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MONITORING GROUP**

Published on *Parliamentary Monitoring Group | Parliament of South Africa monitored*  
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## **Child Justice Bill: Adoption; Reform of Customary Law of Succession & Regulation of related Matters Bill: deliberations**

### Security & Constitutional Affairs

[Meeting Report Information](#)

**Date of Meeting:** 05 Sep, 2008

**Chairperson:** Kgoshi L Mokoena (ANC, Limpopo)

**Documents handed out:**

[Select Committee Proposed Amendments to Child Justice Bill](#) [1]

[Matters Arising from the Portfolio Committee on Justice on Customary Law of Succession Bill](#) [2]

**Relevant document:**

[Child Justice Bill\[B49B-2002\]](#)

[3][Reform of Customary Law of Succession and Regulation of Related Matters Bill](#) [4]

**Summary:**

The Department of Justice and Constitutional Development tabled and highlighted some of the amendments that had been incorporated into the Child Justice Bill. Notably, clause 80 had been reconstructed to give effect to a proposal that a child, should as far as it was reasonably possible, be allowed to give independent instructions to their legal representative. The State Law Advisor was concerned that the clause 100 (short title) specified a date on which the Act must take effect. He cautioned that the constitutionality of the Act would be affected if the relevant departments were not ready to implement the provisions of the Act on the stipulated date of 1 April 2010. The Department cautioned that any change to the short title could have an inadvertent impact on certain other clauses that were coupled to that date, and assured the Committee that it would be prepared to implement all provisions on the stated date. It was noted that the word “guardian” had been added in to the phrase “parent or appropriate adult” and had also been defined. The word “recognisances” used in clause 21 was amended to the usual word “recognisance”, which was an accepted legal term. The Committee, although it had raised queries around the title given to the “Family Group Conference” indicated that it withdrew those queries and this title was retained. Further explanations were given around the non-publication of the names of child offenders, and on the position of independent advocates who did not take instructions from attorneys. The Committee, having considered all the amendments, which were separately summarised, considered each clause and adopted the Bill, as amended.

In relation to the Reform of Customary Law of Succession and Regulations of Related Matters Bill, the Committee discussed the customary practice of levirate unions and whether the children of such unions were entitled to inherit from the biological father, the position of the children of one parent who subsequently married for the second time, the position in relation to the estates of deceased children who had inherited from their parents previously, and the position in relation to royal marriages. Some Members expressed concern that customary law was being overridden by legislative law. Officials from the Department of Justice and the legal experts repeatedly assured the Committee that the Constitution gave recognition to customary law, and that it could be applied when applicable. It was also stressed that the Bill addressed a specific topic and did not interfere with other aspects of customary law, but merely sought to remove those aspects of customary law – primarily the rule of primogeniture – that had been declared unconstitutional. The State Law Advisers briefed the Committee on the issues mentioned in the report of the Portfolio Committee on Justice, and it was resolved that a further briefing would be required to iron out further questions before Members took this matter to the provinces.

**Minutes:**

### **Child Justice Bill**

Mr Lawrence Bassett, Chief Director: Legislative Drafting, Department of Justice, addressed all the outstanding issues that arose out of the previous day's meeting. He noted that the Department had also prepared a list of the proposed amendments, which was circulated to the Committee.

#### **Clause 21**

The first issue pertained to the use of the word "recognisances" in clause 21(3)(b) of the Bill. He recalled that Dr F van Heerden (FFP) had suggested that the word "responsibility" be used instead.

Mr Bassett explained that "recognisance" was an established legal term, which had a particular meaning related to the release of a person after arrest. In view of that, he believed that the existing word should be retained, save that the word should be reflected in the singular (recognisance) as opposed to the plural (recognisances). He added that the Department had taken the liberty to draft amendments to give effect to this recommendation.

The Chairperson asked the State Law Advisor (SLA) whether he had any comments on the Department's explanation.

Mr Herman Smuts, Principal State Law Adviser, Office of the Chief State Law Adviser, supported the Department's stance on this matter.

