JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
14 March 2003
CHILD JUSTICE BILL: DELIBERATIONS

Chairperson: Adv J H de Lange (ANC)

Documents handed out:
Child Justice Bill [B 49-2002]
Summary of Submissions on the Child Justice Bill
Addendum to Summary of Submissions on the Child Justice Bill (Appendix)

SUMMARY
The Committee continued informal deliberations on the Child Justice Bill. The Committee focused on the sections dealing with the preliminary inquiry. As the Bill is currently written, the prosecutor makes the decision regarding diversion. The Chairperson suggested that the Committee could create a mechanism to allow a magistrate to influence decisions while other Members suggested that the Magistrate should have a decisive role to play.

The Committee noted that diversion may not be constitutionally appropriate for serious crimes and made a decision on which schedule offences would not qualify for diversion. However, the Committee would still consider the matter further since the Constitution distinguishes between courts and prosecuting authority. It would have to pass a proportionality test to correctly balance rights of the accused with the rights of the victim.

MINUTES
Ms Skelton distributed an Addendum to the Summary of Submissions, explaining that many submissions have come in since the original summary of submissions was published.

The Chairperson stated that they would have to cut off the submissions at some point, so the Committee would not have to go back over parts of the Bill already discussed. Upon scrutinising the document, the Chairperson noted that all of the issues had already been addressed.

Clause 25
Adv de Lange redirected the Committee's attention to Clause 25, which dealt with the preliminary inquiry. Nowhere in the preliminary inquiry section was it mandated that the child must participate in the preliminary inquiry within 48 hours.

One of the drafters noted that the preliminary inquiry constituted the child's first appearance, which must take place within 48 hours.

The Chairperson asserted that the Bill must clearly state that a child should participate in a preliminary inquiry within 48 hours of arrest. There is no need to refer to other sections and other Bills. It should be stated in this Bill, along with all of the exceptions, such as a child arrested on a Saturday.

The preliminary inquiry may lead to three outcomes for a child: diversion, conversion to a Child

Care Court, or trial. These should be enumerated clearly in the objects clause.

The Chairperson thought that the NICRO suggestion that a preliminary inquiry not take place in a courtroom was impossible and undesirable. The proceedings would have to take place in a courtroom.

Adv M Masutha (ANC) suggested that if NICRO had described the proper environment in which a preliminary inquiry should be held, perhaps the Committee could have accommodated the suggestion. The courtroom was a suitable place for a child perpetrator to appear for a preliminary inquiry.

Adv de Lange stated Clause 25(3), the objectives section, should be short and concise. The inquiry should determine whether a child belongs in the criminal justice system. If the child does not, diversion or conversion to a Child Care Court were the two options. If the child does, then the matter must proceed to trial. The drafters should spell the options out.

He asked if the clause detailed the rights of the prosecutor and other officials at the hearings.

Ms Skelton answered that the accused would not be cross-examined. The preliminary inquiry would be inquisitorial in nature and, as the legislation is currently written, the prosecutor would make the final decision. The powers of the magistrate were listed in Clause 29.

The Chairperson suggested that all the powers for authorities at the preliminary inquiry should be listed in that clause. Additionally, the magistrate should have the power to ask questions and illicit information.

He stated that Clause 27(5), which describes which persons should a attend the meeting, should be articulated earlier as part of the procedures.

Clause 26
The Chairperson said he had significant questions concerning Clause 26. Ms Skelton answered that the clause would not work in rural areas. The clause was inserted to encourage specialisation, especially in urban settings where there are enough magistrates to have one or two designated for preliminary inquiry.

Adv de Lange answered that specialisation should be dealt with differently. It can be written into the report, but should be taken out from the Bill.

Mr J Jeffery (ANC) agreed that it was unnecessary to write specialisation into the Bill. The courts are working towards specialisation. That Section should be deleted from the Bill and included in the report.

Adv Masutha asked to return to Clause 25(3)(h), where he found a problem with the wording 'release or placement'. 'Placement' should be changed to 'detained'. The Committee agreed.

With reference to the section detailing people to attend, Ms Skelton brought up the issue of legal representation for a child. Perhaps the child's legal representative "must" attend, but Legal Aid may not be able to handle the additional burden. By replacing "may" with "must", the entire process may be slowed. Legal representation would cause a delay and is probably unnecessary since the process is inquisitorial.

Mr Jeffery agreed and stated that children do not always want legal representation.

Ms S Camerer (NNP) stated that lawyers need not be present for Schedule 1 offences.

