JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
14 August 2003
PREVENTION OF CORRUPT ACTIVITIES BILL; CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Advocate J de Lange

Documents:
Prevention of Corruption Bill [B19-2002] Working Document No.5 (May 2003) (in current use)
Child Justice Bill [B49-2002]
Prisoner Statistics - Juveniles
Schematic Presentation to Schedules(finalised version)
Working Document No 1 of Child Justice Bill as of 14 August 2002(not available)

SUMMARY
The Committee considered the remainder of the Prevention of Corrupt Activities Bill and recommended that some clauses be redrafted whilst others be removed. The drafters will effect these changes. One of those was a sub-clause dealing with the extra-territorial jurisdiction of courts of the Republic with respect to acts committed in foreign countries even though the act is not a crime in that country.

A fresh draft with proposed amendment to the Child Justice Bill was handed out. The Committee considered the Schedules in order to decide on the categorisation of offences which were assessed, not in terms of seriousness, but in terms of the practicalities of dealing with the children if the charges were placed in those sections. Thereafter, the Preamble and Definitions Clause were discussed.

MINUTES
Prevention of Corrupt Activities Bill
The Chairperson noted that the Committee had reached Clause 21 in reviewing the Fifth Draft of the Bill. The Committee commenced with Clause 22.

Clause 22 Offences and penalties
The Chair said that Clause 22(1) should be removed.

Adv Nel said that 22(2) deals with maximum sentences that different courts may impose. He said that the common law offence of bribery should be reinstated and that the sentence for corruption should be the same as that of bribery.

The Chair observed that Clause 22(2) makes reference to a regional court and the word 'regional court' is not defined in the Bill. The drafter was asked to show the clause that reinstates the offence of bribery. Clause 22(2)(a) should also make reference to Clause 12.

Adv Nel said that he did not think that there should be a specific reference to the offence of bribery since the High Courts know the offence very well.

The Chair asked for the different between a designated magistrate court and a magistrate court.

Adv Nel said that they two differ in terms of sentences that they are able to pass. Only certain courts would become designated magistrate's court after the Minister has classified them as such.

The Chair said that reference to 'any penalty which may lawfully be imposed for the offence of bribery' in 22(2)(a)(iv) is confusing since it seems to mean that the jurisdiction of the court with regard to sentences may be extended. He asked the drafter to redraft the clause. Also the content of the phrase 'designated magistrate's court' needed to be spelt out. The issue of numbers of the number of years and amounts of fines that a person can be sentenced to would be discussed at a later stage.

Adv Nel said that 22(4) provides for minimum sentences and this is in line with the Minimum Sentence Act. The Chairperson asked the drafter to include this as a Schedule in the Minimum Sentence Act.

Ms Camerer (DA) asked if the amounts in 22(4) had been compared with sentences in other jurisdictions. She said that one should be more concerned with imprisoning hard core violent criminals. White-collar criminals are not a danger to a society although they might be a danger to the economy. She felt that the Department had gone overboard in laying down the sentences.

The Chair asked her to bring information regarding the ways in which other jurisdictions have dealt with this issue. He felt that even white-collar criminals should not get off lightly. However, he agreed that white collar crimes are at the bottom of the spectrum and suggested that members might look at reducing or even increasing the sentence. He added that judges also need to change the way they think about suitable punishments.

Mr J Jeffery (ANC) said that it is important to have a major deterrent so that other people would not even think of committing crimes. The issue of stipulating the amount in the legislation was problematic. There should be a mechanism through which the amount in question could be changed from time to time. He suggested that Parliament may change the amount by resolution which must be published in the Government Gazette.

Adv M Masutha (ANC) said that the publishing of the amount in Gazettes would also be problematic as not everybody has access to them.

The Chair said that Gazettes are published in order to inform people. There is no sound reason to believe that Acts of Parliament would be better suited than Gazettes.

Adv Masutha suggested one may say that the Minister must initiate the change and seek approval of Parliament.

The Chair summed up the debate by saying that a clause should be drafted indicating that the amounts may change from time to time as amended by the Minister by notice published in Gazettes.Such an amendment should be approved by Parliament. The Chair directed that 22(5) to 22(11) should be put into the Schedules.

Clause 23 Attempt, conspiracy and inducing another person to commit offence
The Chair said that this clause should come after Clause 21 and would become Clause 22.

