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## Child Justice Bill [B49-2002]: Department summary of submissions

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### Justice and Constitutional Development

#### Meeting Report Information

Date of Meeting:

12 Mar, 2008

Chairperson:

Mr Y Carrim (ANC), Mr J Jeffrey (ANC) and Adv C Johnson (ANC)

Documents handed out:

Summary of Comments on the Child Justice Bill [1]

Child Justice Statistics, Implementation Plans & Costing for Child Justice Bill [2]

Child Justice Bill [B49-2002] as reintroduced in 2008 [3]

Audio recording of the meeting:

Finalisation of Jurisdiction of Regional Courts Bill [B48-2007]; Deliberations on Child Justice Bill [B49-2002] [Part 2] [4]

Finalisation of Jurisdiction of Regional Courts Bill [B48-2007]; Deliberations on Child Justice Bill [B49-2002] [Part 1] [5]

Summary:

The Committee engaged with the Departments of Justice and Social Development and several civil society organisations on the comments received on the Child Justice Bill during the public hearings. The deliberations focused on two contentious issues: diversion and age and criminal capacity. Members also looked at the issues surrounding clause 7 of the Bill. Regarding diversion, the Committee decided that any distinguishing procedure between adults and children was discriminatory and would not be accepted. Also, there was broad agreement that all children should be considered for diversion regardless of age and offence. However, not all children would be diverted based on the schedules and offences.

Regarding age and criminal capacity, the Department and the majority of Non-Governmental Organisations presented differing views on this. The Department insisted on having the age of criminal capacity as 10 years of age whereas most NGOs believed that it should be 12 years of age. Members were not convinced by either arguments but were inclined to go with 12 years.

The Committee discussed clause 7 of the Bill (Manner of dealing with child below 10 years of age). Members agreed with its content but believed that it should be located in the Children's Act.

Finally, the Department briefed Members on various statistics pertaining to child offenders.

Minutes:

### **Jurisdiction of Regional Courts Amendment Bill**

The Chairperson noted that in terms of its programme, the Committee was scheduled to vote on the Jurisdiction of Regional Courts Amendment Bill. However, this would be postponed because Members needed to “apply their minds” to the Judicial Officer’s Association of South Africa (JOASA) submission, which had been presented to the Committee on the previous day. Consequently, the Committee would only finalise this legislation some time next week.

### **Child Justice Bill: Department's summary of submissions**

At the outset, the Co-Chair, Adv Carol Johnson (ANC), indicated that this meeting would be more of a brainstorming session because Members still had to discuss the Bill with their respective parties, and therefore had no firm positions on anything.

#### **Diversion**

Mr Lawrence Bassett, Chief Director: Legislation, DoJ, summarised the different comments received (during the public hearings) on the issue of diversion. The main thrust of the submissions asserted that all children should be considered for diversion, and that the Bill excluded certain children from that possibility, based on age or offence. The submissions argued that it was both unfair and discriminatory because diversion for adults was not limited. Further, the SAHRC contended that the Bill should be modified to state clearly that a child could be diverted more than once.

Adv Johnson posed two questions. Firstly, she asked if adults could be diverted irrespective of offence. Secondly, she asked if all children, in terms of current prosecutorial practice, were considered for diversion.

Mr Bassett clarified that there was no legislation dealing with diversion for adults, and that this was done at the discretion of the prosecutor. In response to the latter question, he stated that the prosecution guidelines, issued under section 179 of the Constitution, stipulated that it was inappropriate to divert certain matters such as murder, rape and other serious offences.

Ms Lirette Louw, Legal Drafter, DoJ, added that the NPA Policy provided for offenders (including child offenders) with a criminal record, and persons to whom the opportunity (of diversion) had been granted previously, to be diverted in exceptional circumstances.

Advocate Shireen Said, Chief Director: Vulnerable Groups, DoJ, added that diversion was a small component of the entire principles of restorative justice.