#### **Non-publication of child's identity**

In addition, Mr Bassett recalled that a concern had been raised as to why the publication of a child's identity was prohibited, particularly in cases where such a child committed heinous crimes. He explained that it was a long entrenched principle of South African law to protect the identity of child offenders. The reason behind the principle was to avoid stigmatisation and harm caused by undue publicity. In addition, he explained that South Africa was a signatory to several international and regional instruments that sanctioned this doctrine. For example, Article 40 of the Convention of the Rights of a Child required State parties to ensure that the privacy of children in all stages of criminal proceedings was fully respected. In addition, Article 17(2) of the African Charter on the Rights and Welfare of the Child prohibited the press and public from attending or reporting on criminal proceedings involving children.

#### **Clause 80**

Mr Bassett noted that Dr van Heerden had pointed out that subclause 80(2) did not cater for a scenario where an advocate did not belong to a controlling body. To address this oversight, Dr van Heerden had suggested that matters of misconduct involving such an advocate be reported to the instructing attorney.

Mr Bassett contended that the recommendation did not adequately address the problem because there were some independent advocates who did not take instructions from attorneys. He admitted that the Department did not presently have a solution to deal with such a particular case. However, he indicated that there was pending legislation, namely the Legal Practice Bill, which specifically required every legal practitioner to be a member of a controlling body.

Mr Bassett indicated that sub clause 80(1) had been reconstructed to give effect to Dr van Heerden's proposal that a child, as far as it was reasonably possible, should be allowed to give independent instructions to his or her legal representative.

Mr Bassett stated that the Department had also given effect to the Committee's request that the term "guardian" be defined in the Bill. This amendment would result in the insertion of the proposed word "guardian" also wherever the expression "appropriate adult" appeared in the Bill.

Finally, Mr Bassett indicated that the Department had considered the Committee's discontent regarding the use of the phrase "family group conferences". The Department now proposed two alternative phrases - namely "family group gathering" or "family group meeting". The Department felt that both wordings were acceptable because they did not radically depart from the recognised terminology.

### **Discussion**

Mr Z Ntuli (ANC, Kwazulu Natal) felt that there was no harm in reverting to the original terminology used for family group conferences.

Mr A Moseki (ANC, North West) concurred with the previous speaker.

Mr N Mack (ANC, Western Cape) indicated that he was in an “accommodating mood”, and would therefore agree with his colleagues.

Mr A Manyosi (ANC, Eastern Cape) also endorsed the sentiments expressed by the previous speakers.

The Chairperson remarked that he had been lobbied and persuaded to accept the original term, notwithstanding the fact that he did not particularly like it. He believed that the purpose of the gathering was the important factor and not the terminology. He was mindful that members of the ruling party, particularly at the branch level, had a different understanding of the word “conference”, and that Members would have to explain what the word meant in the context of the Bill.

Adv Shireen Said, Chief Director: Vulnerable Groups, Department of Justice, indicated that the Department would produce an explanatory document that would help to explain all terminology used in the Bill, as well as simplify the provisions. This would help Members to explain the provisions to their respective constituents.

#### Clause 100

Mr Herman Smuts, Principal State Law Adviser, Office of the Chief State Law Adviser, expressed concern that Clause 100, dealing with the short title and commencement, specified a date on which the Act must take effect. He cautioned that the constitutionality of the Act would be affected if the relevant departments were not ready to implement the provisions of the Act on the stipulated date of 1 April 2010. He reminded the Committee that it had recently amended a similar provision in the Regulation of Interception and Communications (RICA) Amendment Bill. He therefore proposed that the clause be amended to read: “This Act is called the Child Justice Act, 2008, and takes effect at a date fixed by the President by proclamation in the Gazette.”

The Chairperson reminded Members that the Committee had been forced to extend the operation of the remaining sections of the Black Administration Act on two occasions because the relevant departments had not prepared themselves by the time that the Act was supposed to cease operating.

Mr Bassett indicated that the Department did not have a specific mandate on this issue, and that the time stipulation was put in by the National Assembly. At the same time, he cautioned that any change to the short title could have an inadvertent impact on certain clauses, such as 96 and 98, which were coupled to the date of 1 April 2010.

