JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
26 August 2003
PROMOTION OF NATIONAL UNITY AND RECONCILIATION AMENDMENT BILL; CRIMINAL PROCEDURE AMENDMENT BILL; CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Adv J H de Lange (ANC)

Relevant documents
Promotion of National Unity and Reconciliation Amendment Bill [B34-2003]
Steyn Judgment
Criminal Procedure Amendment Bill [B57-2002]
Criminal Procedure Amendment Bill working draft as of 26 August
Comments by Justice Kriegler on Criminal Procedure Amendment Bill (Appendix 1)
Amendments to Promotion of National Unity Amendment Bill (Appendix 2)
Sentenced at Regional Court: 14-16 years old (2001-2003) (email info@pmg.org.za for document)
Child Justice Bill [B49-2002]
Working draft of Child Justice Bill (not available electronically)
Extended legislative programme

SUMMARY
Morning session
The Committee amended the Bill to include non-financial reparations. The courts would have to be approached to amend mistakes and omissions in the TRC Final Report. It does not allow Parliament to alter the Final Report by identifying additional victims of gross human rights violations.

Members considered comments provided by Justice Kriegler on the constitutionality of the CPA Amendment Bill. These dealt with the requirement in the Bill that judges have to read the case record, and also questions the constitutionality of the new procedure dealing with unrepresented accused persons.

Afternoon Session
The suggested amendments to the Criminal Procedure Amendment Bill were reviewed. The Committee received a document outlining the number of children under 16 years sentenced at a regional court between 2001 and 2003.

The suggested amendments to the Child Justice Bill were also reviewed. Clause 39 will be amended to clearly distinguish between formal trial procedures such as bail application and the informal pre-trial procedures such as the preliminary inquiry.

MINUTES
Morning session
Notice on Alteration of Areas of Jurisdiction for High Courts in the Eastern Cape
The Chair noted that Members agreed to the Report.

Promotion of National Unity and Reconciliation Amendment Bill

The Chair stated that, by way of background information to this Bill, that the Truth and Reconciliation Commission (TRC) had been dissolved. It has written a report on its findings which has been passed by Parliament. Regulations have been drafted, and many of them are close to finalisation. The Bill seeks to amend the regulations so as to allow the President's Fund to pay out the monetary reparation to communities as well, because the current dispensation accommodates individual payouts alone.

Some of the amnesty applicants have challenged the findings of their cases in court. The most notable being the *Nieuwoudt* judgment, in which Judge Davis held that the case of the applicants before him had to be referred back to the TRC. The problem is that the TRC no longer exists, and these amendments are now being proposed to provide for a procedure by which cases of this nature can be revisited by a *de novo* committee. An additional problem is that, when such cases are then considered by this new committee, new victims of gross human rights violations could very well be identified. For this reason the amendments also provide that if any other committee is needed, the Minister can make appointments to such a committee to consider these cases.

The third area addressed by the proposed amendments is to accommodate cases such as that of Mr Cornelius. Mr Cornelius had been identified by the TRC as a victim of gross human rights violations and is thus entitled to the reparations. The problem is that the TRC Final Report has listed him as deceased, and he is thus not able to access the reparation that is due to him. The Chair proposed that a resolution be drafted by the Department to deal with such instances and to provide reparation for cases such as Mr Cornelius'. This Committee cannot amend the TRC's Final Report, as Parliament could then be accused of interfering.

Clause 47A: Minister may appoint Subcommittee on Amnesty after dissolution of Commission

Sub clause 3

The Chair proposed that the phrase "and two other members" be inserted after "fit and proper persons".

Mr J de Lange, Legal Drafter: Department, proposed that it read "two other fit and proper persons".

Ms S Camerer (DA) suggested that ", as the Minister deems necessary" be deleted.

The Chair noted that Members agreed to these two amendments.

Sub clause 6

Adv M Masutha (ANC) questioned whether this provision should not be extended to allow the Director-General to provide for office space, equipment etc, and not just administrative staff. This provision should thus read "administrative support, including staff", and not just "administrative staff".

The Chair noted that Members agreed to this amendment, and to Clause 47A as amended.

Clause 47B: Minister may appoint other Committees

The Chair noted that this clause makes it clear that the new Committee would have the same powers as the TRC.

Sub clause 5(a)

The Chair sought clarity on the inclusion of the word "applicant" in this provision.

Ms A Gordon, Legal Drafter: Department, replied that it should properly read "person" and not "applicant". The reference to "person" in subclause 5(b) should also be changed to "person".

The Chair agreed.

Ms Camerer contended that the current wording of this provision excludes those person that should have been identified as victims by the TRC.

The Chair stated that this clause does not deal with such persons. They would have to speak to the Department and apply to court to be classified as a victim of gross human rights violations. The stipulated once-off amount of R30 000 would then have to be paid to that person, as it has been declared in a court order.

