JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
25 February 2003
CHILD JUSTICE BILL: PUBLIC HEARINGS

Chairperson: Adv J H de Lange (ANC)

Documents handed out:
NICRO submission
Restorative Justice Centre submission (Appendix 1)
Professor Julia Sloth-Nielsen submission (Appendix 2)
Presentation by Professor Sloth-Nielsen

SUMMARY
The Committee continued public hearings on the Child Justice Bill. The Bill will establish a criminal justice process for children accused of committing offences that would protect their rights in accordance with the Constitution and international standards.

NICRO said that their programmes show encouraging results in terms of deterring children from becoming repeat offenders. They were opposed to disallowing certain categories of offenders into diversion programmes. They envisaged that diversion programmes would be more intensive than people were expecting. NICRO felt that the Bill provides proper provision for children between the ages of ten and fourteen in terms of alternative sentencing.

The Restorative Justice Centre was unhappy about the deletion of "other restorative justice programmes" in the Bill but the Chairperson noted that this phrase lacked specificity.

Professor Julia Sloth-Nielsen urged the Committee to raise the minimum age of criminal responsibility to the age of ten at the absolute minimum. She argued that that it is impossible to scientifically ascertain the age at which all South African children should be accountable for their moral actions because the age differs with experience, culture, and setting. Her statistics showed that very few young people are arrested. She recommended that a child should be released if their was not completed within six months of the first court appearance but the Chairperson thought that the six months should be a guideline and not a rule.

MINUTES
NICRO submission
This submission was presented by Mr Muntingh, Deputy Executive Director of the National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Mr Deon Ruiters, National Programme Specialist: Diversion and Youth Development.

Mr Muntingh commenced his submission by saying that the Law Commission had done an excellent job of consulting with various stakeholders on the Bill. He gave the following statistics with regard to child offenders:
-In the year 2002, 170 000 children were arrested, 85% of those arrests being for property offences. Mr Muntingh added that the number of children referred for diversions to NICRO

programmes had increased to 20000. The programmes show encouraging results in terms of deterring children from becoming repeat offenders.
-By the year 2001, more children were awaiting trial than those who were in prison.
-The number of children who were being arrested has grown at an annual rate of 16% since 1999.

With regard to the previous day's discussions, Mr Muntingh felt that closing the door to diversions on certain offences would limit obtaining the best results for all concerned.

The Chairperson wanted to know how one could justify the diversion of a rapist to his victim, bearing in mind that such diversions sometimes take the form of attending a ten week course, with two lectures per week.

Mr Muntingh countered that the conviction rate for rape was extremely low. For that reason, it would be better to divert the case, than to run the risk of not getting a conviction. He added it was envisaged that diversion programmes would be a great deal more intensive, and not as light as some people were expecting. He felt it was important to keep the options for diversions open, adding that it was not the organisation's intention to divert every rape case.

In answer to the Chairperson's comment on the lack of monitoring, Mr Muntingh said that each child was individually evaluated. He informed the Chairperson that NICRO experienced a compliance rate of 85%. The organisation does have an admission criteria and those children who do not comply with the conditions of diversion, are sent back to face court proceedings.

The Committee heard that in 1998, NICRO performed a survey in which they started tracking 600 children:
-The rate of re-offences was at 7.5%.
-By the year 2000, the same group of children showed a re-offending rate of 15%.

Mr Muntingh said that at present, a wide range of cases was diverted, but these were mainly for theft and shoplifting.

The Chairperson reminded the Committee that on the previous day, they had heard that in the past year 400 child sexual offenders had been diverted.

Mr Muntingh informed the Committee that not all sexual offenders are rapists. Some are charged with indecent assault, or for inappropriate touching.

At this stage, Mr Ruiters commenced his part of the presentation, which focused on diversions. He submitted that certain terms in the Child Justice Bill should be more descriptive, to avoid confusion. With regard to the preliminary inquiry, the probation officer should make a recommendation on whether the child should be diverted, and to where such diversion should be made.