Clause 24 Giver and acceptor of gratification to be guilty of offence notwithstanding whether the act in relation to the gratification was performed or not, etc
Adv Nel said this clause was important especially in sporting events. He cited the South African cricket match-fixing scandal as an example.

The Chair said that the clause still needs redrafting.

Mr Jeffrey said he could not understand the meaning of "offered to accept" in the clause.

Adv Nel replied that this occurs when one is approached to do something and the person is willing to do it and would accept the gratification at some other time.

Clause 25 Intentional interference with, hindering or obstruction of investigation of offence
The Chair read the clause and concluded that Clause 25 should be merged with the clause dealing with corrupt activities relating to witnesses.

Ms Camerer said that dockets should be specifically mentioned given the fact that they get lost very often.

The Chair said that it might be the case that the definitions of document and record include a docket.

Clause 26 Investigations regarding possession of property relating to corrupt activities
The Chair noted that the clause makes no reference to the right to silence. If one is forced to answer questions during the investigation, the answers thereto should not be used in court.

Ms Camerer felt that it would be unfair to allow for the investigation of innocent people who may even offer verifiable explanation of their wealth. This process might be open to abuse, as it does not show when it would stop.

The Chair said that the purpose of the investigation is to uncover if there is a verifiable explanation of the wealth. If such an explanation is absent, one would then have to go to court.

Mr Jeffrey asked the drafter to clarify the meaning of an investigation direction. He also did not see the link between 26(1) and (2). It is not even clear what the judge may order if he agrees that the investigation must take place in terms of 26(2). He asked if the person to be investigated need not be informed of the investigation. He would understand secrecy when it is a matter of intercepting and monitoring a person's phone calls.

Ms S Camerer (DA) insisted that there should be notification however, she conceded that in certain circumstance one might have to dispense with the requirement of a notice.

The Chair agreed that the sub-clauses need to be clarified. He added that in some instances informing the person of the investigation would defeat the purpose of the investigation, as people would conceal their assets.

Mr S Swart (ACDP) said that one needs to look at the way the Receiver of Revenue does its investigations.

Ms F Chohan-Kota (ANC) asked what would happen where a person is investigated and corrupt activities unrelated to the investigation are uncovered.

The Chair said that the concept of an investigation direction 26(2)(a) needs to be explained. One also needs to guard against people abusing it. He asked the drafter why this direction is important given the fact that the police may investigate in terms of sections 28 and 29 of the National Prosecuting Authority Act, 1998.

Adv Nel replied that in terms of those sections, police might investigate only if they think that specific offences have been committed. In this case one is not sure if an offence has been committed.

The Chair asked that copies of the two sections should be given to members to look at.

Mr Jeffery said that he saw the need of an investigation of the direction. He added that the clause should be narrower so as to avoid abuse. The contents of the direction should be specified. The

order should also be for a limited period and a mechanism for review of the order should also be put into place. This is important given the fact that the investigation might expose people to different things.

Clause 27 Duty to report corrupt transactions
In answer to the question asking if there is any sanction for violating this clause, Adv Nel replied that the sanction is provided for in Clause 22.

Mr Jeffery said that the places where one may report the transactions need to be carefully defined. This is especially the case when one deals with the concept of competent authority. He asked if a religious minister is one such competent authority.

The Chair said that reference to a competent authority should be removed and that a law enforcement agency should be defined.

Mr L Landers (ANC) said that a duty should also be placed on the people to which one has to report. This is important given the fact that people report crimes and nothing gets done. A complainant has to be given something as proof that he reported the transactions - given the fact that he may one day be charged for not reporting.

The Chair said that the Police Act creates this duty. He agreed that there should be a duty to record the complaint and to give a receipt of the complaint.

In answer to Mr B Magwanishe (ANC) asking what would happen in cases where one abuses the clause and files a false report about another person, Adv Nel said that one would be charged with perjury and obstructing the course of justice.

Clause 28 Presumptions
The drafter explained that there are two options in 28(1) and that the two options are different only because there is a (d) in Option 2.

The Chair said he had a problem with creating a presumption with regard to relatives as specified in 28(2)(c). He said that the state must prove that the relatives are involved and consequently instructed the drafter to remove reference to relatives. He doubted if this reference to relatives would pass constitutional scrutiny. He also said that Option 1 should be kept.

With regard to 28(4), the Chair said that this clause may be applicable to Clause 18 since it also deals with acquisition of interest by public officers.