The Chairperson asked why the Bill provided that the preliminary inquiry may take place without parents only in "exceptional circumstances".

Ms Skelton answered that the parent is an important part of the process. The child may be released to the care of the parent after the preliminary inquiry.

The Chairperson declared that there is no reason the parents must be there. Lawyers should not be required to attend as well. Both provisions would slow the proceedings down too much. The legal representative must be there in certain cases, such as when a child is under fourteen years of age.

Adv Masutha stated that "exceptional circumstances" is further qualified whereby the absence of a parent harms the "best interests of the child." This further narrows the qualification and will damage the chances of a swift preliminary inquiry.

The Chairperson stated that it should be up to the magistrate to decide who must attend. He or she will have the power to subpoena those that are necessary for the procedure. There are others that may attend, and should do so with the permission of the magistrate. In the case of a researcher that is given permission to attend, a confidentiality agreement should be reached whereby the child's identity is not released or published.

Adv Masutha stated that the provisions of the Bill did not give the magistrates powers of exclusion. The Bill has provided who must be at the preliminary inquiry and who may be at the preliminary inquiry, but it has not articulated who the magistrate can exclude.

The Chairperson replied that the Committee cannot draft an exclusion clause. If someone is not included in the group who "must" or "may" attend, then that person is excluded.

Adv Masutha suggested detailing those who may be excluded.

The Chairperson stated that the Bill would not provide for diversion service providers to attend every preliminary inquiry. If diversion had been recommended in the assessment report, then the diversion service provider that was specifically recommended could attend. Attendance would not be obligatory.

Adv de Lange pointed out that the "may" in Clause 28(2) should be a "must". A child's record of previous diversions 'must' be available during the preliminary inquiry. Additionally, previous convictions and pending charges must be submitted for consideration during the preliminary inquiry.

Ms F I Chohan-Kota (ANC) stated that responsibility for submitting this information should be specifically assigned.

Adv de Lange agreed that this needed to be addressed. The process was taking shape: first, the child's age would be assessed and the child would be informed of his or her rights and of the nature of the proceedings. The magistrate must have a copy of the assessment report. The magistrate will decide who must and may attend to the meeting. The Bill must then specify what information should be made available.

Ms Chohan-Kota stated that the assessment report, prior criminal proceedings, and the docket should all be accessible.

Ms Skelton interjected that prosecutors want access to the docket for the preliminary inquiry.

Mr Jeffery stated that the responsibility should fall on the magistrate. He or she should have all of the information.

Ms Skelton stated that this may cause a problem because the magistrate will not be able to preside over the child's trial.

Mr Jeffery stated that the magistrate must have the power to call all relevant people to attend the

preliminary inquiry.

Adv de Lange suggested inserting a catchall provision granting the magistrate power to collect all evidence or information necessary for the preliminary inquiry.

Ms Chohan-Kota asked if that would include the docket.

The Chairperson stated that this was open to discussion. He was worried about the potential for delays. The inquiry will not be able to commence within 48 hours if the Bill provides that the docket must be present. Furthermore, if the child's attorney is present, he or she will have access to the docket. The consequences could be severe, particularly when diversion is not an option.

Mr Jeffery responded that it was only important for the magistrate to have the document. There was no point in the accused having access. To avoid delays, the Bill could specify that the complete docket was unnecessary.

The Chairperson explained that, as the Bill is currently written, the prosecutor makes the decision regarding diversion. Why is it so important for the magistrate to have access? The Chairperson suspended the discussion on specifics and stated that the Committee needed to decide whether to leave it as the prosecutor's decision. This is a constitutional issue since every dispute should be adjudicated as a point of law. The final decision can be made by the prosecutor, if the court has enough moral persuasion in the decision.

If the decision goes to the magistrate, chances of delays are much greater since accused persons will want to provide more information.

Mr Jeffery questioned what would happen if a magistrate completely disagrees with a prosecutor's decision. Should the magistrate have the power to change it?

The Chairperson suggested that the Committee could create a mechanism to allow a magistrate to influence decisions.

Mr Jeffery pointed out that it was illogical to have the magistrate lead the inquiry and then be left out of the decision making process.

Ms Chohan-Kota stated that the magistrate should play a decisive role in the process. More importantly, she wondered about the rights of the victim. Perhaps if the offence is minor and diversion is the obvious solution, the magistrate can play a minor role. But in the case of a serious offence, the magistrate must play a more important role.