He further stated that a time limit should be set at the higher and lower courts. The usual practice is that cases are repeatedly remanded, and the case itself drags on interminably.

The Chairperson asked if Mr Ruiters was of the opinion that those children who deal in drugs, sell firearms and commit other serious crimes, should be released if their trials are not concluded within six months.

Mr Ruiters replied that yes, these children should be released with certain conditions in place.

With regard to NICRO's appeal to acquit children who are diverted from the system, the Chairperson wanted to know how this could possibly be allowed, when part of the criteria for diversion is an acknowledgement of wrongdoing.

The Chairperson said he wanted to know if diversion programmes were effective, particularly with regard to monitoring and reporting back. There must be a good degree of accountability, which, he

added, was clearly visible in NICRO's submission.

Discussion

Mr J Jeffery (ANC) asked if any substantial reasoning could be forwarded for wanting the minimum age of criminal capacity to be set at the age of ten. He asked if there were scientific reasons for saying that children between the ages of eighteen and twenty one should be treated the same as those under eighteen. He agreed that children up to the age of fourteen years should preferably not go to jail. But what happens when such a child has committed a serious crime?

Ms S Camerer (NNP) asked if research could prove that without residential capacity, a child could be successfully diverted. Next, she wanted to know where Mr Ruiters felt that family conferences should take place, if not in a court of law. Would alternative arrangements not have financial implications?

At this point, the Chairperson conceded that it did seem from NICRO's submission as though they expected compliance from the child before asking for acquittal.

Mr Muntingh reported that in the last financial year, about 400 children from seven to ten years of age had been diverted to NICRO, countrywide. He reported that if these children were to be asked if the programme had benefited them, they would generally reply that it had.

Mr Ruiters informed the Committee that from the total group served by the diversion programmes, 10 to 15% were between the ages of eighteen to twenty one. They should be treated the same as those children who are under eighteen years of age because for the following reasons: lack of schooling, poor mental abilities, lack of suitable parental guidance, and the environment from which they come. They do not advocate the imprisonment of children between the ages of ten and fourteen because prisons are not suitable for children of that age. He felt that the Bill provides proper provision for those children in terms of alternative sentencing. It was inconceivable to think that imprisonment could at all help these children, especially considering the abysmal state of the prisons.

Mr Jeffrey agreed that this was true, but should imprisonment be absolutely restricted, no matter what the crime? The Chairperson asked if society should not be protected from a child who had committed a serious offence.

Mr Ruiters replied that the Bill provided for alternative means by which to protect society, and help the child.

Ms Camerer stated that although the new Bill stipulated children should not be allowed to go to prison, there were those who should be removed from society. Does the country have the capacity, at present, to accommodate them, and if we do not, what needs to be done?

Mr Ruiters replied that some provinces do have that capacity. Some have the facilities, but these facilities are empty. It is easy to gauge in which areas these facilities are not available by the number of children who are awaiting trial there. Those would be the areas where there are no residences to send them to. He continued that courtrooms are not the best places for children, as the physical situation is unsuitable. He suggested rather using places like community centres and family homes.

He further stated that the decision as to whether a child should be released must not be a blanket decision, but he did request that an open mind be kept. In the case of petty offences, there should be an option to release the child into the care of a parent. This would not happen in more serious offences.

Mr J Malahlela (ANC) called special attention to their submission that the definition of 'residential facility' is incomplete, as it could create confusion, leading magistrates to mistake the term to include the idea of a prison facility. He argued that since NICRO agreed with the provision of

diversions to these facilities, it was inconceivable that any judge could make this mistake.

The Chairperson thanked NICRO for the submission. He said that he took the issues raised by them very seriously, as he saw the organisation as a valuable guide within the process of decision-making concerning the treatment of children within the justice system. There were, however, two legal issues that bothered him. Firstly, the Constitution provides that every dispute can be adjudicated by a court of law. Diversions would limit that right, particularly in more serious cases. The second legal concern was who would accept the burden of responsibility, should the Bill be passed, and not be followed through with due diligence? What would happen, for instance, should a rape victim decide to challenge the diversion of her accused rapist?