Mr de Lange agreed with the Chair.

Adv Masutha informed Members that it was the decision of Parliament's Ad Hoc Committee on Reparations, of which he was a Member, to grant both financial and non-financial reparations to identified victims. Yet the phrase "be paid an amount in the form of reparations" only makes provision for financial reparations, not the social support decided upon by the Ad Hoc Committee on Reparations.

The Chair agreed with Adv Masutha. The phrase "paid an amount in the form of reparations" be replaced with "entitled to reparations as prescribed". The Committee agreed to this amendment.

Sub clause 5(b)
The Chair proposed that the phrase "on Human Rights Violations" be replaced with "referred to in subsection (6)". He noted that Members agreed.

Sub clause 6
Ms Gordon stated that the word "appointed" in the latter portion of this provision should be replaced with "Committee".

The Chair agreed, and proposed that the phrase "for that person to be paid reparations" should be deleted. He noted that Members agreed.

Mr S Swart (ACDP) proposed that the second "is appointed in terms of subsection (1)" be deleted, because it is duplicated.

Ms Gordon agreed, and stated that it is a consequential amendment that should have been corrected.

The Chair noted that Members agreed to this amendment, and to Clause 47B as amended.

Clause 47C: Further powers of Minister after dissolution of Commission
The Chair stated that he does not want this proposed amendment to start up a debate on Parliament changing the TRC Final Report. The purpose of this amendment is simply to provide for the correction of a purely technical matter in the Final Report. As stated earlier, a resolution would have to be passed by the Department to deal with cases such as Mr Cornelius. This Committee will not deal with such cases in the legislation because it will not tinker in the Final Report even for a case of this serious a nature in which the person meets all the requirements, has been identified as a victim by the TRC and is thus entitled to the reparations, but cannot receive them because the report inaccurately recorded him as deceased.

This amendment allows for the correction of a technical mistake in any publication other than the Final Report. The courts would have to be approached to amend the Final Report. The court would thus rectify the matter, and it has to be made clear that this will be done at no expense to the person involved. This is both the safest option and is legally the more correct view. It is the view of this Committee that this kind of mistake cannot be dealt with in this legislation, but should instead be addressed via the judicial process.

Adv D Rudman, Department, stated that the finalisation of the reparations process consists of two phases. The first phase involves the regulations on the once-off payment of the R30 000 to the

victims identified by the TRC. These have already been finalised and are currently in the President's Office. The second phase deals with those regulations for reparations providing for the various forms of social support, and these regulations still have to be finalised.

The Chair noted that Members agreed to this clause. He requested Ms Gordon to insert these three clauses into the Bill, so that the finalised Bill can be voted on by this Committee.

Consideration of Justice Kriegler's Comments on Criminal Procedure Amendment Bill
The Committee considered Justice Kriegler's comments on the CPA Bill, looking first at the second portion of Justice Kriegler's comments which deal with technical issues:

Comment 1
The Chair stated that the judges' comment seems to misread the proposal, because Justice Kriegler can in any event override the decision taken. This would in any case not apply if the parties themselves reach agreement. Perhaps the phrase "and the Judge President agrees and so directs" should be inserted in the new Section 309(3A) of the CPA Bill, so that it clarifies the intention of the provision.

Mr de Lange cautioned against this amendment. A rule has been created in statute, the CPA Bill has then created an exception to that rule, and the Chair's proposed amendment amounts to an exception being created to an exception. Instead clarity is needed. It is important for Members to note that these are merely comments made by Justice Kriegler, and they are not intended to be a formal submission on the CPA Bill. The Chief Justice referred the CPA Bill to Justice Kriegler and these comments are really his ideas, not a formal submission.

The Chair agreed with Mr de Lange that this amendment should be effected, but slightly refined.

Comment 2
The Chair stated that Justice Kriegler seems to have misread the proposed Section 309B(1) and (2) completely. The contention by Justice Kriegler that the application for leave would "come in years after sentence" is not the case, because leave for appeal has to be lodged within 14 days. Thus the proposed Section 309B(1) could not result in a "belated application for leave" nor can it "come in years after sentence", as contended by Justice Kriegler.

The Chair stated that he does not understand Justice Kriegler's concern with the proposed Section 309B(1)(2). Justice Kriegler is correct in asserting that this provision does not allow the magistrate to call for a copy of the record, but s/he would not need a copy because s/he presided over the case.

Mr de Lange stated that this is in fact the present position, and the Bill does not alter anything at all.

The Chair agreed. Thus Justice Kriegler's second comment should not be considered further.

Comment 3
The Chair stated that he does not see the problem with the proposed Section 309B(4)(b), because it merely requires that the magistrate provide reasons for refusing leave to appeal.

Comment 4
The Chair stated that this concern raised by Justice Kriegler seems to misread the proposal, because the proposed Section 309C is in exact accordance with both the Constitutional Court and the Supreme Court of Appeal. This concern should not be pursued.