Clause 29 Extra-territorial jurisdiction
The Chair said that 29(1)(b) is problematic if not unconstitutional and that it should be removed. He said that one could not create an offence for foreigners while they committed the act in their countries and such an act is not a crime in their country.

Adv Nel said that such an act is criminalised only if it affects South Africa whereupon the Chair asked him to explain what he mean by 'affect'. He could not understand finding jurisdiction on the basis of 'affect'. He said that this is especially the case given the fact that people regulate their conduct according to the laws of their countries.

Mr Jeffery said that the problem is that there are or might be foreign nationals who commit criminal acts within South Africa and get off scot-free.

Adv Nel illustrated the issue by saying that one might find that there is an international tender, which a South African public body is bidding for. It happens that a person giving the tender is bribed with the effect that the South African body does not get it. He also referred to the matter of Charles Dempsey who abstained from voting with the effect that South Africa lost the opportunity to host the 2006 Soccer World Cup.

The Chair understood the logic and said that one needs to specify how the act affects South Africa and that the person charged must be in the Republic and the government should not be extraditing him. He added that such a person should have intentionally acted in a corrupt manner, knowing that the conduct would affect the Republic or any of its public bodies.

Clause 30 Reinstatement of common law crime of bribery
The Chair said that since the crime was repealed and therefore dead, no one knows what it is. He said that one should therefore state in this clause what the crime is all about.

Mr Jeffery felt that if one states the content of the crime in the statute, it ceases to be a common law crime and becomes a statutory crime. He felt that one of the essential characteristics of the crime (i.e. the ability to develop it) would be lost. He asked the drafter if there is any precedent for reinstating a repealed crime. Was the offence really needed?

Adv Nel replied that the crime covers offences that may not be adequately covered by corruption and therefore it is necessary to have it.

Clause 31 Repeal and amendment of laws
The Chair said that it was not necessary to deal with the Schedules for the time being. He suggested that such would be looked into once the Bill had been redrafted.

Afternoon session
Child Justice Bill
The Chair told the Committee that the draft they had in front of them was the work of himself and the three drafters during the Parliamentary recess. The Bill was not completely covered even though they had spent four days on it.

The Chair read out the Notice which accompanied the Working Draft of the Bill advising readers that the Schedules had to be ignored, the numbering of the clauses was incorrect and that references to minimum sentences had been tagged on at the end of the Bill. The Notice stated that suggested additions by him were supposed to be marked in yellow and suggested deletions in red. However, only he had a colour copy. So everyone else should read the light shading as yellow and darker shading as red. This was in addition to the bold and underline markings normally used.

The Chair cautioned the Committee that the Schematic representation of the Schedules would be relatively helpful, but he asked the drafters to ensure that the Schedules were formally completed soon.

Schedules
The Chair told the Committee that he did not want them to pay too much attention to the headings of the Schedules as these were not correctly indicating the scope of the Schedule. Also, when deciding on the categorisation of the offences, he did not want the Committee to assess them in terms of seriousness, but in terms of the practicalities of dealing with the children if the charges were placed in those sections.

The Chair took the Committee through the charges in Schedule One. What would be termed "common assault" was to be placed in Schedule One. "MITP" was malicious injury to property. "Corruption" would need to be spelt out clearer in line with the statutory definition.

Mr Jeffrey (ANC) referred to that morning's discussion on designating amounts in legislation and the best means to provide for their increase at a later date. He asked if there was a clause within the body of the Bill to allow for the Minister to increase the amounts?

The Chair replied that this point had been discussed with Adv Nel and he instructed the drafters to ensure that there was a clause which allowed for the Minister to publish an increase in the Government Gazette which would then be voted on by Parliament.

Ms Chohan-Kota (ANC) queried whether "contempt of court" was purely a Schedule One offence. She said that if the child, for example, swore at a judge or magistrate, then this should fall under Schedule One. However, if the contempt was that they failed to appear when they were ordered to, then this should be an offence for which they could be detained. Otherwise it could prove impossible to secure their attendance at Court. The Chair asked the drafters to include in Schedule Two a contempt of court offence of non-appearance at Court.

Mr Jeffrey (ANC) said that surely it had to be wider than simply non-appearance. It should be failing to comply with a Court Order. The Chair asked the drafters to compile a list of potential contempt of court offences.