Restorative Justice Centre's submission
Ms Dudu Setlatjile from the Restorative Justice Centre briefly addressed the Committee concerning the objectives of restorative justice. Ms Setlatjile asserted that the Restorative Justice Centre was specifically concerned that the phrase "other restorative justice programmes" had been deleted from the Bill. By deleting this provision, argued Ms Setlatjile, the Committee was limiting the justice system to two restorative justice alternatives.

Adv de Lange responded that everyone agreed with the principles behind restorative justice, but that the provision calling for "other restorative justice programmes" lacked specificity and would accomplish nothing.

Professor Julia Sloth-Nielsen Submission
Professor Julia Sloth-Nielsen: Law Faculty, University of the Western Cape and Member of the National Council on Correctional Services, addressed the Committee concerning the minimum age of criminal capacity. Ms Sloth-Nielsen presented the Committee with data compiled from 1998-2003 in regard to the age, number, and offence committed (if available) of children in prison under the age of fourteen:
-During the five year period two children were sentenced at age seven.
-Two children were sentenced at age eight.
-One child was sentenced at age nine.
-Four children were sentenced at age ten.
-Seven were sentenced at age eleven.

Prof Sloth-Nielsen informed the Committee that a total of sixteen children under the age of twelve had been sentenced throughout all of South Africa during the five-year period from 1998 to the present day. Another 36 children under the age of twelve are awaiting trial.

-Eighteen children were sentenced at age twelve during the five-year period with another 89 awaiting trials throughout South Africa.
-Forty children were sentenced at age thirteen during the five-year period.
-Throughout the five-year period from 1998 to the present, 74 children under the age of fourteen were sentenced, while another 308 were awaiting trial.

Prof Sloth-Nielsen urged the Committee to raise the minimum age of criminal responsibility to the age of ten at the absolute minimum. She stated that it is impossible to scientifically ascertain the age at which all South African children should be accountable for their moral actions because the age differs with experience, culture, and setting, but that the statistics show that very few young people are arrested.

Prof Sloth-Nielsen asserted that over four times as many children under the age of fourteen were awaiting trial as were sentenced. All pre-trial detention in prison of these children aged less than fourteen years old has been unlawful and has constituted wrongful detainment.

She declared that the magistrate's ability to increase bail after a child has been released on bail was unconstitutional because that child could then be reconfined to custody. Monetary bail should be a last resort for children as it most often leads to their incarceration.

Adv de Lange stated that the Department of Social Development should be forced to come to every child's court proceedings so that they can give the court a certificate relating what facility has room for the child.

Prof Sloth-Nielsen maintained that children and adults should have separate courtroom proceedings. Adv de Lange stated that he did not believe there were enough facilities to propitiate different court proceedings.

Discussion

Mr M Mzizi (IFP) questioned Prof Sloth-Nielsen's assertion that a child's bail should not be raised if he or she has already been released on bail. He described a scenario where a child is released on bail after an assault charge. Following the child's release, if the victim dies as a result of that assault, why can the child's bail not be raised?

Ms Sloth-Nielsen responded that the bail should not be raised because it is unlawful to raise a child's bail after that child is released on bail. She asserted that Mr Mzizi's example was poignant, but that most children were arrested for housebreaking, shoplifting, and theft. In a case such as Mr Mzizi described, the court should take the gravity of the assault under consideration at the initial setting of the bail. It should be unnecessary to raise bail after a child has been released.

Ms Sloth-Nielsen further recommended that a child should be released if his or her case has not been completed within six months of the first court appearance. Chairperson de Lange disagreed, stating that while a child's case should not take more than six months, the state should not be forced into releasing a potentially harmful child into society. The six months should be a guideline, not a regulation.

Ms Sloth-Nielsen recommended that children awaiting trial should return to court every 30 days to ensure that their case reaches the speediest resolution. In 1996 the time was set at fourteen days, but the transportation of children to and from the courthouse combined with the constant changing hands of the docket actually forced the child to be confined for more time. Both the child and the state would be better served with a court visit every 30 days.