Ms Jacqueline Gallinetti, Coordinator: Child Justice Alliance, recognised that every child was eligible for diversion subject to the NPA guidelines. However, she feared that the Bill legislated against an exceptional case, where a child would benefit from diversion.

Advocate Maggie Tserere, NPA, explained that the NPA had policies, which guided prosecutors on how to select cases for diversion. The guidelines also provided that certain serious offences, such as murder, robbery and rape could not be diverted. However, due to the development of restorative justice, the NPA diverted some sexual offences cases even though the appropriate treatment programmes did not currently exist.

Mr Jeffrey said that the prosecutorial guidelines were not preventing diversion, but strictly

recommending against it in certain cases. Consequently, he asked why the Department wanted to restrict diversion as an option and not leave it up to the guidelines, which did not have any absolute restriction.

Adv Johnson said that the Department was taking a step backward from what was currently happening in practice.

Mr Bassett explained that the issue of proportionality played a huge role in the 2002 deliberations on the Bill. At the time, Members were concerned about the rights of victims, the crime wave in the country and the capacity of prosecutors. There was also a general sentiment that there should be a line drawn between serious offences, which could not be diverted, and the less serious offences, which could be diverted.

Mr Jeffrey contended that the line had not been drawn because murder could be diverted in appropriate and exceptional cases. He claimed that the Bill was harder on children than on the adult population, and sought to understand why this was the case.

Mr Bassett admitted that he could not answer the question. Nevertheless, he pointed out that this was the first time that diversion was being regulated by law.

Mr Jeffrey speculated whether murderers who were children, would have a constitutional case that they were being unequally treated because they were restricted from diversion, which was not the case for an adult murderer.

Ms Louw explained that the previous Justice Portfolio Committee had limited diversion because they viewed some of the diversion programmes as inappropriate and inept.

Mr Jeffrey was not convinced by this argument and insisted that the nature of the diversion programme should be separated from the principle of diversion. He reasoned that it could be legislated that a diversion programme should follow a certain criteria for a particular offence.

Adv Johnson outlined the three main issues that formed the basis of the decision taken by the Committee in 2002. Members had raised concerns about the content of the diversion programmes and believed that prosecutors would use diversion as a way of reducing their case roll. Equally, from a policy perspective, the Committee felt that it would send an incorrect message for children that committed serious offences to be diverted and not have criminal records.

Ms Gallinetti indicated that since 2002, there had been extensive research done to develop minimum norms and standards to ensure that both the content of the diversion programmes and the organisational structure of the diversion service providers were credible. She also mentioned that the proposed preliminary inquiry would avoid prosecutors from misusing diversion because magistrates would exercise oversight over their discretion.

Mr S Swart (ACDP) recalled that the whole concept of restorative justice was newly introduced when the previous Committee considered the Bill in 2002. He assumed that things had developed since then and could not understand why children would not at least be considered for diversion when this was afforded to adults. He proposed that children should be considered for diversion subject to the NPA guidelines. He was mindful that this should be phrased in a particular manner in view of the public's sentiments about crime.

Mr Jeffrey asked if there were any statistics regarding children that had been diverted for the categories of crime that the Department intended to restrict.

Ms Tserere confirmed that the current statistics did not indicate which specific cases had been diverted and only focused on the number of diversions for adults and children.

Mr Jeffrey asked if the Committee had restricted diversion in the Sexual Offences Act, which had been passed the previous year. If not, he believed that it was a major inconsistency on the part of the Committee to now restrict diversion for children.

Dr Anne Skelton, Director: Centre for Child Law, clarified that the Sexual Offences Act made it an offence for children below the age of 16 to have consensual sex, and that section 36 of the current Bill would exclude those children for diversion.

Dr J Delpont (DA) emphasised that the Committee could not approve legislation which placed a child in a worse situation than an adult.

Adv Johnson feared that if a tougher system was imposed on children than on adults, then the law could be challenged because it would appear that the legislator arbitrarily applied its mind.

