

Justice and Constitutional Development Portfolio Committee

Report on Child Justice Bill

23 June 2008

The Portfolio Committee on Justice and Constitutional Development, having considered the Child Justice Bill [B49-2002], reports as follows:

1. The important and overdue Child Justice Bill was introduced in Parliament in 2002. The Portfolio Committee made various amendments to the Bill, and in 2003, for a variety of reasons, suspended processing the Bill. The Ministry worked on the Bill further and proposed new amendments to Parliament in December last year.
2. The Portfolio Committee organised public hearings on the Bill in February this year because five years had elapsed since the Bill was first introduced in Parliament and the Bill had been significantly changed. The approach of the Committee in processing the Bill this year was similar to that of the 2002 Committee, revolving around two principal considerations:
 - The need to balance, on the one hand, the rights of the child established in the Constitution and our legal obligations in terms of international treaties and conventions with, on the other hand, the rights of the victims of crime and the need to fight crime and ensure the safety and security of the community.
 - The need to ensure that the State has the necessary capacity to effectively implement the new criminal justice system for children decided on.
3. The Committee is excruciatingly aware of the high levels of crime in our country and the capacity of children in our country to commit crime. The Committee is also acutely aware of the public perception that the State is failing dismally to curb crime. It is precisely because of these concerns that the Committee effected changes to the Bill. Clearly, it is important to be tough on crime, including crime committed by children, but we also have to ensure that this is part of a process of preventing and reducing crime over time, and ensuring that children are not criminalized and constantly re-offend, becoming part of an endless cycle of crime. What future has the country otherwise? Clearly, there need to be short, medium and long term programmes, measures and targets as part of an overall, sustainable long

term strategy to reduce crime by children as part of a broader approach to reduce crime generally in the country. This Bill has to be located in the context of the need of these considerations.

4. The statistics provided by government departments, NGOs, academic and other experts to the Portfolio Committee are far from reliable or comprehensive enough and there are also many gaps in the research on crime committed by children. However, it is reasonably clear that while there are many complex objective and subjective reasons for crimes committed by children, a significant part of crime has fundamental material and structural roots – and unless we adequately address these systemic issues, and develop a child justice system that is effectively based on both preventing and combating crime, we will not be able to reduce the levels of crime committed by children over time. This is not to be reductionist (understand crimes by children to be simply an outcome of the structure of society), nor is it to ignore the subjective choices children make to commit crime for which they must be held accountable; it is about finding a balance between the objective and subjective dimensions of crime committed by children – and it is this that underpins the key changes to the Child Justice Bill that the Portfolio Committee effected. Of course, key aspects of preventing crime by children are dealt with in other legislation and the policies of other Departments, but the Child Justice Bill also has to contribute to this – and this too explains part of the Portfolio Committee's approach.
5. The Committee is clear that we should not be romantic about children in our country or ignore the extent to which children, especially older children, subjectively choose to commit crime, and they must therefore be held accountable for their actions; nor should we downplay the State's responsibility to ensure the safety and security of both the potential victims of crime by children and the society as a whole. But we are equally clear that we should avoid an "exceptionalism" that borders on suggesting that SA children, basically African children, are inherently worse than children universally and are incapable of being rescued from a predilection to committing crime; which in effect borders on neo-racist theories. It is in striking a path between these two extremes that the Portfolio Committee's approach is directed.
6. The Committee processed the Bill this year in a somewhat changed context from that of the Committee in 2002. Of course, public anxieties and frustrations about the levels of crime and the perception that the State is failing to curb crime have heightened. These are very understandable feelings and views, and the Committee is entirely empathetic. But the Committee cannot shape legislation on a new sustainable model of child justice with both immediate and long term goals solely on the basis of the emotions of the

public, as legitimate as these are and as accountable as Parliament is to the public. The Committee is careful to avoid being populist and “short-termist” in our approach and it is precisely because of public concerns about crime and the need to ensure the safety and security of the public that the Committee effected changes to the Bill. Interestingly, while recognizing the limitations of Cape Town-based Parliamentary hearings and the questions about the “representativity” of those who participate, every submission we received at the public hearings, it must be noted, is broadly consistent with, and, of course, influenced, the approach of the Committee and the changes we ultimately effected to the Bill. The changes we made are influenced by other developments since 2002, including:

