the alleged offence" and replace it with "the institution of criminal proceedings, was under the age of 18 years."

The institution of criminal proceedings would have to cover the arrest, the time of summons. Because this was referred to a great deal, it should go into the definitions section in clause 1.

The Chairperson wondered if it would be too onerous also to include the definition in the text of this Clause.

Mr Bassett felt that the institution of proceedings started at court stage.

Ms Pithey said that the institution could include arrest. The institution of a prosecution would start when the matter reached court. In terms of section 76(1) of the Criminal Procedure Act (CPA), the criminal proceedings commenced at the time of notice to appear. They thus excluded arrest.

Mr Bassett suggested that the wording could be "at arrest" or "at warning".

The Chairperson would prefer that it be "arrest, notice, written warning or summons".

Ms Christine Silkstone said that the wording "including arrest." could be used, to extend the usual meaning.

The Chairperson suggested that the drafters discuss the matter, and come to an agreement.

Mr Potgieter summarised that clause 4 (2) and 4(3) would remain as worded at present.

Mr Potgieter said that Clause 77(1)(a) would delete "commission of offence" and substitute it with whatever wording the drafters chose in relation to the institution of proceedings. The same change would be made in Clause 77(3).

The Chairperson said that there was reference in sub clause 77(2) to Schedule 2 of the Criminal Law Amendment Act (CLAA) and asked what correlation there was to the Schedules of this Bill.

Mr Bassett said the closest comparison would be Schedule 3 of this Bill, but it was more exhaustive than the Schedules to the CLAA.

The Chairperson asked about section 51 of that Act, and asked how the Court would decide how the person would be treated.

Mr Bassett said that if a person had committed an offence falling within the scope of Schedule 2 of the CLAA, they would, as far as they were 16 or 17 years old, fall under that Act for the purposes of sentencing. He noted that this section applied to minimum sentences.

The Chairperson accepted that.

Mr Potgieter said that Clause 77(2) also referred to the "time of commission of the offence. " He asked if this should also be changed.

Mr Bassett said that he would raise the matter with Mr Jeffery and ask him whether he wished it also to be changed. It was a slightly different principle, since it was referring to another Act.

Mr Basset noted that Clauses 77(3)(b) and (c) also had outstanding issues. Children could be sentenced to imprisonment if “substantial and compelling reasons” existed.

The Chairperson thought that on the previous evening this was no longer to be flagged for further discussion. He asked that Mr Bassett check on this point with Mr Jeffery.

The Chairperson noted that certain wording of clause 77 had also been taken out and removed to other clauses.

Mr Bassett clarified that the principles had all been retained, with one exception, relating to expungement.

Clause 87
The Chairperson suggested that the words "as to" should remain in the clause. He also suggested that line 3 of clause 87(b) should read “is similar to or more serious than”.

These suggestions would be conveyed to the full Committee.

In relation to the noting of the periods of imprisonment, he suggested that the words “for a period" were superfluous.

Mr Bassett said that this was standard wording, to be found in numerous statutes.

The Chairperson said that he would not then pursue the point.

Ms Christine Silkstone, Parliamentary Researcher, suggested that the word “and” should be replaced in this subclause with “or” and this was agreed.

Clause 88
The Chairperson wondered if there was indeed the capacity to approve rules. He wondered if a time frame should not be put in. So many impositions were put on the Department, that he felt it would be appropriate. He said that he would raise this point with Mr Jeffery. He also noted that it would be incorrect to require approval if the result of this would be to hinder the application of the legislation, and wondered if this might not hold up the Executive.

Ms Pithey wondered if the rules should not "be submitted to Parliament"

The Chairperson thought that this would be a policy issue. He telephoned Mr Jeffery and asked for his comment whether perhaps there should not be a requirement to the effect that the rules be noted as "within 6 months of the tabling".

He then conveyed the view of Mr Jeffery that the procedure under the Promotion of Administrative Justice Act was that Parliament had to approve. He felt that there should be consistency with other legislation around the rules of Court, and he did not see that there would be any problems with that.

Adv Shireen Said, Chief Director: Promotion of Rights of Vulnerable Groups, DOJ, said that this would be specific to the Rules of Court.

The Chairperson did not think that Parliament should take responsibility for approval without specifying a time frame. He thought that the only reason to have it was if it was inconsistent.

Mr Bassett said that the Minister would have to approve the rules of the Rules Board. He would check up on the queries and revert to the Committee.

Adv Said noted that the entire Act would not be coming into effect at the same time. She wondered if a six month period would not be too long, since a period of two months was being specified for other matters.

Mr Bassett noted that these rules were not mandatory. He was not sure whether and what rules would be necessary. That was the reason why this clause had been “softened”, as it was possible that the Rules Board might not need to make rules at all.