The hearings were adjourned for the day.

Appendix 1:
Submission from the Restorative Justice Centre

The Restorative Justice Centre (RJC) is a registered Non-Profit Organization that is passionate about promoting the concept of restorative justice and demonstrating its application. Our comments on the Bill have been divided into two categories dealing with:
Restorative Justice principles
Other restorative Justice programmes

1. Restorative Justice principles

The RJC would like to commend the SA Law Commission for basing the Bill on restorative justice, and for the balanced and realistic way in which they have sought to give effect to it. We are convinced that the framework of restorative justice is eminently appropriate for dealing with young offenders. We have also been extremely encouraged by the range of other policy initiatives currently underway that draw strongly on restorative justice. The Probation Services Amendment Bill that was recently passed by Parliament was apparently the first piece of legislation to mention restorative justice. We hope that the Child Justice Bill be will be the second.

It would seem that there is some concern that restorative justice is a foreign concept, and that we may be guilty of trying to import something from other countries that is not appropriate for South Africa. We are convinced that nothing could be further from the truth. In the course of our work

over the past several years we have heard directly from communities that the South African way of dealing with offending children has traditionally included mechanisms that encouraged them to take responsibility for their actions. This included outcomes such as an apology, restitution and reparation and on restoring relationships between offender and victim. Where a community was involved, meetings were held publicly so as to provide everyone with a sense of ownership in the process. This is still evident in the way traditional courts function and the principles they uphold. Offenders in most cases are not separated from their support system (family and close relatives), and they are held responsible by those closest to them.

These principles and some of the procedures and outcomes are closely linked with restorative justice. The principles of restorative justice are aimed at achieving the following objectives:
Promoting victim's healing from effects of the crime
Engaging the offender to establish accountability and responsibility for the consequences of their actions
Developing an appreciation of the impact of the offence on the victim
Encouraging and facilitating the provision of appropriate forms of reparation by offenders to victims and the community
Seeking reconciliation between victim and offender where possible
Strives to integrate the victim and offender into the community.[see footnote 1 at end]

Restorative Justice is based on a simple concept that:
We are all connected - the basis of ubuntu
Crime is a violation of people and relationships
Violations create obligations
The central obligation is to put right the wrong [see footnote 1 at end]

We are of the opinion that the diverse cultures of South Africa can relate to these principles and that the programmes that are based on restorative justice will
provide practical ways for meeting the needs of communities to be more directly involved with justice processes in an orderly and structured way
provide an avenue for promoting moral regeneration

2. Other Restorative Justice Programmes

It is of great concern to us that the phrase "other restorative justice programmes" has been removed from the original version of the Bill. We see two dangers here: on the one hand, that practices could develop that are not in line with the above principles of restorative justice, and on the other, that by being too prescriptive we will exclude local expressions of the concept.
South Africa is still in its early years of implementing restorative justice programmes and has thus borrowed from other countries such as New Zealand, and Australia. There is a great need for South Africans to develop programmes that are uniquely South African. This will take some time and advocacy has to happen in communities to promote this. There are different roles that need to be filled by both the state and communities respectively if this is to be achieved.

Government has a key role in offering services, overseeing and safeguarding the process, seeing that the 'public dimensions ' of crime are addressed. This requires a partnership between state and communities. Community service providers, such as NGO's need to be given enough latitude to be able to design and develop programmes that will still fit within the restorative justice paradigm.

These programmes could be guided by a series of evaluative questions that address the following:

"Does it address harms and causes?
Is it victim-oriented?
Are offenders encouraged to take responsibility?
Are all three stakeholder groups involved?
Is there an opportunity for dialogue & participatory decision-making?

Is it respectful to all parties?"

It is therefore recommended that the phrasing of the Bill not be restricted to Family Group Conferences and Victim Offender Mediation programmes only. It should include a phrase that is wide enough to allow other initiatives within the country, particularly rural areas that are within the restorative paradigm but exclusive enough to eliminate abuse.

I trust that the above-mentioned recommendation will be considered.

