JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
20 August 2003
CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Adv J H de Lange (ANC)

Relevant documents:
Child Justice Bill [B49-2002]
Schematic Presentation to Schedules(finalised version)
Working Document No 1 of Child Justice Bill as of 14 August 2002(not available)

SUMMARY
The Committee dealt with Chapter 3, 4 and 5 of the Child Justice Bill with regard to the methods of securing attendance of child at preliminary inquiry, assessment of child and preliminary inquiry. It was noted that even those children under the age of ten year who commit criminal offences would not be left out of the system, although they would not be dealt with in terms of the criminal justice system. The Committee would meet on Tuesday to deliberate again on this Bill.

MINUTES
Chapter 3: Arrest, Summons and Warning of Child
Clause 12: Methods of securing attendance of child at preliminary inquiry
The Chair said that although the clause formulation is accepted, its heading needs to be reworded.

Clause 13: Arrest
The Chair noted that a police official effecting an arrest cannot be expected to know an 'appropriate adult' responsible for such child at the time of arrest. Therefore this provision might render some arrests illegal as it has the effect of creating a legal duty on the arresting officer. The provision in 13(3)(d) requiring the arresting officer to notify an appropriate adult should be deleted and a new concept not as wide as that of an appropriate adult be inserted in its stead. Some children might arrange their own private lawyers and thus render informing the Legal Aid Board irrelevant. He then proposed that the phrase "if appropriate" be inserted before "the Legal Aid Board" in 13(4)(a). It should be clear in the Bill where the child arrested would be kept, since he intends to introduce an amendment that all unrepresented children, who are sentenced for any length of time, be taken to automatic review.

Dr L **Basset** (Department of Justice Drafter) said that the department would also clearly specify all those Criminal Procedure Act (CPA) provisions that are affected by the Bill.

The Chair said that the Schedules of the Bill should clearly outline those sections of the CPA that would remain intact if those of the Bill are not applicable. He requested the department to reword 13(6) so as to include all the instructions referred to in 13(4). The National Commissioner should table those instructions referred to in 13(6) to Parliament within four months. This subclause should be moved to Clause 18(2). He requested the drafters to make footnotes of all clauses that have been moved.

Clause 14: Use of force in effecting arrest
The Chair said that this clause is no longer relevant since the Act in this regard has already been passed.

Clause 15: Summons
The Chair asked if this would be the proper stage to accept the existence of an appropriate adult as contemplated in subclause (2).

Ms A Skelton (Project Co-ordinator of the UN Child Justice Project) said that this is the de facto provision. She said that it is an acceptable practice in Courts for people to take responsibility over arrested children.

Mr Jeffrey said that the problem with this provision is that it does not clearly state on whom the summons would be served.

The Chair agreed with Mr Jeffrey and noted that the implication of such is that the summons may be served on the child. This could not be accepted since it could be very embarrassing on a child as it could be served while at school and in front of other pupils.

Ms S Camerer (DA) agreed and said that implying provisions should be avoided in the Bill.

Ms Skelton said that the CPA is clear on whom the summons should be served, that is the person. However it is unlikely that the police officials would ever serve a summons on a child without such child being assisted by an adult.

The Chair said that it should be clear in the Bill that the summons should always be served in the presence of the parent of the child or appropriate adult. However if it cannot be served in that manner, then a copy should be given to such parent or any appropriate adult. The drafters should rewrite this provision so as to make this quite clear.

Clause 16 Written warning to appear at preliminary inquiry
The Chair said that this clause needs to be redrafted since it is similar to Clause 8. He asked the drafters if the Criminal Procedure Act (CPA) does not provide guidelines when it deals with written warning to appear at preliminary inquiries. If there are guidelines, why is the issue not left out of this Bill and dealt with according to the CPA.

Ms Skelton replied that a written warning to appear at the inquiry is given as an alternative to arrest. The Chair said one needs national instructions on how to deal with this issue.

With regard to 16(2) he said that the child should be warned in the presence of the parent or an appropriate adult. He also said that if the provision is more cumbersome it would force the police to arrest the child.

The Chair also felt that 16(3) is a repetition of 16(2) and suggested that it should be deleted.

Ms Skelton said that the two sub-clauses are not similar as one deals with a written warning and the other does not require a written warning.