Comment 5
The Chair stated that he cannot see which portion of the proposed Section 309C allows for applications for condonation and leave to appeal to be considered "piecemeal". In fact the provision specifically states that it cannot be dealt with in a piecemeal fashion. Furthermore the proposed Section 309C(4)(c) cannot be used here because it relates to the court record, and not

the separation of the trial as in Section 309C(8).

Comment 6
The Chair stated that he does not think the proposed Section 309C(4)(c)(iv) would necessarily allow "shortcuts", as contended by Justice Kriegler. This provision in fact aims to save money which is currently wasted on the unnecessary production of records. Furthermore, the court can in any event request a copy of the record, if it needs it. The Chair stated that he does not see the problem suggested by Justice Kriegler here.

Mr de Lange agreed that the provision should remain as it currently stands.

Ms F Chohan-Kota (ANC) proposed that Justice Kriegler here seems to conflate condonation and the merits of the case. Perhaps then the test for condonation has to be looked at further.

The Chair stated that the test for condonation is two-fold: firstly, there has to be a valid reason for the condonation and, secondly, there has to be a reasonable prospect of success. This is the test, and it really does not allow for any shortcuts.

Mr de Lange suggested that the phrase "and if that accused had legal representation" be inserted at the end of the proposed Section 309C(4)(c)(iv). This could bolster the provision, but not much turns on this.

The Chair agreed that this comment does not need to be pursued further.

Comment 7
The Chair stated that this concern does have some merit. The proposed Section 309C(7) should be broken up to stipulate "all applications in the petition must as far as possible be disposed of simultaneously" and the phrase "where imprisonment is involved" has to be added to deal with the more urgent cases, as Justice Kriegler suggests. The Chair noted that Members agree to this proposed amendment.

Comment 8
The Chair stated that this concern seems to misread the proposal. There is no difference now that the lower courts have also been granted leave to appeal.

Mr de Lange stated that this is merely a matter of style, which seeks to bring both systems in line.

The Chair stated that the two should be the same, as is currently provided for in the Bill.

Comment 9
The Chair contended that Justice Kriegler cannot compare the proposed Sections 309C(6) and 315 (1)(b), he seems to have got the issues mixed up. He noted that Members agreed that this comment should not be considered further.

Comment 10
The Chair stated that this concern seems to misread the proposal, because the procedure for the lower courts was taken straight from that provision.

Mr de Lange agreed with the Chair that this is not necessary, as it is merely a matter of style.

Comment 11
The Chair stated that he is of the opinion that "thinks" is the worst word that can be inserted in a piece of legislation. The phrase "is of the view" at least requires the accused to apply his/her mind.

Mr de Lange stated that this deals with principles of interpretation, but not much turns on it here.

The Chair noted that Members agreed that this comment should not be considered further.

The Chair stated that Justice Kriegler has to be thanked for the comments he has provided. It has to be remembered that these are only brief comments, as Justice Kriegler did not have time to look at all the issues carefully. The aim here is to avoid the gaps highlighted in the *Steyn* judgment. The Chair requested Mr de Lange to spell out the new procedures for the lower courts and stated that, apart from Comment 7, all the other concerns raised by Justice Kriegler do not, with the greatest respect, need to be pursued at this stage.

First portion of Justice Kriegler's comments
The Chair stated that this portion of Justice Kriegler's comments is very worrying, because he has never understood the *Steyn* judgment to mean what Justice Kriegler is suggesting. Justice Kriegler did deliver a concurring judgment in that case, so his views here should be taken seriously. These proposed amendments were forwarded to many magistrates and presiding officers and they all concurred with them, including the Judge Presidents of the various divisions. Furthermore, the concerns and proposals they raised were incorporated into the Bill, and none raised the constitutionality concern currently being raised by Justice Kriegler.

The Chair stated that he does not agree with Justice Kriegler's conclusion at the end of the first paragraph, because he is not sure that it was in fact rejected by the Constitutional Court in paragraph 42 of the judgment. The impact of the court order issued in the judgment is that the Department had to correct the oversight by June 2001, and it does not seem to state that the leave to appeal is unconstitutional. This does not make sense because the Bill provides that the court can request a copy of the record in any event. The Constitution even stipulates that the accused has to be provided with a State lawyer in all cases which are substantially prejudicial to the accused, or those involving possible imprisonment.

Justice Kriegler's last sentence in the fourth paragraph seems to misread the proposal, because the Bill provides that a record of proceedings can always be requested by the court. The Chair contended that Justice Kriegler seems to be suggesting that the application for leave to appeal is of no use, and judges would then have to read the entire record. Yet the very aim of the amendment is to reduce the unacceptable length of appeal backlogs and reading the records of the case would enable the judges to better sift through the applications, so that those cases not worthy of appealing are not considered further.