Clause 89
The Chairperson noted that clause 89(4) listed a whole lot of facilities, and he wondered whether "and any other relevant facilities" should not be added.

The Chairperson said, in relation to clause 89(5), that this should possibly read "and other relevant organs of state" rather than "organs of state, as may be necessary".

Mr Bassett agreed with both suggestions.

Ms Jacqui Gallinetti, Senior Researcher, Community Law Centre, UWC, noted that later on in the Bill, when speaking of fostering and promoting cooperation, there were case management teams that included Not for Profit Organisations (NPOs). She wondered if service delivery organisations should not be invited to meetings as well.

Adv Said suggested that wording similar to that used in clause 94 should be used. This referred to "may obtain, as and when necessary, external advice and support" "External to organs of State" would cover everyone.

The Chairperson felt that the same considerations should not apply to NGOs. However, he did not want to be prescriptive. He asked Adv Said and Ms Gallinetti to consider alternative wording and bring some suggestions forward to the Committee.

Ms Silkstone noted under 89(5)(a) that there should be a comma inserted after "Social Development".

Clause 90
The Chairperson suggested that there be a full stop after "the person concerned". The new sentence would then begin "The Department must report"

Mr Vhonani Ramaano, Committee Secretary, raised the point as to what would have to be reported back

by the Department of Home Affairs.

Adv Said noted that this had been discussed. That Department would simply have to consider the application, but this Bill could not prescribe what should be done.

Clause 92
The Chairperson noted that the wording was confusing.

Mr Potgieter noted that the wording referred to schedules of the Criminal Procedure Act and that these covered serious matters.

Ms Gallinetti noted that there was specific reference to Schedules 1 and 2 in the Children's Act, and that the wording of this clause therefore needed to follow the wording of that Act. The cross referencing was intended for the protection of children.

Clause 93
Ms Pithey asked if all the departmental names should not be in capitals.

Mr Bassett noted that they were not being used as proper nouns, but in the dative case, in the sense that the relevant Cabinet Members were responsible for those departments.

The Chairperson asked whether this clause should specify that the policy framework would be published in the Gazette "for public comment".

Adv Said clarified that the Gazette would itself specify why the publication was being made; it would call for public comment.

Ms Pithey thought that this clause was not calling for comment. She was not sure whether this wording was intended.

The drafters from the Department agreed that the words 'publish, for public comment" should be inserted in clause 93(2)(b)

Ms Pithey noted that the National Director of Public Prosecutions was not included. This person was, however, included for comment in terms of the Sexual Offences legislation.

The Chairperson did not agree that this was necessary. The Minister would be responsible, and on policy issues she or he would consult. Institutions should not be on the same level as political heads. He thought that it would not be appropriate to give the same weight to the NPA, and to be consistent the political head should be given due weight.

Clause 96
The Chairperson noted that he liked the text of clause 96(1)(e).

The Chairperson asked if the word "those" should not be substituted for "these" in subclause (3)(b), and the drafters agreed that this would be more correct.

Under clause 96(4) the Chairperson wondered if there should not be cross referencing to the relevant section of the legislation.

Mr Bassett noted that a cross referencing would be inserted to section 8.

Clause 47 and 43
The Chairperson said that there had been a suggestion, as mentioned at a previous meeting, that the two clauses be merged. One set out the objective and the other set out the procedure. He thought that the only overlap was possibly the wording of 47(2)(a)(i) which referred to "an inquisitorial nature", but that there was reasons as the nature and purpose was being explained to the child.

Ms Gallinetti agreed. There was some overlap about the participation of children and parents being encouraged, but she thought that both were valid points worth keeping in both clauses.

Ms Silkstone noted that the goal and procedure were to some extent the same, but she did not think that there was any harm in repeating this.

It was agreed that these clauses should not be merged and the current wording would remain.

Clause 56 2(b)(iii)
The Chairperson suggested that the words "the harm caused by " should be substituted for the words "as a result of" offences caused by children.

He suggested that clause 56(2)(b)(ii) should also be amended. He suggested that the drafters think about wording along the lines of "criteria for the evaluation of diversion programmes, that they reflect a meaningful and adequate response to the harm caused by offences committed by children, as part of fulfilling the objectives of diversion

The Chairperson indicated that he would have to leave to catch a flight to KwaZulu Natal. He suggested that the drafters and the sub-Committee should perhaps discuss any others issues they had noted, and that any suggestions for amendments or changes should be e-mailed to him, so that he could raise them also with other Members of the Committee and make a decision on them in the next week.

He also asked that any policy issues still to be finalised should be listed separately, to be discussed on the 23 June.
He asked that the amendments made at the meeting the previous evening should be checked.

The meeting was adjourned.

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