- The notion of “restorative justice” is a fundamental aspect of the Bill – and there have been significant advances in the concept and practice of restorative justice since 2002, both in South Africa and internationally. Hence it is possible to adopt the progressive and pragmatic definition of restorative justice in the Bill: “an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation”. An essential element of the notion of restorative justice is the acceptance of responsibility by the child for the offence and the need to make amends for the harm caused. In a sense, the notion of restorative justice is an age-old tradition in this country and continent – it is a key aspect of traditional or customary justice. It has surfaced internationally again in the context of the need to more effectively deal with crime.
- Departments, especially the Department of Social Development (DSD), other State structures and NGOs have developed greater capacity to implement the Bill since 2002, and in some respects are already implementing key aspects of it, including assessments and diversion. In a sense, the Bill is lagging behind current practice – and serves to provide a legislative framework for ad hoc practices that have emerged. The Bill is, in some respects, a formalisation of practices already in place.
- According to the Department, there are about 18 000 children already being diverted away from the criminal justice system as provided for in the Bill.
- There are now more and more experienced Probation Officers than in 2002 – and these Probation Officers have a key role to play. The work they are already doing is consistent with the current provisions of the Bill.

- There are also more secure care facilities now than in 2002 for children in conflict with the law. DSD representatives who appeared before the Committee said that there are plans to increase the number of secure care facilities (child and youth care centres, in terms of the Children's Act).
 - There are changes to other legislation affecting children since 2002, including the Children's Act which are more consistent with the current version of the Child Justice Bill.
7. The Bill was also amended to make it easier to read and to be more user-friendly. The draft we received was difficult to read, not just for children rights activists, child care workers, probation officers, police, correctional services officials, diversion service providers, teachers and others, but possibly also for lawyers, prosecutors and magistrates.
 8. A key aspect of the Bill is the diversion of children who come into conflict with the law away from the formal criminal court procedures. Diversion, experts say, began to be applied in our criminal justice system from 1992 and is being increasingly practised, even though it lacks a legislative framework to regulate its implementation. The lack of legislation has led to some problems about legal certainty, and the practice of diverting children has become inconsistent. Some case law on restorative justice has developed. However, the Committee feels that the legislative framework provided in the Bill will contribute to uncertainties being removed and ensure a clear, transparent procedure, and will serve to hold decision-makers to account.
 9. Basically, diversion allows for the referral of a child away from the formal court system to some form of diversion option or programme which represents an alternative to the formal criminal justice system, and instead the child is held accountable for his or her actions through this process. The benefits of this include ensuring that the child receives an intervention based on his or her individual circumstances aimed at preventing him or her from re-offending and producing the best outcome for the child as well as promoting public safety. In addition, the child does not incur a previous conviction, thereby allowing him or her to become a productive member of society without the stigma attached of a criminal record. However, precisely because diversion represents an alternative to the formal criminal justice system, the Bill carefully regulates the issue. The Bill has created a system of checks and balances to ensure that diversion is not a 'soft option' for children who commit crime. These checks and balances include only allowing for the diversion of serious offences in exceptional circumstances; requiring the Director of Public Prosecutions to decide on whether children charged with more serious offences can be diverted; providing that a presiding officer may decline to make a diversion order even if requested by a prosecutor. Other

measures include the adoption of minimum norms and standards for the content of diversion programmes; the regular accreditation of diversion service providers; quality assurance; and the monitoring of diversion orders. There are also mechanisms to bring the child back into the criminal justice system should he or she fail to comply with a diversion order. The Committee has created a carefully balanced system of diversion in order to ensure that children are diverted from the formal criminal justice system, while also ensuring that such diversion is not only in the interests of the child, but also society.

10. Since diversion is such a key feature of the Bill, its success will ultimately depend on how the provisions of the Bill dealing with it are applied in practice. The Bill only allows for diversion to be considered as a possibility if the child acknowledges responsibility for the offence, and if he or she has not been unduly influenced, to make an acknowledgement to this effect. The role of presiding officers and prosecutors in this regard is possibly limited when compared to the role of the legal representative of child. Legal representatives might often be better placed in assisting the court to come to the correct decision relating to diversion, having facts at their disposal which may not necessarily emerge during a preliminary inquiry. The Bill requires a legal representative to promote diversion, but not to unduly influence the child to acknowledge responsibility. Legal representatives need to be acutely aware of their responsibilities when giving effect to this particular aspect of the Bill.
11. The Committee feels that it is important to stress that diversion is not meant to widen the door to adults more readily using children to commit crime, and refers to section 92 of the Bill for action against adults in this regard.
12. While the Committee is clear that the provisions of the Bill on diversion are sound, we have concerns about the capacity of diversion service providers. We are clear that the capacity of the diversion service providers needs to be significantly developed. The Bill has several provisions that seek to ensure this, including the requirement that DSD should “ensure availability of resources to implement diversion programmes, as prescribed” (section 56 (2) iii). DSD, the Department of Justice and Constitutional Development, the Intersectoral Committee for Child Justice, Parliament, NGOs and other stakeholders need to actively monitor the programmes delivered by diversion service providers and, very crucially, the outcomes.
13. A key principle of restorative justice is that of reconciliation, which entails taking into account the views of the victim, their families and others connected to the victim. In good measure, this Bill gives effect to the Service