Mr J Jeffery (ANC) said that 16(5) is problematic. The clause provides that mere production of the duplicate original referred to in subsection (4)(b)(ii) is prima facie proof of the issue of the original thereof to the child and that such original was handed to the child. He said one should require that when the warning is given the recipient should append his or her signature. This would be prima facie proof of issue of the warning. This is necessary to prevent situations where the police would claim having issued the warning whereas they in fact did not issue it. The Chair agreed.

Chapter 4 Release Or Detention and Placement of Child Prior to Sentence
Part 1: Release Or Detention

The Chairperson told members to primarily concern themselves with the release or detention of the child and not the placement of the child.

Clause 17 Procedural guidelines when considering release or detention.
The Chair said that 17(1) (a) and (b) are not guidelines but specific injunctions. It is wrong to refer to the specific things (in the clause) that should be considered when deciding whether to release or detain a child as guidelines. He asked the drafter to indicate when the bail clause is in the Bill.

Mr L Bassett replied that the clause dealing with bail had been removed since bail is dealt with in the CPA.

The Chair said that of where it states that officials should follow procedural guidelines, the clause should state that 'when deciding whether to release or detain a child, the options provided hereunder should be considered'.

Clause 18 Release of child into care of parent or appropriate adult before preliminary inquiry
Clause 18(2) refers to a child who has not been released from detention or has not been "released on bail". The Chair said that reference should not be to a child who has not been released on bail but to a child who has not been granted bail. This is important given the fact that bail may be granted but the child not received it due to failure to pay the amount posted as bail.

The Chair did not think that 18(3) is necessary since it essentially deals with bail and this issue is addressed in the CPA..

Ms Skelton said that in terms of the law a child may be released to the care of the parent from the point of arrest. This is commonly referred to as police bail. Mr Bassett added that in terms of the CPA, a child may also be released on warning.

The Chair concluded that 18(1) is more onerous than s72 of the CPA. In terms of the provisions of this Bill, s72 would still be applicable.

Ms Skelton said that s72 of the CPA would be repealed but the part dealing with adults would be left. The Chair added that it should be made clear that 18(1) amends s72 of the CPA. It is problematic to retain a general provision like s72 and also create something specially for children. He also asked the drafters to look at bail laws so that they should be harmonised.

Clause 19 Duty of police official & person into whose care child is released upon release of child
The Chair said that the notice referred to in this clause should also be signed by the person receiving it before it could constitute prima facie proof that it was issued.

Clause 24 Release of child into care of parent or appropriate adult or on own recognisance
The Chair felt that releasing a person on own recognisance is part of bail even though no money is paid. He asked the drafters to check if this clause is necessary.

Ms Skelton said that at the moment the issue is dealt with in terms of s72 of the CPA. Courts talk of release on own recognisance and the accused tends to see this as free bail whereas it is not really bail. Releasing the child on own recognisance is important given the fact that sometimes parents or an appropriate adult do not accompany the child to court. This might mean that the child would have to be detained since there is no parent to whose care the child must be released.

Part 2: Placement
Clause 22 Procedural guidelines when considering the placement of a child
The Chair said that this clause must be redrafted and should show that placement is considered once a decision to release has been taken. He asked why Clause 22(1) makes reference to detention of child "in lieu of detention in police custody". If this means that the police should first consider detention in police custody before considering placement in suitable placement facility, the clause should specifically say so. He also expressed concern that the clause is not linked to

any schedule. He asked if this means that the nature of the crime that the child committed is not considered when deciding whether to place a child in a placement facility or detain the child in police custody.

Ms Skelton said that the words were taken from the CPA.

The Chair said that the fact that there are no guidelines with respect to placement in placement facilities is also problematic. If one is dealing with a Schedule 3 matter there should be discretion as regards placement. One should first consider placement in police cells. If one is concerned with a Schedule 1 or 2 offence, one should first consider a placement facility and if no suitable facility is available, one should then consider police cells. Prison should be a last resort taking into account the nature of the crime.

Ms S Camerer (DA) said that it is important to have a close look at the Schedules and revise them if necessary.

Clause 23 Protection of children in police custody
This clause deals with the conditions under which children should live while in police custody. Clause 23(1)(c) specifies people who may visit a child who is in police custody. The Chair said that this clause should be redrafted so as to allow any other person who may reasonably be expected to visit the child to be able to visit.

