JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
24 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 clauses dealing with the postponement of the preliminary enquiry as well as with the options for diversion. As the Bill is currently written, the preliminary enquiry may be postponed for a period of 48 hours, and then be further postponed for another 48 hours if that postponement increases the child's prospects of diversion. The Committee debated whether this system would properly balance the need for a swift preliminary enquiry with the need for a thorough preliminary enquiry.

The Committee discussed the legal ramifications of diversion and referral to a children's court and required more information on the legal issue. The levels of diversion were also discussed as well as the responsibility for providing, maintaining and accounting for diversion programs.

MINUTES
Ms A Skelton, legislative drafter, referred the Committee to Clauses 28 and 29 where the Committee had left off their last discussion on the Bill.

Adv de Lange read the Child Justice Alliance's submission for Clause 29(5). He disagreed with the assertion that an Independent Complaints Directorate should be informed if a child was thought to be unnecessarily held in a police cell or in prison. The provision would just add to the bureaucracy and not accomplish anything.

He was perplexed by the organisation of Clauses 28 and 29 and suggested that the drafters rework them and perhaps include all procedural provisions into Clause 28. Subsections 29(3) and 29(4), for instance, are procedural provisions and should be included in Clause 28.

Adv de Lange directed the Committee's attention to Clause 30, saying that he had concerns about the clause. He asked why the police should be limited in their ability to take fingerprints.

Ms Skelton explained that the idea behind the clause was to keep children away from the trauma of the criminal justice system. The exceptions listed should ensure that justice is not impeded.

Mr S N Swart (ACDP) suggested that the provision was meaningless since the exceptions grant police the right to fingerprint children in nearly every case.

Ms Skelton explained that they did not want to limit the police's ability to investigate. The Clause

was meant to convey that children should not have their fingerprints taken needlessly.

Adv de Lange stated that Clause 30 seemed unnecessary and he suggested it should be taken out to avoid complication. If there is currently no abuse of authority, why should the power to fingerprint be limited? He flagged the section and said it should be taken out unless the Committee can be convinced that the clause is necessary.

The Committee dealt with Clause 31, which was concerned with the age of a child as determined by the magistrate at the preliminary enquiry. Adv de Lange asked if the term 'uncertain' was appropriate as it may be too vague and suggested that 'any age in dispute' might be appropriate.

Mr Swart asked what the wording in the Criminal Procedures Act was and suggested they use that same wording.

Adv de Lange believed that the Committee already dealt with Clause 31(4).

Ms Skelton admitted that the Committee had considered the issue and added that Clause 82 was closely linked.

Adv de Lange agreed that all clauses dealing with age determination and changes in age should be listed together.

He asked why 31(3) was included.

Ms Skelton said that this was to ensure that the magistrate accepted the age as correct unless it has been proved otherwise.

Adv de Lange asserted that the provision should stipulate that the change in age would have to affect the proceedings in order for the procedure to be altered. If a sixteen-year-old child undergoes the preliminary enquiry as a seventeen-year-old, the change should be noted, but the procedure should not begin anew.

The Committee agreed to move Clause 31(5) to the miscellaneous section of the Bill.

Adv de Lange noted that Clause 32, "Failure to appear at preliminary enquiry", should be revised so as to decriminalise the failure to appear. The Committee had already agreed on this point with regards to failure to appear at the assessment.

The Committee debated the possible ways of forcing a child, a child's parent, or appropriate adult to appear at the preliminary enquiry. They decided that a subpoena would be appropriate along with the usual sanctions that would accompany non-compliance with the subpoena.

The Chairperson noted that the Committee dealt with Clauses 33, 34, 35, and 36 previously, and proceeded to Clause 37 "Postponement of preliminary enquiry".

With regard to the magistrate's ability to postpone the preliminary enquiry only for 48 hours, Adv de Lange was concerned about what would happen if the preliminary enquiry was not completed.

Ms Skelton responded that the main point of the preliminary enquiry was to complete it quickly so that children would not be imprisoned for an unnecessarily long period of time. There is an exception in the Bill for certain types of children listed in Clause 38, whereby the postponement can be for longer. But once a preliminary enquiry begins, it can be postponed once for 48 hours. In a case where a further postponement would increase the child's prospects for diversion, it may be postponed for another 48 hours. After that, the case would continue to plea and trial.

Adv de Lange asked what would happen if a child could not appear because of illness. He was concerned that a child who might otherwise have been diverted would have to go through a trial.

Ms Skelton pointed out that the Criminal Procedure Act contained a clause dealing with illness and injuries that would apply to children. That is postponement of a different kind.

Mr Swart noted that a child could be diverted even after a court case.

Ms Skelton referred to Section 50 of the Criminal Procedure Act and stated that it applied before the first appearance, or in the child's case, before the preliminary enquiry.

Adv de Lange argued that the drafters should add to Clause 37(1)(a) a stipulation that postponement can only occur if that person's attendance is essential for the successful completion of the preliminary enquiry.

He pointed out that the option of postponement should be limited so that the 48-hour period does not become a 96 hour period. Then parents will have to go back and forth from the courts and miss work. The disruption will be too great.

Ms Skelton answered that postponement could be narrowed.