Mr Moseki reminded everybody that the country’s mode of governance was guided by “Business Unusual”. Given that context and the need for the Bill to be operational as a matter of urgency, he felt that the current short title was sufficient.

Adv Said supported the comments made by Mr Moseki.

Mr Bassett believed that the clause should be retained in its current form. He reasoned that the Bill was a long time in the making and that it would be good to aim towards a specific date. He stressed that a great deal of thought and discussion went into the date that had been set. Equally, a lot of work had already been done in preparation for the Bill. In light of this, he maintained that the sooner the Bill came into operation the better it would be.

Mr Smuts indicated that he did not feel strongly about this matter. He was convinced that the relevant departments would have everything in place to ensure implementation by the deadline of April 1 2010.

The Chairperson placed it on record that the Committee usually did not put a date in a short title. However, it would depart from this policy in regard to this Bill, due to the urgent crisis of children who were in prison.

#### Clause by clause deliberations

The Committee considered each clause, together with the document setting out the amendments.

Mr Bassett reminded Members that all the proposed amendments relating to “family group conference” would be deleted.

They agreed to the changes proposed to clauses 1, 3, 9, 13, 18, 19, 20, 21, 22, 23, 24, 25, 28, 38, 40, 42, 43, 44, 46, 47, 48, 49, 52, 55, 61, 65, 74, 80, 87, 90, 94, and 97.

Members also agreed to the changes made to schedule 4 and 5.

Members then went through the remaining provisions that had not been altered, and agreed to each one of them, namely clauses 2, 4 to 8, 10 to 12, 14 to 17, 26, 27, 29, 30 to 37, 39, 41, 45, 50, 51, 53, 54, 56, 57 to 60, 62 to 64, 66 to 73, 75 to 79, 81 to 86, 88, 89, 91 to 93, 95, 96, 98 to 100. The Committee accepted schedules 1, 2, and 3.

Members then voted to adopt the Bill, with amendments.

Adv Said appreciated the easy going nature and respectful manner in which the Committee engaged with the Department. She thanked all the officials of the Department for their dedication, and reassured Members that the Department would be ready to implement the Bill by the April 2010 deadline.

Mr Bassett wholeheartedly endorsed the sentiments articulated by Adv Said, and also thanked the Committee for the constructive debates.

On behalf of the Committee, Mr Ntuli thanked the Department for their efforts and perseverance.

The Chairperson was impressed with the team from the Department, and hoped that he would work with them again in the future.

### **Customary Law of Succession and Related Matters Bill: Deliberations**

Ms Theresa Ross, Senior Law Advisor, Department of Justice, addressed three issues arising out of the previous days' discussions.

Firstly, she recalled that the Chairperson had outlined a scenario where a man and woman both brought into their marriage their children from their previous relationships or marriages. He had wondered whether the children of the surviving spouse would always be able to inherit from the estate of the deceased's spouse.

Ms Ross advised that it depended on the regime that would be used to determine inheritance. In terms of civil law, such children would be able to inherit from a person who was not their biological parent only if they had been formally adopted. If not, they would not be able to inherit from the non-biological parent. Under customary law, it also depended whether the children were adopted customarily. Children were considered to be adopted customarily when *lobola* had been paid. However, where couples formalised their union without consideration for their children, such children would not be able to inherit unless they were catered for in the deceased's will.

Mr Osborne Dzinqwa, Language Practitioner, Dual Drafts, Office of the Chief State Law Adviser, explained that where the couple was married in community of property, there would be a joint estate and both sets of children would have a claim to the joint estate. However, if the couple was married out of community of property (also excluding accrual), the children could only claim from the estate of their biological parent. Lastly, he explained that if the couple married in terms of customary law, the Recognition of Customary Marriages Act automatically presumed that that marriage was in community of property unless it was specifically excluded.

Ms Ross also recalled that the Department had been asked to shed some light on the effect of levirate unions (*ukungena*) and succession to traditional leadership. In that regard, she explained that the purpose of *ukungena* was to enable the heir to look after the widow and the deceased's other children. The intention had never been to invoke *ukungena* for purposes of providing an heir to the status of a traditional leader. In the wake of the *Nwamita-Shilubana judgement*, she could not foresee a situation where *ukungena* would be entered into for purposes of providing a male heir.