Mr Jeffery said that one should not provide for unrestricted rights to visits, treatment and separate detention from adults. Perhaps one needs to insert a provision stipulating that the National Commissioner should make guidelines dealing with these issues. Since 23(1)(d)(i) says detained children must be provided with adequate food and water, he asked if other prisoners are not getting enough food and water. The Chair agreed that the clause is badly drafted.

Mr S Swart (ACDP) said that members would recall that when they visited Port Elizabeth some prisoners complained about not getting enough food. The Chairperson added that there were instances where sentenced children were accommodated with unsentenced criminals.

Ms Skelton said that perhaps one should state that children must be detained in conditions appropriate to their age as required by the Constitution.

Mr Jeffery asked if it is necessary to specify the conditions under which children must be detained if such are provided for in the Constitution.

The Chair said that words in the Constitution may be limited in terms of the limitation clause. However putting them in the legislation also invites different interpretations.

Clause 23(2) provides that where a police official receives a complaint from a child in police custody that a child had been injured, the complaint must be reported to the station commissioner and the child must be taken a medical practitioner. The Chair observed that the clause imposes a duty. He expressed concern that prisoners would do so in order to get out of prison for a day. One should prescribe the manner in which the issue of taking the child to a medical practitioner should be dealt with. There should also be a duty to record the complaint, as this might become part of civil proceedings. Every complaint should be referred to a medical practitioner.

Ms Skelton said that one of the main concerns is about children who are raped in policy custody. If such children are not immediately referred to a medical practitioner, evidence of rape might be lost. Ms Camerer added that children are vulnerable and a blow to a head may be dangerous. Hence the need for medical examination.

The Chair said that in Port Elizabeth there were cases of children who filed unfounded complaints so as to get out of prison. Things like this need to be avoided.

Ms Camerer said that a provision should require medical examination where there is a complaint and observation by a police official.

The Chair said that the medical practitioner would not always receive the report referred to in 23(2)(b) and as such the drafter should refine this provision accordingly.

Clause 26: Further detention of child after first or subsequent appearance
The Chair had a problem with this provision and noted that there are cases where a Magistrate might withdraw the bail issued by the police and thus send the child back to detention. He proposed that an alternative provision, which would include both the preliminary proceedings and bail application processes, be created. He also proposed that a separate clause dealing with the bail issue in court should be created in the Bill.

Ms Skelton noted that Schedule 330 in 26(3)(a) was a typing error and was meant to refer to Schedule 4. Dr Basset added that Schedule 4 is a new schedule which is almost identical to Schedule 8 of the 1998 Bill. This schedule was created in order to deal with those offences in respect of which children can be sent to prison to await trail.

The Chair said that postponement should not be considered in terms of s45 as stated in 26(1)(a)(i) but in terms of the CPA and that the report of the assessment be made part of the bail order. All the things that should be taken into account with regard to placement have to be clearly stated in the Bill, itself, so as to ensure that one knows exactly what would follow the child's bail refusal or granting. A provision regarding the certificate of availability of a probation officer should be inserted. It is important that the Bill clearly states that the bail order may also include placement as an option.

He proposed that 26(3)(b) should also include cases where bail had been granted but the money has not been paid. Furthermore a duty on the probation officer to have the said assessment available should be created by 26(2)(b). The court should be empowered in terms of 26(6) to enforce the probation officer to make such assessment available. Therefore the Magistrate should always consider the availability of that placement assessment. He requested the drafters reword the provisions of 26(6) and swop around paragraph (a) and (b).

Ms Camerer noted that the fact that the child may be a danger to the community is not evident in the provisions of 26(6)(e) and as such it should be added.

The Chair said that where an order is made under Schedule 4 offences, a child should always be placed in secure care/place of safety. But if it is an order relating to non-Schedule 4 offences then the Court has a discretion whether to place such child in a secure care/place of safety or not. However before such decision could be taken, in non-Schedule 4 offences, the Court should take certain considerations into account, including the level of security, the nature of the offence and the safety of other children.

Clause 27: Conditions of detention at preliminary inquiry or Child Justice Court
The Chair noted that the national instruction referred to in subclause (3) would need to be gazetted in the Government Gazette and a provision to that effect should be created. He requested that all instances that should be taken into account with regard to placement be clearly stated in the Bill.

Adv M Masutha (ANC) noted that a provision relating to food and clothing at this stage of the enquiry is very important and should be created.