In the fifth paragraph Justice Kriegler contends that the process introduced by the Bill "cannot be justified under Clause 36 [of the Constitution]", but this cannot be the case. On what other ground could an appeal then be lodged in the High Court? It appears that Justice Kriegler is arguing that the Bill is unconstitutional because it requires judges to read the record of the case. In the last sentence of this paragraph Justice Kriegler then contends that legal representation has to be provided to all accused who were unrepresented at the trial, and these advocates could then decide whether the case is worthy of going on appeal by simply issuing a *probabalis causa* certificate. This, he continues, will provide young advocates with work when they are "trying to get started". The Chair stated that he does not understand how such a proposal can be constitutional - how advocates can now decide whether the matter should be taken on appeal.

The Chair stated that Justice Kriegler's contention in the sixth paragraph that the process imposed by the Bill will prove more expensive than the current procedure does not make sense. The fact is that the current process is expensive because it requires the entire court record to be retyped when the case goes on automatic appeal. The proposed process is actually less expensive and, in fact, under the previous automatic appeal procedure the judge had to read the entire record in any event.

These concerns do therefore not give any solution, other than proposing that an accused that was unrepresented at the trial should be provided with legal representation. The fact of the matter is that the judge would have had to read the entire record in any event if the automatic right to appeal were retained.

Mr de Lange stated that it is difficult to see exactly which portion of the dictum in the *Steyn* judgment Justice Kriegler is relying on in his first paragraph. Paragraph 51 of the *Steyn* judgment clearly indicates that the Constitutional Court envisaged the passing of legislation to correct the oversight in the principal Act. A potentially confusing issue here is whether Parliament can, as is proposed, by passing legislation, render a judgment superfluous. In other words, is it possible for Parliament to pass legislation that would render the order of the Constitutional Court void?

The Chair stated that the Child Justice Bill is being drafted and stipulates clearly that any person under the age of fourteen and unrepresented accused under age of 16 that are possibly facing the prospect of imprisonment is entitled to an automatic right of appeal. This thus requires the judge to read the report of the case in any event. This means that all those aged seventeen and older have to apply for leave to appeal. Section 35 of the Constitution then also provides that an accused who would suffer a substantial injustice by not receiving legal representation, has to be provided with such representation. The Chair stated that he does not therefore understand Justice Kriegler's concerns here. Justice Kriegler presents an argument on constitutional grounds, but the conclusion he reaches is not a constitutional objection at all. The Chair stated that both he and Mr de Lange cannot find where exactly the Bill is unconstitutional.

Ms Camerer stated that several submissions received during the public hearings did argue that the Bill is unconstitutional, such as the submission from the magistrate in Port Elizabeth. This issue should thus be considered further.

The Chair disagreed with Ms Camerer. He noted that Mr H Du Preez, Legal Drafter: Department, agreed with him that only the submissions from the Law Society and the magistrate from Port Elizabeth questioned the constitutionality of the Bill. Those concerns were dealt with and differ from the issues raised by Justice Kriegler.

The figure for cases that are granted leave to appeal but are then turned down on appeal currently stands at 95%. The aim of the Bill is to impose more stringent "sifting" requirements on accused, so that this figure is reduced substantially. This will also then clear up the backlog in appeal cases. This Bill has to be passed with the resolution that processes have to be put in place to ensure that steps are taken to provide legal representation to an accused who has been sentenced and faces possible imprisonment. This Committee cannot go any further than this and will provide for an amendment to oblige a presiding office to provide an unrepresented accused facing a term of imprisonment an opportunity to approach the Legal Aid Board to seek legal assistance.

The Chair stated that he has the greatest respect for Justice Kriegler. The Chair conceded that the Bill could be constitutional but that the consequences of the implementation of the Bill could in a particular case be unconstitutional, such as the *Vries* case in Namibia. But legislation passed by Parliament cannot be drafted to cater for every possible ramification, and the possibility of these unforeseen consequences materialising is accepted by the Committees. Should such consequences materialise the person affected has to approach the court for relief, and it then has to be rectified by the judges on an individual basis. It can also be cured by passing a resolution such as the one proposed above and to provide for the above amendment.

Afternoon session

Criminal Procedure Amendment Bill: deliberations

Amendment of Section 302 of Act 51 of 1977

The Chair noted that this is one of the important amendments since it would have an effect on the Child Justice Bill. Members should bear in mind that this clause relates to unrepresented accused.

Amendment of Section 309 of Act 51 of 1977

The Chair said that the phrase "Subject to section 302(1)(b)" in par (a) should be removed. He proposed that a provision which would ensure that children below the age of sixteen years are protected when they appear in the Regional Court should be inserted after the provisions of subpar (i). The addition of the phrase "at least be 14 years and not below 16 years old, and was not

assisted by a legal representative at the time of conviction" was also proposed with the drafters refining it accordingly. In subsection (3A), the phrase "and the Judge President agrees, and" will be inserted at the end of par (a).

