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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

27 August 2003

PROMOTION OF NATIONAL UNITY AND RECONCILIATION AMENDMENT BILL; CRIMINAL PROCEDURE AMENDMENT BILL: ADOPTION; CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Adv J de Lange

Documents:

[Final draft of Criminal Procedure Amendment Bill](#)

[Promotion of National Unity and Reconciliation Amendment Bill \[B34-2003\]](#)

[Committee Amendments to National Unity and Reconciliation Amendment Bill](#)

Committee Report on Promotion of National Unity and Reconciliation Amendment Bill (Appendix 1)

Committee Report on the Criminal Procedure Amendment Bill (Appendix 2)

Working draft of Child Justice Bill (not available)

Document 80: Preliminary enquiry (not available)

SUMMARY

The Committee voted in favour of Promotion of National Unity and Reconciliation Amendment Bill and the Criminal Procedure Amendment Bill. The Inkatha Freedom Party and the Democratic Alliance abstained from voting as their parties had not mandated them to vote.

The Chairperson commended the Department for the work that they have done in redrafting the section of the Child Justice Bill that deals with preliminary inquiry. Some changes will be effected to avoid delays in criminal proceedings. The Department was also asked to establish a variety of diversion programmes throughout the country and to ensure that diversion programmes are proportionate to the seriousness of the crimes committed.

MINUTES

Criminal Procedure Amendment Bill

The Committee went through the final changes made to the Bill as requested by the Committee before voting.

Clause 3 Substitution of sections 309B, 309C and 309D of Act 51 of 1977

The Chair observed that sections 309B and C were in order. The heading of section 309D, Explanation of certain rights to unrepresented accused, must be enlarged to include reference to other accused. He said that one specific concern was to make it clear that the section also covers children. He noted that section 309D (3)(ii) does not create a right but only a procedure through which one could access the Legal Aid Board. It would then be up to the individual to satisfy the requirements of the Board before legal aid is granted.

Clause 4 Amendment of section 315 (Act 51 1977), as substituted by section 20 (Act 105 1982), as amended by section 10 (Act 107 1990) & section 39 (Act 105 1997)

The Chair said that the words "or their legal representatives" must be inserted in the proposed 315 (1)(c) after the phrase 'if the parties' in line 4.

Clause 5 Applications for condonation, leave to appeal and further evidence

The Chair expressed concern that should the Prosecuting Authority decide to charge a child in the High Court, such child might lose some of his/her rights. He was particularly concerned with the issue of automatic appeal that children who are not charged in the High Court have. He felt that discrimination might result from such a decision.

Promotion of National Unity and Reconciliation Amendment Bill

The Committee went through the final changes made to this Bill as requested by the Committee before voting.

Long Title

The Chair noted that this now includes "and to make provision regarding funds and property vesting in or accruing to the fund subject to conditions; and to provide for matters connected therewith".

Clause 2

The Chair said that reference to "in terms of regulations made by the President" in (2A) should be substituted by 'as prescribed'.

The Chair noted that the Bill says nothing about its commencement date and suggested that the commencement date should be 1 October 2003.

Committee Report on Bill

The Chair said that paragraph 1 should refer to erroneous classification of "a victim" and not "certain victims" who are alive since only one person has been classified as dead whereas he is alive. He also said that paragraph 2 should direct the Minister to correct classifications administratively, if possible, before approaching a High Court.

Voting on Criminal Procedure Amendment Bill and Promotion of National Unity and Reconciliation Amendment Bill

The Chairperson asked members to vote so that the Committee could pass the Promotion of National Unity and Reconciliation Amendment Bill and the Criminal Procedure Amendment Bill. All members present voted in favour of the Bills except for Ms S Camerer (DA) and Mr V Ngema (IFP) who abstained because their parties did not mandate them to vote. Ms Camerer indicated that she personally does not oppose the Bills.

Child Justice Bill

The Committee considered the issue of the preliminary inquiry.

Clause 39 Nature and purpose of preliminary inquiry

Ms F Chohan-Kota (ANC) said that clause 39(1)(a) and (b) seem to suggest that everyone who is not in detention can appear before the preliminary inquiry at any time. The Chair asked the Department to redraft the clause.

Ms Chohan-Kota went on to ask if it is necessary to hold a preliminary inquiry within 48 hours in cases wherein a child has appeared before a prosecutor but was released. She felt that the only time a child has to appear before a preliminary inquiry is when the child is in detention.

The Chair requested the Department to indicate in 39(2) that the first appearance in terms of the Criminal Procedure Act (CPA) is replaced by this Chapter.

Clause XX Consideration of referral to children's court

The Chair said that XX (2)(c) should be amalgamated with XX (2)(d).

