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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

3 September 2003

CHILD JUSTICE BILL: DELIBERATIONS; NCOP AMENDMENTS TO PUBLIC PROTECTOR AMENDMENT BILL & JUDICIAL OFFICERS (CONDITIONS OF SERVICE) AMENDMENT BILL: ADOPTION

Chairperson: Adv J H de Lange (ANC)

Relevant documents:

[Public Protector Amendment Bill \[B6B-2003\]](#)

[Judicial Officers \(Conditions of Service\) Amendment Bill \[B33-2003\]](#)

NCOP Proposed Amendments: Public Protector Amendment Bill (Appendix 1)

NCOP Proposed Amendments: Judicial Officers's Amendment Bill (Appendix 2)

Child Justice Bill [B49-2002]

Proposed Amendment to the Child Justice Bill (Appendix 3)

Other relevant documents:

Article 40: Dynamics of Youth Justice & Convention on the Rights of the Child in SA:

- [Monitoring the New Child Justice System - Mapping the Way Forward](#)

- [Reform and Reform Schools: Collaboration Pays Off](#)

- [Quality Justice vs Quantity \(in\) Justice: A Personal Reflection on 12 Months Spent Representing Children in Juvenile Court by Gadija Parker, UCT Legal Aid Clinic](#)

SUMMARY

The Committee considered the NCOP proposed amendments to the Public Protector Amendment Bill and Judicial Officers (Conditions of Service) Amendment Bill. The Public Protector Amendment Bill was adopted as amended by the NCOP but the latter was adopted with some further amendments. The Committee thereafter dealt with Clauses 54 to 64 of the Child Justice Bill.

MINUTES

The Chairperson welcomed a new member of the Committee, Ms V Moruti (ANC).

Public Protector Amendment Bill: NCOP proposed amendments

Adv **Labuschagne (Department of Justice: Legal Drafter)** noted that the **Select** Committee on Security and Constitutional Affairs had proposed the following amendments to the Bill. In Clauses 2 and 4 they inserted some amendments while they rejected the provisions of Clause 3 in toto and proposed a new provision (see Appendix 1).

The Chair noted that the proposed amendments are not substantive and so there need not be any delay in passing them. If any member wanted to argue against them then an opportunity to do so would be afforded in the National Assembly during the plenary debate on the Bill.

Public Protector Amendment Bill: voting

The ANC and the UDM voted for adoption of the NCOP amendments. The DA, NNP and IFP abstained as they had not consulted their parties on the Bill and thus did not have the mandate to

vote on its adoption.

Ms C Johnson (NNP) noted that it should be put on record that the NNP supports the principles embodied in the Bill although they have not met formally to discuss it.

Judicial (Amendment of Conditions of Service) Officer Bill: NCOP proposed amendments
Mr J De Lange (Department of Justice: Legal Drafter) noted that some of the amendments proposed by the Select Committee are very technical:

- The provisions of Clause 18 are rejected in toto and a new clause proposed.
- In Clause 20, a few amendments are inserted in subclause (1) while a new provision is inserted as subclause (2) and the present subclause (2) becomes subclause (3).
- The reference to the exact date on when the Bill comes into operation has been omitted from Clause 21 "1 November 2003 or on such earlier date as may be" and instead it states that the President will fix "a date".

The Chair noted that the Committee accepts all the proposals made by the Select Committee on the Bill except the one to Clause 21, regarding the date for commencement of the Bill. The department would need to ensure that it is passed by 21 November 2003.

Judicial Officers (Amendment of Conditions of Service) Bill: voting

The ANC voted for its adoption. The DA, NNP, IFP and UDM abstained on the grounds that they had not consulted their parties on the Bill and thus did not have the mandate to vote on its adoption.

Mr J Maseka (UDM) noted that it should be put on record that although UDM supports the Bill in principle, they object to the provisions of Clause 16 on moral grounds.

Child Justice Bill: deliberations

Proposed new clause (to be inserted at Clause 54): Selection of diversion option in case of rape by child under 14/16 years

The Chair noted that the drafters should say something about proportionality in par (a) of Clause 54 (1). He proposed that the last part of 54(2)(a) be made a separate provision and the directives issued in terms of this provision be tabled to Parliament and then be published in the Gazette.