Yours truly

(Ms) Dudu Setlatjile
Restorative Justice Centre

Footnotes:
1. Howard Zehr, Little book of Restorative Justice, (Good Books, November, 2002)

Appendix 2:
ORAL SUBMISSION BY PROFESSOR JULIA SLOTH-NIELSEN: THE CHILD JUSTICE BILL

Scientific evidence: children and criminal capacity

1. The broad consensus amongst child development experts is that children only develop the capacity to foresee and shape their behaviour according to an understanding of what consequences might occur around the age of 11 (just pre-puberty). This is also articulated in the 'second leg' of the current test for criminal capacity.
2. Many countries/territories/states undertaking law reform in the last decade in this area (at least 25) have chosen a fixed minimum age (eg 12). Children mature at different rates in different settings and cultures, and under different parenting, family and social systems. This has led most states to opt for a fixed minimum age, which applies as a rule of law (irrespective of the actual developmental status of an individual child).
3. Although the doli incapax presumption has been abolished in some jurisdictions recently, retention of this rebuttable presumption does allow for a more flexible approach which accommodates differences in maturation rates.

B. Children below the minimum age of criminal responsibility

1. Section 7(7) which requires a police official when confronted by a child below the minimum age of criminal responsibility to ' inform the relevant probation officer of such particulars of the child as may be prescribed' is vague and weak. It will, in practice, have no effect at all. The police official should be permitted/required to accompany the child to the probation officer.
2. Concrete measures that a probation officer can take when appraised of the details of a child below the minimum age should be directly referred to in this legislation. Refer to the SALC Report and draft Bill for such a proposal, and concrete provisions which include opening a children's court inquiry, arranging a family group conference to examine the child's welfare needs, and organising therapeutic services for the child and his or her family.
3. Although the Child Care Act itself is the subject of a law reform process, the progress of this endeavour is not certain, and the Child Care Act cannot therefore be relied upon to fill gaps left by this legislation.

C: Venue for convening a preliminary inquiry

1. Section 25(4) suggests that a preliminary inquiry should take place ' in a court or any other suitable place'. It is submitted that a court should be the last option - it is far more useful to

hold the Preliminary Inquiry in a venue such as an office - the offices used for the Children's Court, for example. The wording should therefor rather read that the preliminary inquiry should take place in any suitable venue, but preferably not a court room.

D. Detention of children prior to the finalisation of the preliminary inquiry

1.The provisions of section 36 relating to when a child may be detained in police cells pending the finalisation of the preliminary inquiry are obscure, and will led to much confusion amongst the magistracy. The fact that detention in police cells should be prohibited after the conclusion of the preliminary inquiry (also the current legal position) has to be worked out backwards, from an internal cross reference to section 37 and 38. Given the interpretative problems that have beset the implementation of section 29 of the Correctional Services Act over the last six years, this kind of indirect allusion should be avoided at all costs. Magistrates that I have consulted cannot determine from this convoluted wording when they may or may not remand a child to police cells, and the potential for State liability for wrongful detention arises. This is also a good example of the kind of provision which has been redrafted to become user unfriendly and obscure.

2. It is therefore proposed that the legislation state directly that no child may be detained in a police cell after the conclusion of the preliminary inquiry. Again the Committee is referred to the SALC report and draft Bill.

E: Conversion from a criminal trial to a children's court inquiry

2. There is no provision in the Bill as tabled for converting a matter to a children's court inquiry after the preliminary inquiry stage. This means that the opportunity to use a section like section 254 of the present criminal procedure act will not be available to the judicial officer at any stage during the trial or sentencing process. This is unfortunate, as research shows that such conversions are in fact as frequent at sentencing stage as they are in practice early on in the proceedings. For example, one a detailed pre-sentence report has been prepared, accompanied by interviews with parents and family members, the fact that the child is in fact in need of care becomes clearer. It is therefore proposed that the section 254 provision be re-inserted into the Chapter 7 of the Bill (note that the Bill provides that the present section 254 will be repealed: see section 86 of the Child Justice Bill).