Charter for Victims of Crimes, which was adopted by the Executive in 2006, by, among others, the following provisions:

- Specifically including, as diversion options, victim-offender mediation, which is designed to bring together the victim and the child offender, and family group conferencing, which includes not only the victim and child offender but also their respective families.
- Encouraging, where reasonably possible, regard for the victim's views by the prosecution on whether or not the matter may be diverted, as well as, in the most serious offences, the victim's views on the nature and content of the diversion option that is being considered, including the payment of compensation or the performance of a specific benefit or service by the child.
- Obliging a child justice court to take into account the severity of the impact of the offence on the victim when sentencing a child.
- Allowing the prosecution to place before a child justice court a statement by the victim on the physical, psychological, social, financial and other consequences that the crime has had on him or her.

14. The implementation of the above provisions, however, requires sensitivity to the plight of victims. It is important that government departments ensure that their information management systems are designed to collect and analyse trends to allow them to intervene more appropriately, where necessary, with respect to the needs and the plight of victims.

15. The Committee notes that the DSD has established 30 secure care facilities in all the provinces and has budgeted and planned to establish another 20. This is important as the Bill aims to divert children as far as possible away from the criminal justice system into the child care and protection system. In terms of Chapter 13 of the Children's Amendment Act, 2007, all secure care facilities and reform schools will become child and youth care centres, for awaiting-trial and sentenced children. The existing four reform schools and 17 "schools of industry", which are administered by the Department of Education at the moment, will be transferred to DSD within the next two years. The Committee notes that until this happens there might be challenges, and feels that the process should be fast-tracked.

16. There is currently a ban on children under 14 awaiting trial in prison. While recognizing the challenges, the Committee has decided to provide for this restriction to be extended to children under 14 being sentenced to a term of imprisonment. Unlike other provisions of the Bill, there was not substantial consensus within the Committee on whether the exclusion should apply to the child when he or she is under 14 at the time of sentencing, as the Bill provides for, or whether the child has to be under 14 at the time of the commission of the offence. This may require further consideration in future.

17. The Constitution requires children in conflict with the law to be kept separately from adults. The Bill provides that this must apply also when children are being transported to and from their place of detention and court. However, it is recognized that this is in some situations not possible and the Committee has, very reluctantly, after much deliberation, allowed for these exceptions. But the Committee is clear that only in exceptional circumstances and where it is simply not possible otherwise, must children be transported together with adults. All stakeholders are required to monitor this to the extent reasonably possible.
18. The Committee was informed that girl children, especially in police cells and lock-ups who appear in court, are often found not to have access to sanitary pads required during their menstrual cycle. While the Committee recognizes that this falls outside the ambit of medical assistance, we feel it should be considered by the police, secure care facility and correctional facility authorities.
19. The “recognizing” section of the Preamble of the Bill suggests that black children are more vulnerable to crime because of the legacy of apartheid. While supporting the Bill, the Democratic Alliance (DA) raised reservations about the reference to black children in this context. The majority in the Committee feels that this section of the Bill holds true for the present, but agreed that it may not necessarily be so in the future. An amendment was effected to this section of the Preamble to partly address the DA’s concerns, and the Committee agreed that the section should be reviewed after 5 years to consider its continuing relevance.
20. In terms of section 154(3) of the Criminal Procedure Act, there is a prohibition on the publication of any information which may reveal the identity of an accused person who is under the age of 18 years. However, once the person turns 18 the prohibition falls away. The Committee feels that the Department, and perhaps the South African Law Reform Commission, should consider an amendment to section 154(3) of the Criminal Procedure Act to provide for the retention of the prohibition after a person turns 18. The Department should report back to the Committee on this within a reasonable time.
21. The Committee feels it is important to draw attention to the many provisions in the Bill relating to the need for children and their parents or “appropriate adults” to be fully informed about the way the new child justice system will

work, and there is significant space for them to also be heard in respect of the offences the children are accused of.

22. While the State has obvious obligations towards children it cannot substitute for the role of parents, who have the primary responsibility towards children. This principle has been given legislative definition through the inclusion of the concept of parental rights and responsibilities in the Children's Act. Section 18 states that parents of children have both parental rights and responsibilities towards children, which include care of and contact with their children. Care is defined in the Act to include protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards and guiding the behaviour of the child in a humane manner. These are responsibilities best fulfilled by parents and the State should not be a substitute provider for this type of care unless circumstances require. The issue of parental care being the primary care for children has been alluded to by the Constitutional Court in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), where the Court reasoned (albeit in the context of socio-economic rights) that the Constitution contemplated in section 28, seen as a whole, that children should be basically cared for by their parents and families. The Bill provides many opportunities and obligations to ensure the participation of parents, both in requiring their presence at formal justice processes, and involving them as far as possible in diversion and community-based sentences. This is one of the practical ways in which the aim of promoting "Ubuntu" can be realised. Children do not live alone, they are members of families and communities. It is well understood that a sense of belonging, as well as caring about what one's family and community think or feel about one, are powerful factors in preventing crime. The Committee feels that unless we can re-establish functional families, we cannot solve all the challenges associated with children coming into conflict with the law. We need to rebuild society through strong families, kinship groups and communities, which will further add towards crime prevention and the prevention of children re-offending.