Mr Carrim recommended that the co-chairpersons meet with the previous chairperson, Mr Johnny de Lange, now the Deputy Minister of Justice, to establish the reasons behind the decisions taken by the Committee in 2002. He sensed that the Department was trying to retain the Bill in its original form, when it was first introduced into Parliament six years ago.

Mr Swart pointed out that, since 2002, there had been several developments relating to diversion, particularly in the area of case law.

Mr Carrim remained unconvinced that the developments in the last six years were as dramatic as people made them out to be. He maintained that the Committee would only agree to assessment for all provided that the Department of Social Development (DSD) and the NPA provided the necessary evidence that this could be done. Regarding diversion, he believed that at this stage, the Committee “tentatively” agreed that all children should be considered for diversion, but that certain children would not qualify for diversion. Notably, he voiced concern about the powers of prosecutors and believed that their discretion should be overseen by a higher authority. Finally, he argued that it might be intellectually correct to separate the policy on diversion from the actual programmes, but politically it was not the case.

Dr Skelton explained that diversion was a conditional withdrawal of charges granted by a prosecutor. Any legislation that prevented prosecutors from granting diversion, would contravene the *dominus litus* principle, which gave prosecutors the discretion to decide whether to prosecute or not. In addition, she clarified that the Bill in its current structure, did “not leave everything in the hands of the prosecutor” because magistrates could oversee the prosecutorial discretion during the preliminary inquiry. Lastly, the legislator could play a role by conducting regular oversight over the prosecutorial guidelines.

Mr Carrim proposed that the Committee consider the prosecutorial guidelines as a basis on which it pivoted issues on diversion. The Committee should be clear about the framework for those guidelines.

Mr G Magwanishe (ANC) asked if there were enough diversion facilities, particularly in rural areas.

Ms Conny Nxumalo, Chief Director: Child, Youth, Families and Social Development, DSD, indicated that the DSD was working towards standardising the minimum norms and standards

in all areas.

Dr Skelton mentioned that diversion was not entirely programme-based and that creative interventions could be designed to cater for areas where proper facilities did not exist.

Mr Carrim commented that a final discussion on this area would have to consider the quality, content, nature, scope and effectiveness of the diversion programmes.

Mr Carrim asked if there had been a full costing on the Bill.

Dr Skelton confirmed that DSD had received funding for diversion (in their budget) over the past three years. She claimed that this was probably one of the few Bills in the world where a department received a budgetary allocation for legislation had not been passed as yet.

Adv Said added that the costing needed to be updated because there had been several developments since the original costing in 2002.

Mr Carrim insisted that the Committee should be provided with a full account of the costing and DSD's capacity for implementation.

Ms Nxumalo verified that DSD did its costing on the original Bill in 2002. She also maintained that her department had the necessary capacity and was ready to implement the Bill.

Mr Carrim believed that there were more formidable arguments why the 2002 Bill ended up the way it did than was emerging here. In addition, he pointed out that NICRO had objected to the allocation of a maximum time period for diversion options because children did not respond the same to behavioural interventions.

Ms Louw answered that the reasonable maximum periods had been set at 12 and 24 months. However, clause 58(4)(c) allowed for diversion options of a longer period if there were sufficient reasons for this.

Ms Nxumalo stated that the minimum norms and standards made provision for after care services. This implied that a child who had been through the diversion programme could still be further catered for after the lapse of his/her programme.

Mr Swart stated that the Committee needed to look at the schedules and to what degree the Committee could limit the prosecutor's discretion in terms of the separation of powers.

Adv Johnson said that any distinguishing procedure between adults and children was discriminatory and would not be accepted by the Committee. She added that there was broad agreement that all children should be considered for diversion regardless of age and offence. However, not all children would be diverted based on the schedules and offences.

Ms Gallinetti explained that there were two options. Firstly, all children should be eligible for diversion, with no exclusion in the legislation and that the NPA should develop guidelines for exceptional cases. Secondly, certain children were excluded from diversion in terms of the schedules. She concluded that she preferred option 1.