Clause 41 Persons to attend preliminary enquiry

Ms Chohan-Kota said that she had a problem with this section stating that the listed persons 'must' attend the inquiry. She felt that the word 'may' should be used. The problem is that if the listed

people do not attend the inquiry it would have to be unnecessarily postponed.

The Chair noted that the clause gives the inquiry magistrate the power to exclude certain people from attending the inquiry as well as powers to proceed with the attendance of certain people.

Clause 44 Failure to appear at preliminary inquiry

Mr Bassett, the drafter, indicated that this clause has two options.

The Chair said that clause 44 (2)(c) in Option 1 should read as follows: "if the inquiry magistrate is satisfied that the failure of a child to appear or to remain in attendance or to comply with any condition imposed was due to fault on the part of such child and that the purpose of a preliminary inquiry will be undermined, the inquiry magistrate must consider the matter anew in terms of provisions dealing with bail".

The Chairperson said that if the Department wants to create an offence under Option 2, it should do so instead saying that a person may be liable on conviction to a fine or imprisonment if it is found that the person did not attend or remain in attendance of the inquiry due to his or her own fault.

Part 2: Preliminary Inquiry in Terms of Section 39(2)(A)

The Chair said that this part should indicate that it applies to children contemplated in some sections, which will have to be specified. He also directed the Department to find names of inquiries referred to in this part. He was concerned with calling inquiries just informal inquiries.

Clause 42 Procedure relating to holding preliminary inquiry where diversion may be considered

The Chair said that clause 42 (2) must be re-arranged as follows: (c) should become (a); (a) should become (b) and (b) should become (c). Also 42(3)(c) should refer to "any documentation" as opposed to 'all available information'.

The Chair also noted that 42(7) does not say anything about the roles of, among others, the probation officer during the inquiry. Also reference to legal representative under 42(7)(a) and reference to legal representative and to any person under 42(7)(b) should be deleted.

The Chair had a problem with the issue of a joint preliminary inquiry in terms of 42(8). He said that such an inquiry should only be possible if it would not prejudice the children concerned.

Clause 45 Postponement of preliminary inquiry where diversion may be considered

The Chair said that unnecessary postponement of proceedings is to be avoided where possible. He had a problem with clause 45(3) in that it allows for a postponement of proceedings for the purposes of noting a confession or an admission or the holding of an identity parade or a pointing-out.

Clause 46 Consideration of diversion

The Chairperson felt that clause 46(4)(b) is too wide. He said that people may be defamed during the proceeding and to say that all information furnished at the inquiry is inadmissible in any subsequent proceedings is not right. The clause should rather say that the information must not be used against or in any subsequent criminal proceeding against that child or limit this to the charge the child is facing.

Ms Ann Skelton (Child Justice Project) said that the concern here is that children may admit to various things not understanding the repercussions. The main aim is to protect the children against the use of such information, which might not even be true. She asked if the Chair meant to say that the information received at the inquiry might not be used to open a new charge. In reply, the Chair felt that the Constitution would not allow this to happen.

Part 3: Preliminary Inquiry in Terms of Section 39 (2) (B)

Clause XX Procedure relating to holding of preliminary inquiry where diversion is not applicable

Mr L Bassett indicated that this part repeats most of the provisions stated in Part 1.

The Chair had problems with the way the clause is drafted. He said that the clause should substitute the first appearance in terms of the CPA. The clause should refer to the referral of the matter for trial and should also say what should happen if the trial court considers the release, detention or placement of the child. The clause should also indicate that if the court does not want to release the child it should proceed to deal with bail application and if it cannot, the bail application should be dealt with in the court to which the matter has been referred.

Ms Chohan-Kota said that she did not understand the need for a preliminary inquiry where diversion is not applicable. The Chairperson shared this concern and said that all cases that are not subject to diversion should go straight for trial.

Chapter 8

Clause 50 Diversion

The Chair said that clause 50(2) should specify that Section 7 of the CPA does not apply in respect of a matter which has been diverted in terms of this Act.

Clause 52 Provision and accreditation of diversion programmes and diversion register

The Chair said that 52(1)(b) should say that only diversion programmes accredited in terms of this Act might be used. He could not understand why the clause says that the Cabinet Member responsible for social development must, within six months after the commencement of this Act- (b) (i) table the policy and regulatory framework and system for accreditation contemplated in paragraph (a) in Parliament. He felt the clause should state this happens immediately. He also suggested that the clause should be moved to the part dealing with transitional arrangements.

Adv M Masutha (ANC) had a problem with the use of the words 'regulatory framework as used in 52(1)(b)(i). The word 'regulatory' has been used to refer to Acts, regulations and codes. He felt that the use of this word would give rise to confusion. The Chair agreed and requested that 'regulatory' should be taken out of the clause.