Substitution of Section 309B
Mr J De Lange (Department of Justice: Drafter) proposed that the phrase "decision or order" be retained in subpar (b)(ii) of subsection (5).

The Committee concurred.

Explanation of certain rights to unrepresented accused (Section 309D)
The Chair asked the drafters to refine the provisions of par (a) of S309D(1). He proposed that par (b) be refined to read: "An accused contemplated in the first proviso to S309 or whose sentence is subject to review in the ordinary course in terms of S302(1)(a), must be informed by the presiding officer that the provisions pertaining to such reviewâ€¦, provided that the presiding officer shall refer the accused to the Legal Aid Board in such instances that the accused was unrepresented and sentence given was wholly not suspended".

He said that the Bill should make it clear that when the Judge refers an accused to the Legal Aid Board such referral would be dealt with in terms of the Legal Aid Board Act. He requested the drafters to refine this section. He proposed that the phrase "contemplated in subsection (1)(a)" in subsection (2) be removed.

Amendment of Section 315 of Act 51 of 1977
The Chair said that it is important to note the difference in procedures applicable in higher courts and those applicable in the lower courts. What has been said about children in lower courts has not been said about them in High Court since such court is considered to be the higher guardian of all children and as such would be able to protect them when they appear before it.

Mr F Chohan-Khota (ANC) could not see the reason for differentiating between the higher courts and the lower ones.

The Chair said that the reason for such is simple as there has never been an automatic right of appeal against the decision of the High Court. Therefore it would be proper if the Committee could wait and see what happens on the ground before taking a decision in this regard.

Dr L Basset (Department of Justice: Drafter) concurred with the Chair that there should be no automatic right of appeal in the High Court.

Transitional Arrangements
The Chair proposed that the following words "in accordance with the Act" be inserted in par (a) of subsection (2).

Mr de Lange also proposed that the words "where necessary" be inserted after the words "revise and amend" and before the words "all rules".

Ms Chohan-Khota said that there is a danger that one may interpret par (c) as requiring that Parliament should approve those rules within three months after being submitted to it. This could create problems, especially in those cases where three months expires while Parliament is in recess.

The Chair agreed and proposed that par (c) should end after "be submitted to Parliament" and the phrase "for approval" be removed from this paragraph. He also proposed that par (d) should read: "Any amended rules must be approved by Parliament and thereafter be published in the Gazette". The drafters should determine the person who would be responsible for publishing those rules in the Gazette.

He then thanked Mr H Du Preez (Department of Justice: Drafter) and his team for the wonderful job that they have done with the Bill.

Sentence at Regional Court: 14-16 years old (2001-2003)
The Chair noted that this document simple explains to members the number of children below the age of sixteen that are in prison, however it does not tell how many of those children are unrepresented. This document simply shows which cases would fall under automatic review.

Child Justice Bill
Chapter 6: Diversion before preliminary inquiry in respect of minor offences
The Chair noted that this Chapter deals with diversion cases in respect of Schedule 1 offences that were committed before the preliminary inquiry stage. It was noted that the prosecution may still refuse to divert the child in terms of this Chapter in which case the normal provisions applicable to diversion in general would still apply.

Clause 38: Diversion before preliminary inquiry in respect of offence referred to in Schedule 1
The Chair said that since the Constitution empowers the NDPP to issue prosecution directives without the Minister being involved in the process, the proposal to consult him noted in par (a) of subclause (2) may be done thereafter. Therefore the Minister of Justice should only be consulted after the directives have issued so as to make his input.

Dr Basset asked if it should be required that these directives and instructions be submitted to Parliament for approval.

The Chair felt that since they are normally of an administrative nature and have no legal effect, that should not be necessary. However the Committee would have to decide on this matter.

Adv M Masutha (ANC) concurred with the Chair noting that parliamentary approval is not necessary when directives are dealing with administrative issues. However such approval becomes necessary when the directives are legislative in nature.

The Chair proposed that since the word "prescribed" may imply that such are regulations then it should be changed to "provided".

Clause XX: Diversion option to be made order of Court
The Chair was concerned that someone may interpret subclause (1) to mean that a child should not be diverted where the child's parent(s) are not present. Such would not be acceptable and thus proposed that the presiding officer should be empowered by the Bill to deal with the matter regardless of the presence or absence of the child's parents, whether their absence is bona fide or not. He requested the drafters to refine this provision and make this very clear in the Bill.

Chapter 7: Preliminary Inquiry
The Chair said that it should be noted that in those cases where diversion is not possible, such as murder, there would be no need of a preliminary inquiry. In such cases the matter would go straight to trial.