Adv de Lange argued that if narrowed too much, the child will simply proceed to trial because the proper information will not be in place.

Ms Skelton agreed that a balance needed to be reached so that a preliminary enquiry could be done quickly and properly. The point was to avoid the possibility of the case being remanded for two weeks as it is now.

Adv de Lange suggested the Bill create a test in 37(1), whereby postponement would only occur in cases where it was necessary for a proper recommendation to occur.

Mr Swart expressed concern that the probation officers would take the easy way out, not gather the proper information, and allow the matter to proceed to trial.

Adv de Lange offered two options for the Committee to consider for the issue of postponement. The first is to leave it as is and the second is to add a test. The Committee agreed to return to the issue later for a decision.

The Committee discussed Clause 38, which dealt with the postponement of a preliminary enquiry in order to obtain a detailed assessment.

Mr Swart asked what the was difference between an assessment and a detailed assessment.

Ms Skelton explained that a probation officer could recommend that a child have a detailed assessment which may include interviews with experts and specialists. For instance, in the case of a sexual offence, the child may be interviewed by an official from a sexual offenders' programme to determine if the child would be a suitable candidate for such treatment.

The Chairperson stated that the procedure for a detailed assessment was suitable, but asserted that Clause 37 should not apply to a child earmarked for a detailed assessment. Only Clause 38 would apply to that child.

The wording "residential facility" in 38(3) was identified as a problem.

Ms Skelton acknowledged that the wording was a mistake and that it would be replaced with "placement facility".

The Committee briefly discussed Clause 39, "Decision regarding diversion". Adv de Lange reminded the Committee that they had already laid out the three options: diversion, referral to a children's court, or trial.

A Member voiced concern that the magistrate was sidelined in the process.

Adv de Lange explained that the Bill will include an override so that the magistrate may change the decision, but must then explicitly state on the record the reasons for disagreeing with the prosecutor.

The Committee's attention turned to Clause 41, which dealt with referral to a children's court. Adv de Lange proposed that a child must be considered for referral to a children's court if the child has committed more than one offence.

He asked if Clause 41(1) contained criteria to consider for referral to children's court.

Ms Skelton answered that the criteria was listed in Clause 41(2). If the child was one specified in 41 (2), that would trigger a compulsory referral to a children's court. Adv de Lange did not approve of the referral being compulsory.

Ms Skelton suggested that the triggers could not be compulsory, but merely trigger consideration for referral.

Adv de Lange said that everything should be included under 44(1) and the magistrate may consider referral for the child described. What if the prosecutor did not agree with the referral?

Ms Skelton answered that it was the magistrate's responsibility to stop the proceedings and refer the child to a children's court.

Adv de Lange could not see how a prosecutor could be removed from the process. This must be done on the same basis as diversion. The prosecutor will decide and the magistrate will have an override.

The Committee considered the procedure for a child who does not successfully complete diversion.

Ms Skelton explained that the child who did not complete diversion was charged. If the child fails diversion, the prosecutor may continue with the trial or the enquiry magistrate may issue a warrant for the arrest of the child.

Adv de Lange asserted that the legal consequences of diversion must be spelled out in the bill. The Bill needed to include what diversion means legally and what happens legally if a child successfully completes diversion or fails to successfully complete it.

The Committee debated Clause 42, which dealt with a child who was not diverted or referred to a children's court. The procedures for plea and trial were discussed. Adv de Lange stated that a charge sheet must be filled out in order for a child to be considered for bail. The Committee was confused by the difference between a charge and a charge sheet. They could not clarify when a child would be charged and agreed to return to the issue later.

The Committee reviewed the scheme for diversion, which was agreed to previously. The magistrate would automatically divert a Schedule 1 offender in whose case the prosecutor agreed with the assessment's recommendation for diversion. Schedule 3 offenders would not be considered for diversion except in those cases where the Committee decided diversion may be suitable. The rest of the offenders would be considered for diversion.

Adv de Lange informed Mr Basset that he would have to add common law offences not listed in the Schedules for the purposes of this Bill.

Additionally, he believed that a flaw existed with the three tiers of diversion. Level three diversion, the most serious level, was only for those cases where the offender would have been sentenced for less than six months. Adv de Lange was worried that this would limit the options for diversion

so much that the children would not benefit.

Ms Skelton replied that the levels were prescribed in that fashion because of the need for certainty, similar to the certainty of sentencing guidelines. This is not a major issue because the most serious offences are not being considered for diversion.

Adv de Lange stated, with regard to 45(5), that an accreditation system must be put in place so that diversion programs are accredited before they are used.

He stated that Clause 46 was troublesome because the Social Development Cabinet member could not be responsible for developing all of the diversion programs and for keeping a record of which children completed the programs. Most diversion programs have been developed by civil society. As such, it would not make sense for the social development Cabinet member to develop the programs. The Cabinet member may create the legal framework necessary to facilitate diversion. Social development can help increase the legitimacy of diversion. The bill should empower social development to do so and to build the proper capacity.

Adv de Lange stated that Clause 48 seemed inappropriate because the Bill defined diversion options broadly and then described the "family group conference" in depth. Having the principles laid out and then one diversion option described specifically seemed peculiar. Adv de Lange asked the legislative drafters to think about that section.

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).