The Chair queried with the drafters why the MITP offence in Schedule Two did not have an upper limit? He remembered having told them that he felt it should be R50 000.

Ms Camerer (DA) said that she thought MITP was a very serious offence when for example a car was burnt out, and that it should not be in Schedule Two at all. The Chair reminded her that he had already said that the issue was not whether it was serious or not. The issue was one of practicalities. Did they want there to be an option to divert or not?

In response to Mr Jeffrey (ANC) asking what the rationale had been in allocating the amounts to "possession of stolen property", "robbery" and "theft", the Chair said that he was running ahead of the committee. Some crimes had been allocated higher or lower amounts on the basis they took more planning than others. However, MITP and "theft" should probably have the same amounts allocated.

In reply to Ms Camerer (DA) asking if repeat offenders would still be able to get out of going to prison, the Chair said that her question did not apply to the situation they were discussing. She clarified her point by saying would repeat offenders be able to get out of being held in custody awaiting trial?

The Chair repeated that he had asked the Committee to disregard the headings to the Schedules on the Schematic representation. The only reason the Committee was going through this exercise was to acquaint themselves with the crimes the drafters felt should be included in the various Schedules. He appreciated that the Committee had not looked at the content of the Bill for a long time and that he was lucky in that he had looked at it during the recess. He did not expect them to remember the content of the Bill, but they did not need to know it to carry out their current task.

The Chair noted that "possession of drugs" in excess of R1 500 was taking the situation extremely close to an assumption that the child was dealing in drugs.

Mr Jeffrey (ANC) said that he felt the amounts allocated to possession of stolen goods should be higher than the amounts allocated to robbery or theft as taking the item was more serious than having the item. The Chair agreed and asked that the amount allocated to "possession of stolen property" in Schedule One be raised to R2 000.

Mr Jeffrey (ANC) also asked if "robbery without aggravating circumstances" should not be limited to a particular amount under Schedule Two with the rest coming under Schedule Three? The Chair agreed and asked the drafters to limit it to R100 000.

Mr Jeffrey (ANC) asked if "public violence" and "arson" should be left only as Schedule Two offences. Perhaps they should have limits and above those limits it would be a Schedule Three offence?

Ms Camerer (DA) questioned whether the decision to place the crime in Schedule Two or Three should be based on monetary considerations. She felt that other considerations should come into play such as was there any injury or deaths. She said that kidnapping should not be regarded as a

Schedule Two offence.

The Chair reminded her again that the point of the exercise was not to categorise the crimes in terms of their seriousness, but whether or not they wanted the Prosecutor to have the ability to show discretion or not.

Mr Swart (ACDP) said that he recalled different amounts having been allocated to the crimes initially. He asked what rationale had been applied when the figures were changed?

The Chair replied that it had been a value judgement which had sought to pad out the initial figures into a more realistic scheme.

The Chair noted that Schedule Three was very complex as it had three parts. Part 1 was the part which basically treated the children as adults, with the exception of a possibility for under 14s to receive some leeway. Part 2 and 3 differed slightly and which crime is placed where was to be the result of value judgements.

The Chair asked if "indecent assault" without Grievous Bodily Harm could be placed in Schedule Two as it was not currently shown anywhere. He also asked if item (ii) shown under "fraud, corruption, extortion" was actually necessary.

Ms Skelton (UNDP Child Justice Project) said she thought it was a duplication.

The Chair asked why "robbery" was in both Part 1 and Part 2 of Schedule Three.

Ms Skelton explained that the duplication was necessary as Part 1 related to under 14s also. Only the most serious of crimes would result in the imprisonment of children under the age of 14 years.

The Chair asked if "Forgery and Uttering" could be added to Part 3 with a limit of from R20 000 to R150 000, and the rest to be placed in Part 2.

The Chair said he wanted to draw the Committee's attention to "rape" but he did not want them to discuss it at present. Interest Groups had strongly motivated for this to be a divertable offence for the young children. Whilst this was theoretically a good idea, the diversion programmes were very poor. At present it was a "non-divertable" offence. He wanted the Committee to discuss later the possibility of making it divertable in some circumstances.

Ms Camerer (DA) asked whether loitering for the purposes of prostitution was included in the Schedules? The Chair said he believed this was a Statutory Offence and so it was included.