Clause 39: Nature and purpose of preliminary inquiry
The Chair said that it should be borne in mind that there are children with special needs, an example would be street children. Their special needs should be taken into account and since such would not fall in either of the two options then it would form part of the third option. This was not clear in this clause.

Adv Masutha agreed and noted that should the child's special needs prevail in any given case, then such child would have to be dealt with in terms of the diversion options.

The Chair expressed dissatisfaction with the provisions of this clause and noted that they also do

not clearly distinguish between formal trial procedures and informal pre-trial procedures. He requested the drafters to rewrite this clause and make it clear that preliminary enquiry only applies to par (a) of subclause (2) and not par (b) since the latter involves formal trial procedures. The drafters should bear in mind that there are issues of confidentiality involved in preliminary procedures whereas that is not the case with bail applications.

The meeting was adjourned.

Appendix 1 : Comments by Kriegler J

Brief comments on the proposed amendments to the CPA
In the first place I see potential constitutional objections. The proposed amendments to the Criminal Procedure Act seem to overlook the very cause of the current problem. Although the whole issue was precipitated by the judgment in *Steyn,* the new proposals seem to ignore the grounds on which the leave/petition procedure was struck down there. The draft appears to assume that because the leave/petition procedure was found to be constitutionally acceptable for appeals from the high courts, the analogous procedure for appeals from lower courts also passes muster. Yet that very reasoning was rejected by the Constitutional Court in that case.

The only change of substance that I can see in the present draft, is that a petition to the high court for leave to appeal after refusal of such leave by the trial court, will now have to be accompanied by the full record of the trial (except in defended regional court cases) whereas before it was only the judgment of the application for leave that would be looked at. Although this paucity of information was one of the grounds for the striking the procedure down, it was only one of several and certainly not a crucial one.

What the draft bill envisages is a procedure that will still expect an unsophisticated layman:
(a) to persuade a magistrate who has just announced why the accused's version was being rejected as beyond reasonable doubt false, that another court, which has not seen the witnesses, might reasonably possibly come to a different conclusion;
(b) to produce a "petition", which in the nature of things cannot be expected to differ at all from his "notice of application for leave".

The overwhelming majority of applications for leave to appeal will inevitably (and possibly even properly) be refused by the trial magistrate; and prospective appellants, who have a right of appeal under C35(3)(o), will then have to have this right explained to them and arguably will have to be given reasonable assistance (heaven knows by whom) in drafting the petition, lest they give up their appeal right in ignorance or confusion. Neither the "application" nor the "petition" of an unrepresented prospective appellant is likely to tell the judge anything useful (readers will remember Didcott J's wonderful description in *Ntuli* referred to in *Steyn)* and the burden will fall on the high court to decide prospects of success by reading the record, where there is one.

In my view the new procedure may suffer the same fate as its immediate predecessor, and for substantially the same reasons: the impediments placed in the way of prospective appellants limit the right under C35(3)(o) and cannot be justified under C36. There is, for instance, the simple alternative of providing legal aid to all prospective appellants who were unrepresented at the trial and who need it to appeal and requiring a certificate *probabilis causa* from counsel in all cases. This would immediately eliminate any discrimination against poor people (the problem in *Ntuli)* or unjustifiable limitation of the right to appeal (the problem in *Steyn)* while screening out the hopeless appeals and giving much needed work (and training) to young advocates trying to get started.

In any event, if the new procedure does manage to pass constitutional muster, it in effect, extends the old judge's certificate procedure to all proposed appeals, save that now there will be the enormous cost (and delay) of typing the full record in all cases where the trial magistrate refuses leave or is unavailable to consider the relevant application. Unless significant numbers of

prospective appellants give up their right of appeal in the face of the new obstacles, judges will have to deal with substantially the same number of cases as now, but on paper without the benefit of heads and/or oral argument.

Apart from the constitutional problems I have with the proposals, there are a number of technical difficulties. I mention a few:

1. The proposed new S 309(3A) envisages the high court concluding that oral argument is necessary in the interests of justice (subs (a)) but then provides (in subs (b)) that such consent can be overridden by consent between the parties. This surely cannot be. How can a mere inter-party agreement override a judicial decision based on the needs of justice?

2. In draft 309B (1) and (2) a belated application for leave is contemplated (and we know they can come in years after sentence) but does not seem to allow the trial magistrate to call for a copy of the record - when it will clearly be necessary.

3. In 309B(4)(b) the magistrate is required to "record" the reasons for refusing leave to appeal. What this means and how it differs from the ordinary duty to pronounce the reasoned conclusion in court (and 4ause it to be recorded) I do not know.

4. The petition procedure envisaged by 309C is unworkably prolix and does not take into account established practice, in the CC, in the SCA and in the high courts, with applications for condonation coupled with applications for leave to appeal (possibly accompanied by applications to adduce fresh evidence) - and the appeal itself. Thus, for instance, subs (7)(b)(i) contemplates that the high court, presumably having granted condonation for the lateness of the filing of the application for leave to appeal, will refer that very application for leave to appeal back to the trial court. This is nonsensical as a court of appeal would not grant condonation without considering the merits of the proposed appeal.