Ms F Chohan-Khota proposed that a regulation be issued setting out clearly which kind of cases should be considered for diversion and this not be left to the sole discretion of the inquiry magistrate. The drafters should also make it clear that this clause applies to cases of rape committed by children below the age of sixteen but above the age of fourteen. She said that it is important that the seriousness of a rape of a baby by a sixteen year old is understood and that it would be treated differently from a rape of a fourteen year old by a sixteen year old.

The Chair said that it is important that these regulation clearly emphasise the importance of the National Directorate of Public Prosecution in the diversion process. He also proposed that the department should create criteria in the Bill which should be complied with in diversion cases.

Clause 54: Diversion options

The Chair proposed that the provisions contained in 52(2) be also included in the regulation and the subclause be rewritten.

Ms Chohan-Khota asked why they were differentiating and limiting the application of the level noted in 52(2) since they could both be applicable in serious crime.

The Chair said that what she is saying is not necessarily excluded but the levels are there to ensure that children are treated based on their specific age. He proposed that "prescribed manner" and "100 hours" in paragraphs (i) and (n), respectively, be removed. Also that 53(3) provisions be not applicable to rape cases since its inclusion would limit the options available. "Exceptional circumstances" should remain deleted as its inclusion would imply that the magistrate is given a

discretion. He noted that the decision about diversion lies with the prosecutor and not the magistrate. He requested the drafters to take into account the provisions of Clause 53 when rewriting this clause.

Clause 55: Monitoring of compliance with diversion order

The Chair noted that if the people who are employed to look after diverted children, fail to do their job then they should be removed from the system.

Clause 56: Failure to comply with diversion orders

The Chair requested that the drafters refine the provisions of 56(1) and also to make it clear that there would be a sanction for children who failed to comply with their diversion orders.

Clause 57: Family Group Conference

The Chair noted that the differentiation between those who are 14 and those who are 16 years old should be made clear. He asked the drafters to refine those provisions that are either vague or too wide.

Ms Chohan-Khota proposed that the plan made in terms of this clause should be made an order of the court.

Chapter 9: Trial in Child Justice Court

The Chair noted that this chapter deals with those children who do not undergo the diversion route. He said that this would be the case with those crimes mentioned in the Schedule of the Bill and those children would be dealt with in the Child Justice Court.

Clause 59: Child Justice Courts and conduct of proceedings

The Chair requested that the drafters state clearly those CPA sections applicable in this instance. He questioned the constitutionality of 59(3) and noted that it would be unfair to exclude assessors in children courts while they are allowed in adult courts. As 59(4) may be susceptible to many interpretations and thus be abused, he asked for it to be rewritten. In so doing they should ensure that the formality of the proceedings is maintained and thus remove the words "informal" in par (a). In par (b) they should reconsider the following words "the cross-examination which is appropriate to the age and understanding of the child and which does not have an element of hostility".

Clause 60: Parental assistance

The Chair requested that this clause be rewritten and that subclause (2) include both the "best interests of the child and best interests of justice".

Clause 62: Admissibility of certain evidence

The Chair said that it should be noted that there are different types of confessions and admissions. While some confessions would need the child to be assisted by a parent to be admissible, others would be admissible even if the parent was not present - so long that they were made in front of the magistrate. It is imperative that the police be given guidelines on how to deal with admissions by children.

Ms A Skelton (Child Justice Project) noted that the drafters would indeed insert a provision requiring the police to set out those guidelines.

Clause 63 Establishment of criminal capacity

Ms Skelton noted that this clause, especially 63(3), intends to strengthen the requirement of *doli incapax*.

Clause 64: Time limits relating to conclusion of trials

The Chair proposed that the period of six months noted in 63(3) should be changed to twelve months. He asked that a discussion on the new 63(2) be deferred and thus requested the department to keep it in square brackets.

The meeting was adjourned.