Mr Carrim said that he was conflicted. On the one hand, he felt that all children should be considered for diversion but not all get it. On the other hand, he believed that it was clear that certain children should not be diverted, particularly those who committed the most heinous crimes. He proposed that there be a schedule, which stipulated that for particular offences, no

diversion was allowed unless there were exceptional circumstances. Lastly, he stated that Parliament could have a role in influencing the content of the prosecutorial guidelines.

Mr Jeffrey said that the existing set up was working fine for both adults and children in terms of the NPA guidelines and was not sure why this should be changed. Consequently, he suggested that the Committee should keep the situation as it currently existed in law, where everybody was considered, and legislate a framework for those guidelines.

The Committee rejected the submissions by NICRO and the Legal Aid Board's submission. Conversely, the Committee accepted the recommendation of the SAHRC.

#### Age and Criminal Capacity

Mr Bassett presented a brief summary of the different submissions regarding age and criminal capacity. Most of the submissions believed that the age of criminal capacity should be raised to 12 years old rather than 10, as envisaged in the Bill.

Mr Jeffrey asked why the Department had raised the age of criminal capacity to 10 years old rather than 12 years.

Ms Louw explained that this was done on the basis of a recommendation by the South African Law Reform Commission (SALRC), which had conducted extensive research and consultation. In arriving at the recommendation the Commission took into consideration the diverse nature of the South African society, differences in upbringing, maturity and development. The Commission also took into consideration other factors that played a role in shaping the development of a child, such as culture, rural and urban environment and socio-economic and educational factors. The Commission indicated in its Report that, during its consultation and research, there was significant support for setting the age of criminal capacity at 12 years but, on considering all the above factors, the Commission was convinced that the minimum age should be set at 10. Ms Louw added that the higher the minimum age, the greater the chances of adults using children to commit crime.

Mr Carrim responded that Ms Louw's last point was catered for in other legislation.

In reply to Mr Jeffrey asking in what year the Commission's report was released, Ms Louw confirmed that it was in 2000.

Mr Jeffrey stated that the Committee needed to look at the psychological argument of whether a child of 11 understood what was right and wrong to the same extent of an adult.

Ms Gallinetti admitted that there were diverse views on this issue amongst civil society organisations. She contended that there was emerging scientific evidence, which showed that children's capacity developed at an older age.

Mr Carrim indicated that he did not have a strong view on this issue. He observed that the UN had set the age of criminal capacity at 12 years old and could not understand why the Department believed that South African children matured at an earlier stage (10 years) than their international counterparts.

Mr Magwanishe and Adv Johnson both favoured 12 years of age. Adv Johnson argued that if the rest of the world afforded children under the age of 12 that protection, then South Africa should do the same.

Mr Carrim asked about the crime statistics for children who were 12 years old.

Adv Said cited SAPS statistics, which showed that an average of 860 children per month, between the ages of 7 and 13, committed crimes. This number spiked to 10 000 for children in the 14 to 17 age category.

Mr Jeffrey said that the Committee should consider scientific fact and international norms. He noted that Uganda, with its history of child soldiers, had raised the age of criminal capacity to 12 years.

*Afternoon session:*

Mr Jeffrey said that he did not believe that he had enough material to take a decision whether to increase the age of criminal capacity to 12 years old. He insisted that it would be useful to have a neutral scientific input on the ability of 10 and 11 years old and the Report of SALRC, on which the Department had based its position.

Mr Carrim commented that brain development was a biological thing, which was universal. This implied that a child in New York should be no different from a child in Soweto. In conclusion, he argued that moral, psychological and emotional capacity to distinguish between right and wrong were also factors relevant to criminal capacity.

Mr Jeffrey speculated whether there was a counter view to the NICRO submission, which focused on brain development. He also wondered if there were other countries that had considered this issue recently, and what age they had set.

Ms Gallinetti noted that the international trend favoured a higher age of criminal capacity. The SALRC was conscious of society's perception of crime and therefore set 10 as a compromise. It was a political decision whether to choose 12 or 10. Finally, given all the problems with the application of the rebuttable presumption (for children between 10 and 14), she believed that 12 would probably be the best compromise.