5. The subsection also contemplates applications for condonation and for leave being considered piecemeal by the high court. This is echoed in subs (4)(c)(iv). At the same time, however, subs (8) proclaims that multiple applications should if possible be handled simultaneously.

6. Talking about subsection (4)(c)(iv), I do not know how it can be envisaged that an application for leave to appeal against sentence only, or on the merits as well if the applicant was represented in a regional court, can be decided on the judgment alone. I know there is room left for the high court to call for the record (subs (6)) but this provision suggests shortcuts that do not seem warranted.

7. Heaven knows what 309C(8) generally suggests. Obviously the fact that someone is in prison renders a matter inherently relatively urgent, but as I understand the proposed new mechanism under 309B, C and D, it applies to all criminal appeals from lower courts (see 309B(1)(a)). Why should an appeal be regarded as urgent if the sentence was a fine, which has been paid, or was some other non-custodial order?

8. Then the draft proceeds to interfere with sections 315, 316 and 317. Why the committee wants to "fix something what aint bust", I do not understand. The only reason I can guess at is that, being enamoured of the draft 5 309B, C and D (an admiration I do not share), the drafters thought fit to engraft that invention onto the perfectly satisfactory high court appeal procedure. Appeals from a high court and those from a magistrates' court differ fundamentally and what is sauce for the high court goose in not sauce for the magisterial gander. That was made plain in *Steyn.*

9. In any event, why there should be a difference between the procedure under 309C(6) and 315(1)(b), I cannot see. In the first instance the judges considering the petition make the decision whether to call for additional information or the whole record while in the second it is the head of the court concerned. Why should the latter have to read the papers?

10. I can also see no merit in the amendments to S 316, a section that to my mind has been sorted

out judicially on its current wording and needs no legislative tinkering. It certainly does not need the unduly prolix and piecemeal procedure devised for appeals from lower courts.

11. And really, the amendments to section 317 are pedantry gone mad. What is a court now to make of the legislative intent when "thinks" is removed and "is of the view" (without thinking?) is substituted. As for the change of titles, there are a myriad of these outdated terms in the CPA, all of which could be eliminated in a new Act, if and when that comes about.

Johann Kriegler
Johannesburg
18 August 2003

Appendix 2 : Amendments to Promotion of National Unity Amendment Bill

Regulations
40. (1) The President may make regulations -
(a) prescribing anything required to be prescribed for the proper application of this Act;
(b) prescribing the remuneration and allowances and other benefits, if any, of commissioners: provided that such remuneration shall not be less that that of a judge of the Supreme Court of South Africa;
(c) determining the persons who shall for the purposes of this Act be regarded as the dependants or relatives of victims;
(d) providing, in the case of interim measures for urgent payable over a period of time, for the revision, and in appropriate cases, for the discontinuance or reduction of any reparation so paid;
(e) prohibiting the cession, attachment or assignment of any such reparation so granted;
(f) determining that any such reparations received in terms of a recommendation shall not from part of the estate of the recipient, should such estate be sequestrated;
(g) providing for the payment or reimbursement of expenses incurred in respect of travel and accommodation by persons attending any hearing of the Commission in compliance with a subpoena issued in terms of this Act;
(h) with regard to any matter relating to the affairs of the Fund, established in terms of section 42;
(**hA) with regard to any matter which is necessary for the effective allocation of the amounts as contemplated in section 42**;
(i) with regard to any matter which the President deems necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Any regulation made in terms of subsection (1) which may result in the expenditure of State money shall be made in consultation with the Minister and the Minister of Finance.

President's Fund

42. (1) The president may, in such manner as he or she may deem fit, in consultation with the Minister and the Minister of Finance, establish a Fund into which shall be paid-
(a) all money appropriated by Parliament for the purposes of the Fund; and
(b) all money donated or contributed to the Fund or accruing to the Fund from any source.

(2) There shall be paid from the Fund all amounts payable to victims by way of reparations in terms of regulations made by the President.

(2A) There shall be paid from the Fund all amounts payable by way of reparations towards the rehabilitation of communities in terms of regulations made by the President.

(**2B) Anv funds or property which by a trust, donation or bequest vests in or accrues to the Fund shall be dealt with in accordance with the conditions of such trust, donation or bequest.s**

(3) Any money of the Fund which is not required for immediate use may be invested with a

financial institution approved by the Minster of Finance and may be withdrawn when required.

(4) Any unexpended balance of money of the Fund at the end of a financial year, shall be carried forward as a credit to the Fund for the next financial year.