Appendix 1:

The Select Committee on Security and Constitutional Affairs, having considered the subject of the **Public Protector Amendment Bill** [B 6B-2003] (National Assembly - sec 75), referred to it, reports the Bill with proposed amendments, as follows:

CLAUSE 2

1. On page 4, in line 12, after "Parliament" to insert "; or".

2. On page 4, after line 12, to add:

(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years

CLAUSE 3

Clause rejected

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 2 of Act 23 of 1994, as amended by section 5 of Act 113 of 1998

3. Section 2 of the principal Act is hereby amended -

by the substitution for heading of the following heading:

"[Appointment of committee, remuneration] Remuneration, vacancies in office and other terms and conditions of employment of Public Protector"; and

by the substitution for subsection of the following subsection:

"(1) The National Assembly shall [in accordance with the rules and orders of the National Assembly, appoint a committee for the purpose of] refer to a committee of the National Assembly the-

(a) nomination of a person in terms of section 193(5)(a) of the Constitution to be appointed as Public Protector;

(b) nomination of a person in terms of section 2A(3)(a) to be appointed as Deputy Public Protector;

(c) consideration in terms of section 194(1)(b) and (3)(a) of the Constitution of the removal from office of the Public Protector;

(d) consideration in terms of section 2A(9)(b) and (11)(a)(ii) of the removal from office of the Deputy Public Protector; and

(e) [considering matters] consideration of any other matter that can be referred to [it] such a committee in terms of the Constitution or this Act [; Provided that the composition of such committee shall be in accordance with the provisions of section 193(5)(a) of the Constitution]."

CLAUSE 4

1. On page 6, in line 8, after "Parliament" to insert"; or".

2. On page 6, after line 8, to insert:

(e) has acquired any combination of experience mentioned in paragraphs (a) to (d), for a cumulative period of at least 10 years

Appendix 2:

**SELECT COMMITTEE ON SECURITY AND CONSTITUTIONAL AFFAIRS
(NATIONAL COUNCIL OF PROVINCES)
AMENDMENTS TO JUDICIAL OFFICERS (CONDITIONS OF SERVICE)
AMENDMENT BILL [B 33-2003]**

CLAUSE 16

1. On page 10, in line 34, to omit "**17**". and to substitute "**10**".

CLAUSE 18

Clause rejected.

NEW CLAUSE

That the following be a New Clause:

Amendment of section 13 of Act 47 of 2001

18. Section 13 of the Judges¹ Remuneration and Conditions of Employment Act, 2001 is amended

(a) by the addition in subsection (1) of the following paragraphs:

"(cA) the requirements for, and the registration of, not more than one person and the deregistration of that person as a partner of a Constitutional Court judge or a judge with the Director-General:

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(cB) the determination, for the purposes of the proviso to section 9(1), 10(1) or 11(7), by a Constitutional Court judge or judge who has more than one spouse, of the division of the amounts referred to in those sections between those spouses in the event of his or her death": and

(b) by the subsection in subsection (1) of paragraph (e).

CLAUSE 19

1. On page 11, in line 26, after "(1)" to insert "Subject to subsection (2)",.

2. On page 11, after line 33, to insert:

(2) The remuneration referred to in subsection (1) does not include (my amount payable

(a) to a magistrate under a regulation made in terms of section 16(1)(a) or (g) of the Magistrates Act, 1993; or

(h) to a judge under a regulation made in terms of section 13(1) (c) or (d) of the Judges¹ Remuneration and Conditions of Employment Act, 2001.

Clause 21 - The date of commencement be removed.

Appendix 3

Selection of diversion option in case of rape by child under 14/16 years

54. (1) In selecting a specific diversion option for a child under the age of 14/16 years in respect of whom diversion is being considered for an offence of rape, in addition to the factors set out in section 53(1)-

(a) an inquiry magistrate, in terms of section Z. or a presiding officer, in terms of section Y as the case may be, must consider whether the diversion option in question is appropriate in terms of content and duration;

(b) a prosecutor, in terms of section Y, must ensure that the directives of the National Director of Public Prosecutions contemplated in subsection (2) are complied with; and

(c) a probation officer must, when making recommendations in terms of section 36(1)(a), provide detailed information on diversion Programmes available for the offence in question and in particular on any diversion programme which might be considered in the matter in question

(2) The National Director of Public Prosecutions must, in consultation with the Cabinet member responsible for the administration of justice, issue directives regarding the diversion of matters in which children under 14/16 years are accused of having committed rape, including the types of matters which may be diverted, the minimum norms for such diversion and the circumstances in which such matters should be diverted and a~ directive so issued must be observed in the application of this section.

(b) The National Director of Public Prosecutions must submit directives issued under this subsection to Parliament before those directives take effect and the first directives so issued must be submitted to Parliament within four months after the commencement of this Act.

(c) Any directive issued under this section may be amended or withdrawn.

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