Mr G Solomon (ANC) agreed that it was ultimately a political decision. The Committee should take into consideration the fact that the majority of submissions leaned towards 12 years of age.

Mr Carrim queried what financial consequences there would be if the Committee settled on 12.

Adv Said did not believe that there would be significant financial implications.

Mr Jeffrey reasoned that if the age of capacity were increased, then the number of children involved in the criminal justice system would drop. In theory, this implied that there would be fewer resources utilised.

Ms N Mahlawe (ANC) observed that a far lower proportion of 15 year-old females were in detention when compared to their male counterparts. Consequently, she wondered whether this could have any influence on the determination of the age.

Ms Gallinetti mentioned that any increase in the age of capacity would lessen the strain on the criminal justice system, but create greater pressure on the child protection system.

In reply to Mr Carrim asking what percentages of arrested children had been used by adults in the commission of a crime, Adv Said said that almost 40 to 50% of children fell into this category.

Ms Gallinetti added that children used by adults to commit crime was not a just a phenomenon

for children under the age of criminal capacity, but also for those above this threshold. The criminals did not care whether the children were older or younger than the age of criminal capacity.

Ms Louw stated that the experience in Brazil illustrated that children were more vulnerable once the age of criminal capacity was raised.

Dr Delpont stated that unless otherwise persuaded, he was inclined to accept the Department's position, which was based on the recommendation of the SALRC Commission.

Adv Johnson reminded him that the submissions had built convincing arguments in favour of 12.

Mr Jeffrey was more concerned whether there was a mechanism in the Bill to manage children who did not have the required criminal capacity. He appreciated that this determination was ultimately a political judgement call, and indicated that he was tending towards 12 years. He also expressed concern that the Department's proposal would divert the country from international best practice.

Mr Carrim noted that the arguments in favour of 10 did not come out as strongly and those in favour of 12. He said that the Committee would tentatively settle on 12, pending further discussions which convinced the Committee that it should be 10.

Adv Johnson noted that this issue would be flagged. She also sensed that the Committee was leaning towards 12. She repeated that the onus was on the Department to convince the Committee why it should not set the age for criminal capacity at 12. She also indicated that the Committee wanted the extracts from the SALRC's Report and the submission from NICRO regarding brain development.

Clause 7 Manner of dealing with child below 10 years of age

Mr Jeffrey stated this clause was linked to the age of criminal capacity and gave a synopsis of the content of the clause. He had no problem with the clause but believed that it would be better placed in the Children's Act.

Assistant Commissioner Susan Pienaar, Head: Social Crime Prevention, SAPS, indicated that the role of the police was problematic and unclear in such a scenario because a child who did not have criminal capacity could not be arrested. As a result, the police did not know where to take the child.

Mr Jeffrey responded that such children should ideally be placed in a place of safety.

Ms Gallinetti explained that the referral mechanism was catered for in the Children's Act and the Child Care Act.

Mr Solomon proposed that clause 7 be deleted and catered for in the Children's Act.

Mr Carrim stated that the Committee should confer with the Social Development Portfolio Committee and the relevant Minister, before amending legislation that affected other parliamentary committees.

Mr Jeffrey encouraged the Department, NGOs and DSD to come up with proposals to deal with this amendment.

**Briefing by Department on Child Justice and Diversion Statistics**

Adv Said compared the figures for diversion for adults and children. On average 1571 children were diverted every month. She also briefly reported on the number of children in correctional facilities, the number of children arrested and charged and the number and location of secure care facilities around the country.

Mr Jeffrey complained that the different statistics did not correlate. As a result, he claimed that they had no meaning because they were incomplete, inaccurate and unreliable.

Adv Said agreed that the statistics were not completely accurate but they were a general trend of what was happening.

Mr Carrim commended all participants for their hard work.

The meeting was adjourned.

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