(5) The administrative work, including the receipt of money appropriated by Parliament for, or donated for the purposes of the Fund or accruing to the Fund from any source, and the making of payments from the Fund in compliance with a recommendation in terms of this Act, shall be performed by officers in the Public Service designated by the Minister.

(6) The Minister shall appoint an officer designated under subsection (5) as accounting officer in respect of the Fund.

(7) The Auditor-General shall audit the Fund and all Financial statements relating thereto, and the provisions of section 6 of the Auditor-General Act, I 989 (Act No.52 of 1989), shall apply in respect of any such audit.

Chapter 8
Finalization of matters after dissolution of Commission

Minister may appoint Subcommittee on Amnesty after dissolution of Commission
47A. (1) If, after the dissolution of the Commission, it appears that **any matter that was dealt with by** the Committee on Amnesty **or** any subcommittee **thereof** contemplated in section 17(2A) is required to **convene needs to be dealt with further** or anew as a result of-
(a) any order or finding of a competent court; **or**
(b) **any settlement agreement reached pursuant to pending litigation emanating from such a matter**,
the Minister may, by notice in the *Gazette*, convene the relevany persant committee for the purpose set out in the notice **appoint a [Committee on Amnesty] subcommittee as contemplated in Section 17(2A) to deal with the matter in such manner as may be required.**

(3) A [Committee on Amnesty] subcommittee appointed in terms of subsection (1) must consist of a judge, as chairperson, and such other members who are fit and proper persons, as the Minister deems necessary.

(4) A **[Committee on Amnesty]** subcommittee that has been **appointed** in terms of subsection (1) shall have all the powers to deal with the matter for which it was **appointed** that it **[the Committee on Amnesty]** a subcommittee referred to in section 17(2A) would have had, prior to the dissolution of the Commission.

(5) The Minister may, after consultation with the Minister of Finance, authorize the expenditure with regard to the functioning of the convened **[Committee on Amnesty]** subcommitee and may determine how the expenditure is to be regulated.

(6) The Director-General of the Department of Justice and Constitutional Development shall provide the necessary administrative staff required by the **[Committee on Amnesty]** subcommittee for the execution of its functions.

(7) If a subcommittee appointed in terms of subsection (1) grants amnesty to any person, the Minister must, by notice in the *Gazette,* make known the names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which amnesty has been granted.

(8) If a subcommittee has refused to grant amnesty to any person, the provisions of section 21 shall apply, with the necessary changes required by the context.

Minister may appoint other Committees

47B. (1) If, after the dissolution of the Commission, it appears that any committee referred to in this Act, other than the Committee on Amnesty or a subcommittee thereof, needs to deal with a matter arising from the consideration of any matter by a **[Committee on Amnesty]** subcommittee appointed in terms of section 47A(1), the Minister may, by notice in the *Gazette,* appoint a committee to deal with the matter in such manner as may be required.

(2) A committee appointed under subsection (1) may consist of one or more fit and proper persons.

(3) A committee appointed under subsection (1) shall have all the powers to deal 'with the matter for which it was appointed that the corresponding committee in terms of this Act would have had prior to the dissolution of the Commission.

(4) The provisions of section 47A(5) and (6) apply, with the changes required by the context, in respect of a committee appointed under subsection (1).

(5) Where a **committee is appointed in terms of subsection (1) that carries out the functions of a** Committee on Reparation and Rehabilitation is appointed in terms of subsection (1) **in order** to consider a matter referred to it by a subcommittee established in terms of section 47A(1), that Committee shall, if it is of the opinion that
(a) the applicant is a victim, recommend to the Minister that such person be paid an amount in the form of reparations; or
(b) a determination needs to be made **whether an applicant is a victim and** whether an act, omission or offence constitutes a gross violation of human rights, refer the matter to a Committee on Human Rights Violations.

(6) Where a **committee is appointed in terms of subsection (1) that carries out the functions of a** Committee on Human Rights Violations is appointed in terms of subsection (1) in order to determine a gross violation of human rights as contemplated in subsection (5)(b), and the Committee is of the opinion that -
(a) a gross violation of human rights has been committed, and
(b) a person is a victim of such violation,
it shall, recommend to the **appointed to carry out the functions of a** Committee on Reparation and Rehabilitation to forward such person's name to the Minister for that person to be paid reparations, **who shall deal with the recommendation in terms of subsection 5(a)**

Further powers of Minister after dissolution of Commission
47C. (1) The Minister may, after the dissolution of the Commission-
[*(a)*] in order to correct any error contained in any notice3 proclamation or any other **publication,** excluding **the Final Report** ,issued by the Commission in terms of the Act, amend by way of a notice in *the Gazette* a publication so made.**[and**
***(b)* in consequence of amnesty being granted to any person by a Committee on Amnesty appointed in terms of section 43A(1), issue a proclamation as contemplated in terms of section 20(6).]**

(2) Subsection (1) does not detract from the general nature of section 46(7)(b)