The Chair acknowledged that, but said a general provision would be created in this regard.

Clause 28: Reconsideration of detention by Child Justice Court
The Chair raised concerns on the fourteen-day period stipulated in this clause and noted that the Committee should not create something that would not be workable in practice. To require someone to come back to Court every fourteen days is absurd and could be very disruptive on the

child's school programme at the place of safety.

Ms Skelton acknowledged this concern and noted that this provision originates from the old Clause 29. In that clause the required period was 30 days but this was changed at the request of the Committee.

The Chair proposed that a provision should be created which would require that once a matter has been transferred to the Child Justice Court, whether a bail has been granted or not and provided that the trial has not commenced, it could not be postponed for more than 30 days at a time, unless there are exceptional circumstances requiring so. It would be important for a Court chapter to be created and thus requested the department to refine it accordingly. The drafters should also come up with guidelines as to how Courts should deal with children in prison still awaiting judgement where the trial has not commenced.

Chapter 5: Assessment of Child

Clause 29: Objectives of assessment

The Chair said that the establishment of the child's need of care is the most important thing and therefore paragraph (c) should become paragraph (a).

Clause 30: Confidentiality of information obtained at assessment

The Chair was concerned that some people might want to use the information received during the assessment process in trial against those children. While such information may be used in civil processes, a provision ruling out their admissibility in criminal trials should be created.

Clause 32: Place where assessment is to be conducted

The Chair requested the department to consider inserting "is" after the words "as far as" and before "possible" in subclause (2).

Clause 33: Person to attend assessment

The Chair raised concerns on those provisions of 33(4) which empowers the probation officer to exclude the child's parent from attending the assessment process. He requested the drafters to put in brackets all those provisions of the subclause that empowers the probation officer to exclude the child's parent from attending the assessment. The Committee would deliberate on this matter together with that one which had been flagged as noted in footnote 33.

Adv Masutha said that the probation officer should always try to obtain the views of the child as to who should be present at such assessment.

The Chair agreed and said that a provision to that effect should be created, which would require the probation officer to first obtain the child's views in private as to who should be present or not before making a decision in this regard.

Clause 34: Powers and duties of probation officer before assessment

The Chair said that the notice should not only be given to the child's parent or appropriate adult as contemplated in subclause (1) but also to the prosecutor and the police official.

Ms Skelton said that the department considered the practicability of such an approach and decided against it since such notice should be issued immediately after arrest.

The Chair insisted that the interests of justice require that such notice be to the prosecutor and the police official and noted that this can be done telephonically and the notice be delivered latter. He further requested the department to refine the provisions of 34(2) as an oral request in 34(1) cannot be delivered. It should be made clear in the Bill that there would be no sanction against those parents who failed to comply with the provisions of this clause, notwithstanding the fact that there is a duty on probation officers to locate them.

Clause 35: Powers and duties of probation officer at assessment

The Chair said that it should be made clear in 35(5) that the probation officer may only conduct simultaneous assessments, where a child is accused with another, if such would not lead to prejudice.

Dr **Basset informed the Committee that subclauses (7),(8) and (9) have been removed from this clause and put in a new clause.**

Clause 36: Assessment report of probation officer
The Chair said that in terms of paragraphs (a) and (b) there seems to be two options available to the Court, that is the diversion option and the trial process. However should the Court feel that there are certain circumstances that it is compelled to take into consideration, 36(c) empowers it to take them into account. It should be clear that 36(c) only applies where a decision has not been taken in terms of paragraphs (a) and (b) and if a child would go on trial. He requested the drafters to simplify the provisions of paragraph (d) and also make sure that it is clear that the probation officer is required to prove all these paragraphs. A duty should be created for the probation officer to have a certificate for each case where a child is not released, especially for those serious offences referred in Schedules 2, 3 and 4. The drafters should also try to incorporate the provisions **of 36(3)(e)** into those of subclause (3)(d).

Clause 37: Assessment of children below 10 years of age
The Chair said that although children below the age of ten years lack criminal liability, the Committee is not going to be leave them in the wilderness. Therefore if such children commit an offence, then the probation officer is required to deal with them but not in terms of the criminal justice system. He requested the drafters to put a footnote indicating the applicability of this clause to the provisions of Clause 6, so that when members deal with that clause they can also consider this one.

The meeting was adjourned.