Ms Chohan-Kota said that 52(1)(a)(ii) should impose a duty not only to establish and maintain systems of accreditation but also to develop them.

Ms S Camerer (DA) had serious reservations about clause 52(1)(iii). The clause says that the cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services and safety and security may provide financial and technical support. She was primarily concerned with the funding of the diversion programmes. She said that if people are serious about the success of the programmes then the clause should oblige the persons specified in the clause to provide funds for the programmes.

The Chair said that there are programmes and NGOs, which are running without the assistance of the government. He said that if one says that the specified persons must provide financial support there might be problems since certain NGOs would not want to be linked with the government. He was not prepared to create such kind of an obligation.

Ms Camerer insisted that some kind of an obligation is necessary. One might qualify the obligation by saying that the support should be provided where necessary.

The Chair said that he was prepared to entertain the issue should Ms Camerer come up with examples of countries, which oblige the government to fund diversion programmes.

Ms A Skelton and the Chair indicated that provinces have allocated some money for diversion programmes and therefore there is no need for creating an obligation.

Clause 51 Minimum standards applicable to diversion and diversion programmes

The Chair said that Clause 51 should refer to programmes and not options. The minimum standards guide the exercise of discretion. Proportionality is needed under minimum standards especially when one is dealing with serious crimes. One should be able to justify the diversion option to the community.

Ms Chohan-Kota asked if there is any difference between a diversion option and a diversion programme. Advocate Skelton said that an option indicates that it is one choice from a number of choices whereas a programme has its own content and duration. A programme is also an option. Basically there is no clear cut distinction between the two.

Ms Chohan-Kota said that it is easier to develop guidelines for programmes. A variety of programmes is needed to accommodate different crimes. Such programmes should be developed at about the same time throughout the country. Also there should be a monitoring mechanism to evaluate the programmes.

The meeting was adjourned.

Appendix 1:

REPORT OF THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION AMENDMENT BILL [B342003]

1. Report of the Portfolio Committee on Justice and Constitutional Development on the *Promotion of National Unity and Reconciliation Amendment Bill B34-2003*] National Assembly -sec 75) dated

The Portfolio Committee on Justice and Constitutional Development having considered the subject of the *Promotion of National Unity and Reconciliation Amendment Bill [B34-2003]* (National Assembly-sec 75), referred to it and classified by the Joint Tagging Mechanism as a section 75 Bill, endorses the classification of the Bill and reports the Bill with amendments B34A 2003].

The Committee wishes to report further, as follows:

(1) During the Committee's deliberations on the Bill it was brought to the Committee's attention that the Final Report by the Truth and Reconciliation Commission contains erroneous classifications of certain victims who are alive, as deceased and certain victims who are deceased, as alive.

(2) In light of the above, the Committee recommends that the Minister for Justice and Constitutional Development be requested to direct his Department to approach a High Court with an application to correct the erroneous classifications as identified above. The cost incurred in respect of the application to a High Court should be borne by the Department. The Committee further wishes to recommend that, if at a later stage any further technical errors are identified in the Final Report by the Truth and Reconciliation Commission, such errors should only be corrected through the judicial process.

Appendix 2:

Report of the Portfolio Committee on Justice and Constitutional Development on the Criminal Procedure Amendment Bill [B57-2002] (National Assembly -sec 75), dated 27 August 2003:

The Portfolio Committee on Justice and Constitutional Development, having considered the subject of the **Criminal Procedure Amendment Bill [B57-2002]** (National Assembly - sec 75), referred to it and classified by the Joint Tagging Mechanism as a section 75 Bill, reports the Bill with amendments {B57A - 2002}, and endorses the classification of the Bill as a section 75 Bill.

The Committee wishes to report further, that clause 3 of the Bill substitutes sections 309B and 309C of the Criminal Procedure Act, 1977 (Act No.51 of 1977)("the Act"), in order to reintroduce

the application for leave to appeal (in the magistrate's court as provided for in section 309B) and the petition procedures (in the High Court regulated in terms of section 309C) in the Act. Section 309B(3)(b) of the Act allows for an accused person to apply orally for leave to appeal immediately after a magistrate has passed his or her decision or order as a result of a conviction. During its deliberations on the Bill the Committee found that Rule 67 of the Rules of Court in terms of the Magistrates' Courts Act, 1944 (Act No.32 of 1944), dealing with appeals under section 309B of the Act, does not make provision for the situation where an accused person applies orally for leave to appeal, as contemplated in section 309B(3)(b) of the Act. The Committee considers it appropriate that Rule 67 should be revisited in order to determine whether it should be amended accordingly.

The Department is requested to investigate the above matter and to report back to Parliament before 28 November 2003.

Report to be considered.

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