F: Separation and joinder of trials

1. Separation and joinder of trials is a difficult issue. In the quest to create a separate child justice system, it is obviously preferable that wherever possible children should be tried separately from adults. This goes to the very essence of the century of history that has lead to separate juvenile justice systems for children, and constitutes international best practice. However, it is conceded that there are practical problems sometimes, including the question of duplicate dockets and the role of the defence counsel for any adult co-accused. Nevertheless, there are many systems where complete separation is maintained, eg Canada. The role players (eg the prosecution) have become accustomed to running two trials on occasion, and do not experience difficulty.

2. In the SALC Draft Bill, the above principles are far more clearly stated than in Bill 49/2002. Clause 80(1) says that trials are to be separated unless compelling reasons for joinder exist. By comparison, Bill 49/2002 provides that separation should occur unless it is in the interests of justice to join the trials - in my submission a far weaker criterion. It is proposed that the test for allowing joinder of trials be defined more strictly, so as to preserve the essential goal of separation of children from adults wherever possible. It is not, however, submitted that separation be a

blanket and inflexible rule.

G: Sentencing

1. The Bill should expressly prohibit the imposition of a fine as a sentence. The provisions of section 71, which may appear to provide alternatives to fines, in fact only govern those instances where a fine is the **prescribed penalty**. It therefore opens the way for a judicial officer to consider imposing a fine for common law offences (for example) where there is no prescribed penalty. This runs counter to the intention to prohibit monetary penalties which children cannot pay. See the discussion of this point in the SALC report and Draft Bill.
2. The constitutional principle that detention should always be a matter of last resort, and then only for the shortest appropriate period of time applies far more broadly than simply to detention in a prison. It applies to any situation where a child is deprived of liberty. This is especially relevant in the child justice system, where children can be and are deprived of liberty in a range of alternative institutions - places of safety, secure care facilities, reform school youth centres and other residential centres. This has long been recognised by the Criminal Procedure Act, which provides for automatic high court review of any reform school sentence, as which limits the period of time for which a sentence to a reform school may be imposed.
3. The restrictions on the imposition of residential sentences in the Bill follow the constitutional principle, as also three decades of research here and abroad which illustrate the overwhelmingly negative long term effects of institutionalisation upon developing youth. The committee is cautioned against proceeding from the stance that **sentencing** be linked to **facilities** - the danger exists that we will always find children needed in to fill available institutions, whereas the trend here and internationally is towards community based sentencing for both youth and adults.
4. The present experience with Kokstad prison, a maximum security facility for adult prisoners built at vast cost is also salutary. The 1400 bed facility (which serves the entire country) is only half full, evidently because an insufficient number of high risk prisoners who fulfil the admission criteria exist to transfer to this facility. A reason why the secure care facility for children in Polokwane is at present apparently underutilised is probably explained by the same phenomenon.
5. No child under the age of 14 years should be sentenced to imprisonment. The Department of Correctional Services does not have the capacity to provide services to children of this age. The age for admission to one of the 7 Youth development centres in the country is 16-21 years. Given the sentencing data presented earlier, it is clear that the numbers of children **really** requiring a residential alternative are few enough to be accommodated in existing reform schools and similar institutions, including secure care facilities (even though they are presently used only as remand institutions).

H: Miscellaneous

1. The definition of 'an appropriate adult' as included in Bill 49/2002 does not make sense. How can a custodian exclude a primary care-giver? The broader definition should be redrafted to include a custodian and a primary care giver who does not necessarily bear legal responsibility for a child, but de facto cares for the child on day to day basis.

2. The SALC report and draft Bill created a new statutory offence of using children in the commission of a crime, an option strongly advocated for by members of the public during consultation processes. This has been considerably watered down, and the only provision now to hold adults accountable concerns aggravation of sentence. However, this only kicks in when the adult is convicted of incitement conspiracy or being an accomplice. Prosecutions for incitement and conspiracy are so rare as to be non-existent and it is therefore submitted that this provision will in practice carry no meaning.