Adv de Lange asked whether the Committee should exclude those that have committed the most serious crimes from the possibility of diversion. The more serious the offence the more the interests of the victim need to be considered. The proportionality changes between the rights of the child accused and the victim. Diversion may not be constitutionally appropriate for serious crimes.

Ms Chohan-Kota argued that there must be a category of serious crimes, such as murder and rape, where diversion is not an option. There must be a trial for those crimes. The victim has the right to have justice done. Certainly diversion could be considered as a sentencing option after the trial. In many cases it would be fruitful for a child convicted of a serious crime to go to prison and participate in diversion and rehabilitation programs while in prison.

The Chairperson agreed and the Committee went through the Schedules of offences and decided which ones would not be suitable for diversion. The Committee decided that diversion would not be an option for Schedule 3 offences except for (4), (5), (8), and (9), unless (9) was an attempt.

The Chairperson stated that this would create three categories. For Schedule 1 offences where the assessment recommends diversion and the prosecutor agrees, the child will automatically be

diverted. For Schedule 3 offences (1), (2), (3), (6), (7), and (9), unless (9) is an attempt, diversion is not an option and the case should proceed to trial. The group that is left in the middle, consisting of Schedule 1 offenders who are not automatically diverted, Schedule 2 offenders, and those Schedule 3 offenders that are eligible for diversion, would participate in the preliminary inquiry.

The Chairperson stated that this arrangement seemed efficient and desirable, but it was still subject to legality issues. The Constitution distinguishes between courts and prosecuting authority. The Committee would have to think more about this issue. He asked for a copy of the *Pennington* judgement because the word "dispute" was defined by the courts in the decision. The Committee would have to take time to consider this. The final outcome must pass the proportionality test to correctly balance rights of the accused with the rights of the victim.

Ms Chohan-Kota asserted that when a child was charged with more than one crime, the more serious crime should apply. The Committee agreed.

The Chairperson concluded discussions on the Child Justice Bill and told the drafters they would have one week to complete the changes made. The Committee would meet concerning other matters during the following week.

The meeting was adjourned.

Appendix:
ADDENDUM TO SUMMARY OF COMMENTS ON THE BILL

Comments received after 28 Feb 2003.

CLAUSE 4(3)(a):

CJ 54 (Human Rights Commission)

It is not clear what this provision seeks to achieve. Our reading of this section is that it could potentially stand to jeopardize the spirit of the Bill and the targeted segment of the population that it has set out to protect.

CLAUSE 18(1):

CJ 54 (Human Rights Commission)

The Commission is of the view that separate records for child offenders should be kept.

CHAPTER 4: ASSESSMENT OF CHILD

CJ 54 (Human Rights Commission)

Diversion should be an option at the assessment stage, and not only be available at the preliminary inquiry. This would help with deal with backlogs that currently exist in courts and in addition ensure a more effective flow of cases.

CLAUSE 36(5)(a):

CJ 54 (Human Rights Commission)

The HRC is very concerned about the unduly long periods the child must wait before reappearing in court.

CLAUSE 44: CHILD TO BE CONSIDERED FOR DIVERSION UNDER CERTAIN CIRCUMSTANCES

CJ 56 (Community Law Centre)

In response to a question put by the Chair to Ms. J Gallinetti during her oral submission to the committee the community Law Centre has submitted the following further comment on the question of Are diversion practices constitutional, particularly in the light of Section 34 of the Constitution?

Article 34 of the Constitution states
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a
court or, where appropriate, another independent and impartial tribunal or forum."

The Community Law Centre points out that according to the case of S v Pennington 1997 (10) BCLR 1413 (CC) that criminal proceedings are not ordinarily referred to as "disputes". In the case Chaskalson P held "The words any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That Section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that Section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted".

It is therefore submit that this section of the Constitution does not affect the constitutionality of diversion and it cannot be argued that diversion is a violation of section 34 of the Constitution. It would appear that section 34 relates primarily to access to court, in that it seeks to ensure citizens a right to due process of law in the context of civil proceedings.

In any event, when looking at all types of offences, the availability of admission of guilt fines can be likened to diversion as the offender can avoid formal court in trivial matters just as certain minor offences can be diverted from court. In this instance a mechanism in section 57 of the CPA exists, which allows for disputes not being determined in an ordinary court of law.