The Chair drew the Committee's attention to the addition of "sedition", war crimes and "genocide" to take account of South Africa's international obligations. He said that they had also included "organised crime" but had left "gangs" in Part 3 to allow for diversion into a satisfactory programme.

He also questioned whether the final section in Part 3, serious offences committed in syndicate, would clash with other provisions of the Bill.

He concluded the deliberation of the Schedules by reminding the Committee they had to bear in mind concerns over rape and serious offences when committed in syndicate.

Preamble

The Chair said that he was passing over the Long Title of the Bill as this had to be done at the end. He then read out the Preamble. He asked Mr Bassett, the Department drafter, if the Preamble should not spell out more clearly what Rights of the Child were being enforced. He said the Bill, conceptually, was far more important than the two bullet points containing references to detention and conditions.

The Chair also said that the second part of the Preamble, "it is consequentlyâ€¦", was acceptable but a bit sterile. He wanted it to highlight more clearly the changes made and the fact that additional mechanisms had been added to the Criminal Justice System to accommodate children.

Adv Masuthu (ANC) asked whether reference should be made to the Constitution and international obligations?

The Chair asked Mr Bassett to consider this point too. He said that the Preamble must reflect:
- International obligations;
- Constitutional obligations
- The history of South Africa
- What the Bill is seeking to achieve.

Definitions
The Chair asked the drafting team if they could please revert to the old method of linking up the definitions with a reference to the section they related to, even if it was shown in a footnote.

Ms Camerer (DA) asked if "appropriate adult" had additional qualifications within the clause relating to it as the definition appeared to allow for adults regardless of their suitability to act as the child's representative. Mr Bassett said that the pattern within this Bill borrowed from the qualifying provisions of the 1998 Act.

In answer to the Chair asking why there were two "Child Justice Courts", Ms Skelton explained that they were both the "one-stop" Child Justice Centres and the normal court system.

The Chair asked if all the "detention centres" listed under that definition had themselves further defined? Ms Skelton said all except "prison", "police cell" and "lock-up". The Chair asked that this be amended.

The Chair asked why the "Directors of Prosecution" were being referred to and not simply the "National Director of Public Prosecution". Ms Skelton said this was because it was the individual Directors who had the power to divert. The Chair cautioned against stating that the Directors had the power as, what was required was that the Directors understood they were to use discretion within the confines of a policy directive from the National Director.

The Chair and Ms Camerer (DA) asked that the latter part of "diversion option" which said "and includes an option developed in terms of this act" be removed.

The Chair pointed out to the Committee that he had asked for the definition of "family group conference" to be taken out as it replicated the clause.

Ms Skelton explained that an "independent observer" was someone who was appointed from a list of potential people who were able to represent a child that had no family members to assist her or him.

The Chair pondered on the Committee's trip to the Child Justice Centre in Port Elizabeth. He said that there was a Police Officer there who would beat up children (all be it with the consent of the parents). Also, the Child Justice Centre was sending all the children to the prison for crimes involving dishonesty and not the secure care facility which was very much under-used.

Ms Camerer (DA) questioned the definition of "residential facility" as it only related to sentenced children. She wondered where unsentenced children were to be held?

Ms Skelton also drew the Committee's attention to the fact that reference was made to the Ministers for education and social development with no reference to correctional services.

Ms Chohan-Kota (ANC) noted that the Minister for Social Development had no power to detain

sentenced children. Ms Skelton said that the Bill proposed to change this. The Committee debated whether to remove the reference to the Minister for Social Development. Mr Bassett suggested that they remove the word "residential" as this appeared to be causing all the problems.

The Chair asked if the full definition of Probation Officer was needed? Adv Masuthu (ANC) said that the Probation Services Act made a distinction between probation officers and assistance probation officers in terms of their designation *and* competences.

Mr Swart (ACDP) asked if the principal of the "Restorative Justice Act" had changed? Ms Camerer (DA) asked if restorative justice needed a definition and if it should not simply be placed in the preamble? The Chair said it was referred to in the clauses so it needed a definition.

The Chair said he was aware that the Child Care Act had a huge problem with the definition of "secure care facility" so he asked Ms Skelton to provide the Committee with copies of all the Acts which relate to places of this type in order that they could ascertain what they were.

Ms Camerer (DA) complained that the definition of "symbolic restitution" was too limiting as it should surely also be allowed to mean the putting on of a play, singing of a song, reading of a poem, etc.

The Chair drew the meeting to a close.