23. The Committee is acutely aware of the capacity and other constraints of the State to implement the Bill, and the amendments to the Bill were effected with this constantly in our collective mind. There are also various provisions in the Bill that relate to the need to develop the capacity of the State. The Preamble also notes, in the "acknowledging" section, that "there are capacity, resource and other constraints on the state which may require a pragmatic and incremental strategy to implement the new criminal justice system for children". We engaged rigorously with the Departments and other state structures on their capacity to implement the Bill. This included about 12 hours in closed workshop-type meetings and a further eight hours in ordinary

Portfolio Committee meetings. We also required the State and other structures to respond in writing to questions about their capacity to implement the Bill, which were put to them in writing. We also undertook study visits, without pre-warning, to the One Stop Child Justice Centres and diversion service providers in Mangaung and Port Elizabeth. Overall, we feel that while the co-operation and co-ordination among the government departments responsible for the implementation of the CJB has improved recently, there is still some way to go. We would have preferred to have seen greater consensus among the Departments on the use of terms and the accuracy of statistics and on other issues, but we are clear that the departments and other State structures certainly have the potential to implement the Bill effectively. Of course, it will be challenging - but it can be done. There has to be a pragmatic, phased, sensible implementation strategy. In any case, the Bill will only come into effect on 1 April 2010.

24. Interestingly, the original independent 2001 report on the costing exercise on the Bill noted: "capacity is an important consideration in transformation (human capacity, financial capacity, information technology, etc). But current capacity should not dictate the destination that the Child Justice Bill wishes to achieve. ... Current capacity does however influence the trajectory of the implementation strategy to achieve the specified objective". An important consideration is that people tend to seek to invest time in learning how a new system works only if that system is a reality in their lives. "So long as the implementation of the system is being planned so people will only plan to learn how it works some time in the future, i.e. capacity will not be developed without some external pressure." The report also rejects a big bang approach, which, it says, could severely compromise service delivery but acknowledges that dividing the actual implementation into a number of phases is a challenge. The report also suggests that a systemic approach will probably require a reasonably long roll-out period, requiring a project management approach. The implementation plan will also need to be reviewed regularly. Obviously, there will be major costs in implementing the Bill, but over time, experts argue, there will be financial savings for the government.
25. Obviously, there are aspects of the CJB that only the state structures should implement, but there are other aspects that the NGOs could assist with and are keen to do so. It is important, however, not to conflate the roles of the State and NGOs, but certainly there is a need for greater co-operation between them, and the Committee effected various amendments in the Bill to encourage this.

26. There are various regulations, directives and national instructions that Parliament has to approve of. The Committee commits itself to fulfilling its responsibilities in this regard with due expedition.
27. In view of the need for inter-sectoral co-operation and co-ordination in the implementation of the Bill, the Committee will co-operate with the Social Development and other relevant portfolio committees in oversight of the implementation of the Bill. The Committee will seek to facilitate at least one meeting a year to jointly receive reports from the relevant departments and other stakeholders in order to monitor progress on the implementation of the Bill.
28. The Committee acknowledges the extremely valuable contribution of various individuals in the finalization of the Bill, including Mr Laurence Bassett, Advocate Shireen Said, Ms Thandazille Skhosana, Ms Corlia Kok and Mr Hennie Potgieter, who made up the Department team; Dr Anne Skelton, Dr Jacqui Gallinetti and Ms Dhaksha Kassin from the Child Justice Alliance; Ms Christine Silkstone of Parliament's Research Unit; researcher Mr Tumisang Bojabotshena; and Mr Neil Bell, Chief Editor, Bills Office of Parliament.
29. While the Committee regrets the delay in finalising the Bill, we would like to think the delay served to, ultimately, produce a better quality Bill. Certainly, the Bill is the outcome of considerable negotiations among a range of stakeholders, and there is now substantial consensus on its content between Parliament, the Executive, NGOs and academic and other experts. The challenge now is for us all to work together to implement the Bill effectively. The Committee feels we owe this to the children of our country and we need to do this to consolidate and advance our democracy.

Report to be considered.