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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

15 August 2003

CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: The Chair

Documents handed out

[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 continued with the deliberations on the Child Justice Bill focusing on Chapters 2 and 3. The Committee was concerned that the objects of the Bill as contained in Clause 2 of the Bill did not capture the essence of the Bill, which was that of removing children out of the criminal justice system. The rest of the amendments related to issues of technical legal drafting, so as to ensure the provisions of the Bill were based on solid footing.

MINUTES

The panel comprised Mr Hennie Potgieter, South African Law Commission, Ms Anne Skelton, UNDP Child Justice Project and Mr Lawrence Bassett, Department of Justice.

Child Justice Bill

Chapter 1 : Objects of Act [General] Guiding principles

Clause 2: Objects

The Chair noted that the object of the Bill as contained in Clause 2 did not capture the essence of the Bill, which was that of removing children out of the criminal justice system. Hence there was a need to capture that in the preamble.

Ms Camerer (DP) asked whether it was not the object of the Bill to keep the children out of prisons and the criminal courts into the child justice system.

The Chair asked the legal drafters to redraft the objects of the Bill so as to capture the above propositions.

Clause 3: Guiding Principles

The Chair referred to Clause 3(a) and was of the view that it was too general, because there would be instances when a child would talk through a lawyer. Hence the clause had to be clear that it was referring to the preliminary inquiry. He proposed that Clause 3(a) be redrafted to the following effect "every child should, as far as possible, be given an opportunity to respond before any decision affecting him or her is taken, particularly in those parts of the procedure in which they are allowed to talk".

Mr Jeffery (ANC) referred to Clause 3(1)(h) and was of the view that there was a need for some

clarity in respect of that clause.

The Chair explained that Clause 3(1)(h) meant that a white kid would be treated differently from a black kid, because there was an assumption that a poor kid would need special treatment.

Ms Camerer (DP) was also concerned with the way Clause 3(1)(h) was expressed as she was of the view that there had to be equal access to child justice. She further noted that the Bill did not embody any words used in the Constitution such as "dignity".

The Chair explained that it was no use repeating the words contained in the Constitution, which has a limitations clause, in a piece of legislation without setting out how such words would be limited.

Mr Jeffery (ANC) was of the view that the proposed Bill was aimed at dealing with children who were on the wrong side of the law and he proposed that such a principle had to be captured clearly.

The Chair apprised members that subclauses 3(2) and 3(3) had been moved. However he asked the drafters to insert a footnote specifying where those provisions had been moved.

Chapter 2 : Application, Criminal Capacity and Matters related to age

Clause 4: Application of Act

The Chair noted that this clause was focusing on jurisdictional issues and matters relating to application. He pointed out that the whole criminal process remained intact, but there was a need to specify which sections have changed in the Criminal Procedure Act in respect of the Child Justice Bill.

He referred to subclause 4(3) and was of the view that the contents of this provision had to be contained in the Criminal Procedure Act. In the interim he proposed that the whole provision be put in one of the schedules at the back of the Bill as amending the Criminal Procedure Act so as to make children under the Criminal Procedure Act be also subject to diversion.

Mr Potgieter (SA Law Reform Commission) informed the Committee that they had already inserted a footnote to that effect.

The Chair was of the view that the above proposition could have fundamental bearings on the definition of a "child" in terms of the Bill - hence it would be necessary to amend the definition of a child. Mr Potgieter concurred.

The Chair referred to subclause 4(b) and proposed that the word "unless" be removed because that could mean that if the provisions of the Criminal Procedure Act were to be invoked, they had to be invoked separately.

Mr Jeffery (ANC) referred to 4(b) and proposed that instead of the use of the phrase "a person other than child" the word "adult" be used as an alternative and then a definition of an "adult" would have to be provided under the definitions.

The Chair concurred with the above proposition save that a definition of an adult would have to exclude people of unsound status.

Mr Jeffery (ANC) referred to 4(4) and asked what would happen in cases where a child and non-child were involved in the same incident such as murder, but the child was not charged with murder but with assault.