On the issue of whether diversion is constitutional from the victim's perspective, particularly in relation to serious offences such as rape and murder, the Community Law Centre makes reference to section 12(1)(c) of the Constitution provides that "everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources." Reference is also made to the Carmichele case which emphasises a victim's right to life, human dignity and freedom and security of the person. On the other hand, the committee's attention is drawn to section 179(2) of the Constitution which states that:
The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

Section 179 has established a single prosecuting authority that is now regulated by the National Prosecuting Authority Act 32 of 1998. It has been stated that "it is the duty of the national director of public prosecutions to see to it that prosecutions are instituted without fear, favour or prejudice that is correctly and with just cause.

Section 20(1) of Act 32 of 1998 sets out the powers, duties and functions of the prosecuting authority and states.

The power as contemplated in section 179(2) and all other relevant sections of the Constitution, to
(a) institute and conduct criminal proceedings on behalf of the State;
(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
(c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

Therefore the national prosecuting authority has a clear discretion and power to direct criminal proceedings and this extends to the decision to either conduct criminal proceedings or discontinue

them.

It has been noted by Du Toit et al (commentary to CPA) that the powers of the prosecuting authority are extensive and therefore have to be exercised with care and the highest degree of objectivity and it is only in exceptional cases that a court will interfere.

An example of this occurred in S v F 1989 (1) SA 460 (ZH) A where a 10 year old boy was charged with indecent assault of a 8 year old girl. The review court found that the element of wrongfulness had not been adjudicated on and the State had failed to prove its case. In forming this decision, Greenland J held:

Though mindful of the Attorney-General's prerogative in regard to prosecutions, I am compelled to hold it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that such child will not understand or apprectate the proceedings."

It is submitted that the discretion granted to the prosecuting authority by the Constitution envisages that the prosecution must act in the best interests of the State and this entails weighing up the circumstances of the crime, the victim and the accused in making a decision to prosecute. It is further submitted that the prosecution has the discretion to discontinue proceedings in appropriate matters. In light of this it is submitted that any victims rights could be reasonably and justifiably limited by a prosecutorial decision to divert in appropriate circumstances.

On the issue of **whether certain categories of offences should be excluded from diversion,** the CLC proposes that for certain serious types of offences extra checks and balances could be built in such as the need to have the agreement of the victim prior to considering whether to divert such matters, or the use of victim impact statements to guide the preliminary inquiry in deciding on the diversion of such matters. These special procedures could be spelt out clearly for such cases.

On the issue of **whether diversion exposes the State to liability** the CLC describes the finding of the court in the case of *Carmichele V Minister of Safety and Security and another 2001(10) BCLP 995 (CC)*

In addressing concerns that delictual liability might affect the proper exercise of duties by public servants, the Constitutional Court noted that
"Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents [49]."

With regard to the role of prosecutors the Court stated that they "have always owed a duty to carry out their public functions independently and in the interests of the public" [72]. The Court however cautioned that "care should be taken not to use hindsight as a basis for unfair criticism" [73]. The Court emphasised the role of prosecutors as set out in the United Nations Guidelines on the Role of Prosecutors which has been incorporated in the National Prosecuting Authority Act 32 of 1998 and in terms of which prosecutors shall, in the performance of their duties:

"Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect [73]."

Subsequent to Carmichele, the extent of State liability in cases with similar facts, was examined. In the Supreme Court of Appeal case of *Ghia van Eeden V Minister of Safety and Security* (case no. 176/2001, judgement delivered on 27 September 2002), the Court emphasised that an open-ended, flexible approach was used in determining whether a particular omission or act should be held unlawful [22]. The case concerned a woman who was sexually assaulted and raped by a serial rapist who had escaped from police custody. In addressing the respondent's concern about the danger of "limitless liability on public authorities" the Court in this case noted that "[i]n deciding that question the requirements for establishing negligence and causation provide sufficient

practical scope for limiting liability" [22].

This point was also emphasised in the Supreme Court of Appeal case of *Minister of Safety and Security V Dirk van Duivenboden* (Case no 209/2001, judgement delivered on 22 August 2002) where the Appellate Court stated that "the requirements for establishing negligence and a legally causative link, provide considerable practical scope for harnessing liability within acceptable bounds" [19].

In terms of all the above cases therefore, public servants can be held liable where their negligence or misconduct infringes the rights of victims. Liability would then be present, as in the *Carmichele* case, where the prosecutor failed to bring previous similar convictions to the attention of the presiding officer in a bail application, and the accused committed an offence on release from bail.