Finally, Ms Ross recalled that the Committee had raised a concern regarding the capacity of the Master's Office to deal with enquiries arising out of the Bill. She disclosed that the Department had engaged with the Office of the Chief Master on this matter. It seemed that, even though this Office had increased the amount of service points where rural communities were served, it still had human resource challenges. To address this, the Minister of Justice had indicated that she would request Parliament's assistance on how to best capacitate the Master's Office so that it would be able to deal with the responsibilities to be entrusted to that office under the Bill..

Ms Maureen Moloi, Researcher: South African Law Reform Commission, explained that the *Nwamita-Shilubana* case dealt with the situation where the royal formality arranged for a "candle wife" to bear a

male heir. This case differed from an ordinary ukungena, because the king was still alive but did not have a male heir.

The Chairperson questioned whether a child who was born out of an ukungena union, which was arranged by the royal family, would be able to inherit from his biological father's estate.

Ms Ross admitted that she was not very knowledgeable about the subject matter. Notwithstanding this, she maintained that in terms of customary law, such a child "belonged" to the royal family, and could therefore not inherit from his biological father's estate.

The Chairperson stated that these issues were complex. He interrogated whether so-called illegitimate children could claim inheritance from their biological father, even though damages had been paid for them in terms of customary law.

Mr J Sibiya (ANC, Limpopo) believed that children were entitled to inherit from their biological father.

Mr J Mkhali (ANC, Mpumalanga) had a different perspective. He noted that there was a tendency to delineate constitutionality as opposed to customary law in cases of this nature. He argued that customary practices should be respected.

Ms Ross quoted the Constitutional provision that dictated that customary law should be applied when it was applicable. In view of that, she explained that the Court would apply customary law for any claim arising out of a customary arrangement. This would imply that illegitimate children, for whom damages had been paid in terms of customary law, could not inherit from their biological father's estate.

Mr Dzinqwa added to the discussion. He indicated that everything depended on whether the women and the child were loyal to customary law, and regarded themselves bound by it. If that was the case, the matter would be regarded as settled when the damages were paid, and the biological father would not have demands made on him by the women and the child. However, if the women and the child had no respect for customary law, nothing would prevent them from approaching a court to claim maintenance. The maintenance claim would be honoured by the courts, despite the fact that customary damages had been paid to settle the matter. This example clearly illustrated the conflict between customary law and legislative law because when the two were invoked together, almost invariably the latter overrode the former.

Mr Manyosi provided a brief lesson on how customary law of succession was applied in the Eastern Cape. He explained that in the event that an ordinary man (commoner) died, and his cousin entered into a levirate union with his widow, any child produced from such a union would not be regarded as belonging to the cousin but to the deceased man. Similarly, if the king died, and his half-brother entered an ukungena union with the queen, any offspring produced from this union would belong to the royal family and not the half-brother. Lastly, he advised the Department to study the 1994 *Sigcau vs Sigcau* case to get a better grasp of customary law of succession.

Mr Ntuli contended that the purpose of ukungena was not only to provide an heir but also to maintain and support the surviving members of the family.

Ms Moloi disagreed with the Mr Ntuli, and countered that the purpose of ukungena was to provide an heir for the house of the deceased and not necessarily to maintain. In addition, she cited Section 211 of the Constitution, which stated that a customary law arrangement should be dealt with in terms of customary law.

Mr Mack was confused by the discussion. He enquired whether customary law discriminated against female children.

Ms Ross confirmed that the customary practise of primogeniture was inconsistent with the Constitution, and that the Bill sought to address that aspect of customary law. She stressed that the Bill did not intend to codify or change customary law but only deal with those aspects that the Constitutional Court had declared invalid on the basis of being discriminatory to children and women.

Mr Moseki asked what could be done to bridge the gap between customary law and legislative law.

Mr Smuts stated that there was no easy answer to that question. He reiterated that the Constitution recognised customary law and stated that it should be applied when applicable. Also, he clarified that