The Chair suggested the following phrase as an alternative "charged in the same trial or appearing on the same offence". However he cautioned that if Clause 4(4) was going to be amended in terms of the above proposition, it had to be carefully drafted, because a child could be charged on the

same charge but not necessarily commit the same offence.

He further noted that the definition and the procedures of the Child Justice Court had to be in line with Clause 4(3) of the Child Justice Bill and whenever this Act did not amend the Criminal Procedure Act, the Criminal Procedure Act would apply.

Clause 5: Criminal Capacity

Mr Jeffery (ANC) was of the view that sub clause 5(2)(b) did not relate to criminal capacity as it was dealing with other factors that a prosecutor should take into consideration.

The Chair explained that 5(2)(b) was very important because it dealt with the prospects of establishing criminal capacity.

Mr Jeffery (ANC) proposed that there was a need to insert a clause that would cover children between the ages of 10 and 14 years.

The Chair pointed out that once a prosecutor decides to prosecute, if the child was below the age of 14, the presiding officer would have to determine whether s/he had capacity.

Mr Jeffery (ANC) asked what would happen to a child where a prosecutor had decided not to prosecute?

The Chair said that a child between the age of 10 and 14 years would fall within the criminal justice system but certain things have to be proved, and if there was decision not to prosecute, the prosecutor cannot prosecute.

Mr Jeffery (ANC) pointed out that he was referring to a child who had committed a criminal offense but who lacked capacity. Hence there was a need for an empowering clause similar to Clause 6.

The Chair explained that, if a state could not prove its case beyond reasonable doubt, they could not create an empowering clause for the state to prosecute. He added that for children between the ages of 10 and 14, the criminal justice system would apply.

Ms Skelton (Child Justice Project) pointed out that they would re-look at the aforementioned propositions, but there was a need to make it clear that many of those children could be diverted.

Ms Chohan-Kota (ANC) referred to Clause 5(2)(b) and asked whether there would be any legal implications where a person could challenge the prosecutor's decision on the basis that it was ill founded, and if possible what would be the criteria.

The Chair explained that Clause 5(2)(b) only required the prosecutor to show that s/he had taken all the factors as listed in 5(2)(b) as guiding lines and hence the clause as it stood had had no further consequences.

Clause 6: Children below 10 years of age

The Chair referred to Clause 6(7)(a) and proposed that there was a need to make that clause much broader to include society so as to capture an element of family support.

Clause 7: Responsibility of police official where age of child is uncertain

The Chair requested the legal drafters to flag this clause and come back to it later because what was required from the police was very difficult especially under arrest. Hence there was a need to draft it more clearly.

Clause 8: Age estimation by probation officer

The Chair asked why Clause 8(2) was not referring to a birth certificate.

Ms Skelton (Child Justice Project) pointed out that Clause 8(2) could only kick in where there was uncertainty and therefore it was only applicable where there was no birth certificate.

The Chair noted that in terms of the clause, a probation officer could only make an estimation before the assessment. He asked the drafters to redraft the provision to the effect that a probation officer could make the estimation after the assessment or any other stages after the assessment.

Clause 10: Age determination by court

The Chair requested the legal drafters to draft a clause that would empower a court to determine the age, as well as a clause that would empower the court to alter the age if there was enough evidence.

Clause 11: Error as to age at trial

The Chair proposed Clause 11 be reformulated, so that if a diversion had to be made in the case where a child below the age of 18 had committed a crime of rape, it could only be done under the instructions of the National Director of Public Prosecution as a special category. He further noted that there was a need to re-draft Clause 11 in a manner that met the proportionality test.

He asked as to why there was a reference to Sections 303 and 304 of the Criminal Procedure Act.

Mr Potgieter explained that Section 303 proceedings dealt with review and Section 304 dealt with transmission of the record to the court.

The Chair was of the view that there was a need to re-look at Clause 11, alternatively the legal drafters could flag that clause and the Committee would deal with it in detail in the section on confessions.

It was agreed that the Committee would reconvene on this Bill on 19 August 2003.

The meeting was adjourned.

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