It is submitted that liability does not extend to cases where subsequent offences were committed, either after diversion, a suspended sentence withdrawal of charges or parole, except where evidence indicates that the prosecutors, police or judicial officers neglected their duties, did not apply their minds to the facts of the case and did not pay due consideration to factors which would indicate the likelihood of further offences.
Various checks and balances are applied before a case is diverted from the criminal justice system. Firstly, a probation officer will make an assessment of the child and his or her circumstances and whether the case should be diverted in the circumstances and with due consideration of the impact on victims and the community. Secondly, a probation officer in charge of the diversion programme to which a child might potentially be referred, will make an assessment of the appropriateness of the referral after interviewing the child and considering all surrounding circumstances. Finally the prosecutor will apply his or her mind to the matter of whether diversion is a suitable option. The prosecutor should take the views of the victim into consideration when deciding whether to make a recommendation for diversion. If all the above parties, after applying their minds and finding diversion the most suitable manner of dealing with the offence, and the child commits a subsequent offence, it is submitted that the State cannot be held liable.

Section 297A

Another option to consider when looking at State liability in relation to diversion is the provisions of section 297 A of the CPA. These state that:

"(1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him in the performance of community services in terms of section 297, that loss may, subject to subsection (3), be recovered from the State.

(2) Subsection (1) shall not be construed as precluding the State from obtaining indemnification against the liability in terms of subsection (1) by means of insurance or otherwise.

(3) The patrimonial loss which may be recovered from the State in terms of subsection (1) shall be reduced by the amount from any other source to which the injured person is entitled by reason of the patrimonial loss suffered by him.

(4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the accused shall pass to the State.

(5) If any person as a result of the performance of community service in terms of section 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director General Justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he may deem reasonable to that person."

It is submitted that these provisions can also be made applicable to instances of diversion. In addition it is submitted that, in any event, it might be
expedient for it to be mandatory that the relevant State departments indemnify themselves through insurance, against potential delicts suffered by persons
on account of actions by an accused undertaking a diversion programme.

CLAUSE 58: TIME LIMITS RELATING TO CONCLUSION OF TRIALS

CJ 56 (Community Law Centre)

It must first be noted that the 6 month time limit only operates from plea. This allows the police and prosecution to co-ordinate their efforts to ensure that all preparatory work is done before putting the charge to the accused for plea purposes and thereby ensuring that a trial can reasonably occur within a six month time period.

It is submitted that in certain instances the interests of justice might require a child offender to be held for longer than 6 months. Provision is already made for this in that the crimes of murder rape and robbery with aggravating circumstances are excluded from the time period. It is acknowledged that items 6 (b) and 7(a) of schedule 3 are of also such a serious nature that the 6 month time period might not justifiably apply. However it is submitted that the remaining items in schedule 3 are not worthy of excluding the time limit and therefore the time period limit should still apply.

As far as limiting section 58(3) on account of fault for the delay on the part of the accused is concerned, it is submitted that this is in order only in so far as circumstances where the child accused might have escaped or refused to attend court. This would clearly be willful default on the part of the accused. However, in so far as delays on the part of the child's legal representative are concerned, this would only be a possible exception to the time limit if the child offender refused to instruct the attorney properly and should not be an exception if the delay was occasioned by fault of the legal representative himself or herself. Therefore a condition to the time limitation might be deliberate delaying tactics solely attributable to the child accused.

CLAUSE 69(1):

CJ 56 (Community Law Centre)

Community Law Centre is firmly of the view that there should be a blanket
prohibition on imprisonment under the age of 14 years of age. In the course of the public hearings questions were raised regarding comparable jurisdictions. The Community Law Centre has provided an overview of sentencing practices in various countries that indicate that life imprisonment is not applied and in
fact a maximum capped sentence is often applied to children found guilty of
offences. In addition in countries where the minimum age of criminal capacity
is above **14 this automatically means that there is no imprisonment for** children below that age. Where the age of criminal capacity is younger than 14, most of the jurisdictions examined provide for alternative residential care other than imprisonment, such as in England where secure care is used, and Australia where training centres are used. Uganda, which has a minimum age of criminal capacity of 12 does not allow children younger than 16 to be held in a prison, and the length of sentence does not exceed 3 years.

CLAUSE 72(1):

CJ 56 (Community Law Centre)

The Community Law Centre is of the view that it is very important to have a ban on life imprisonment for children. They provide international comparative information to show that most countries do not have life imprisonment and in fact many limit imprisonment to a specific number of years such as, 3 years (Uganda), 6 years (Netherlands) and 10 years (Russia, Hungary, Austria and Germany).