Child Justice Bill [B49-2007]: Summary of public submissions

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Justice and Constitutional Development
Meeting Report Information
Date of Meeting:
14 Mar, 2008
Chairperson:
Adv C Johnson (ANC)
Documents handed out:
South African Law Commission Project 106 Juvenile Justice Report July 2000 [1]
Department's Response to Comments on the Child Justice Bill, 2002 [2]
Prof S S Terblanche: Sentencing a Child Who Murders [3]

Child Justice Bill [B49-2002] as reintroduced in 2008 [4]

Audio recording of the meeting:
Deliberations on Child Justice Bill [B49-2002] [5]

Summary:

The Committee continued to consider the public submissions on a clause by clause basis, covering the Preamble through to Clause 10 of the Child Justice Bill – the primary aim of which was to direct child offenders away from the criminal justice system.

Minutes:

Child Justice Bill: Department's summary of submissions
Mr Lawrence Bassett, Chief Director: Legislation, DoJ, and Ms Thandazile Skhosana, State Law Advisor, continued with the presentation of the the Department's summary of public submissions:

Preamble
Mr Bassett noted that the Catholic Institute for Education raised the following objection and proposal:

While the preamble raises the issue that black children were particularly affected by Apartheid it seems to be pointing a finger at this category of children as culprits of criminal activity. This wording should be amended. The following changes are proposed: "Recognising that before

1994, South Africa, as a nation, had not given many of its children the opportunity to live and act like children. Some children have turned to crime because of their circumstances"

Adv Joubert (DA) noted that in 2002, this could have made sense, but wondered whether six years later, it was still relevant to refer to a pre-1994 period.

Mr Y Carrim (ANC) objected to the phrase "South Africa as a nation" as South Africa was too multi-ethnic to be considered a nation, and suggested "country" or "state" as a substitution. He also noted that the substance of the Bill was at variance with some of the substantive provisions of the Bill, but did not provide examples.

Mr Basset continued with his presentation, noting that the CSIR suggested a further paragraph be added to the preamble.

Advocate Shireen Said, Chief Director: Promotion of Vulnerable Groups, DoJ, noted that the rights of victims in the preamble seemed to be an afterthought. She was concerned that it sent out a message that they were being soft on crime. This was especially in light of the widespread perception that restorative justice was being soft on crime.

Mr Carrim felt that victim's rights were downplayed.

Mr Basset pointed out that crime prevention featured very strongly in Clause Two and Three.

Ms Lirette Louw, Legal Drafter: DoJ, noted that there was no reference to regional charters promoting children's rights and this seemed to be an oversight.

Clause 1 Definitions
There was no comment on the definitions by the Committee.

Clause 2 Objects of the Act
Mr Bassett noted that they might want to strengthen the reference to prevention in the preamble and in this clause.

Clause 3 Guiding Principles
Mr Bassett explained that the principles guide any person performing any function in terms of the Act. At this stage they were not mandatory.

Mr Carrim asked why this was the case.

Mr Bassett replied that as guiding principles they indicated what should be done, rather than what must be done.

Ms Louw noted that the guiding principles are all encompassing and apply to the application of the Act in general. As an example, she referred to clause 3(c) that stated "Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary."

Mr Basset provided background to clause 3(g), noting that there had been a long debate about the difference between the treatment of poor and rich children, and that it should be clearly stated, that as far as possible, they should be treated in the same manner and receive the same services. Most of the other principles were self-explanatory. He pointed out that it was important that preamble, objects and guiding principles were complementary.

Adv Joubert requested elaboration on the distinction between “must” and “should”.

Mr Bassett replied that “must” meant that the official would have no option but to do what was prescribed in the Act, whilst “should” imposes a discretion.

Adv Joubert enquired which option was wanted

Adv C Johnson noted that should an official so choose, if a clause requires that something “must be considered”, they were at least obliged to apply their mind and stated her dissatisfaction with the word “should”.

Mr Carrim commented that older legislation had either used “may” or “must”, never “should.” Some of the guiding principles could be “must” and others could be “may”, but to have all principles “may”, would be too give too much latitude.

Ms Ann Skelton, Coordinator of the Children’s Litigation Project: Centre for Child Law, noted that in the 2002 Bill as introduced, the “guiding principles” were called “general principles” and that they were imperatives, not permissive. She stated that guiding principles had two purposes - they were educative, in that they informed as to how magistrates should apply the Bill and secondly, that it would inform a judge as how to interpret other provisions in the Bill, and that judges were unlikely to appreciate “should” clauses.

Mr Bassett could not recall the motivation was for the change but would have a look.

Adv Joubert expressed preference for “general” rather than “guiding”.

Mr Carrim gave a brief explanation on the legislative process to the non-governmental organisations present and noted that they would not be able to give the NGOs everything that they asked to be changed in the Bill.

Ms Skelton stated that they were being reasonably pragmatic in their concerns and demands. They were aware of the legislative process and constraints and that compromises needed to be made but that there were some points that they simply could not compromise on, such as criminal capacity. In this respect, she argued that this should not be the product of compromise but should be a decision reached on real and available evidence.

Adv Joubert asked what had happened to the Bill the last time it was deliberated on in 2002. Had they run out of time and it lapsed?

Mr Bassett stated that the Bill had lapsed. It was deliberated upon until 2003 and it had been revived only in 2007. The version of the BilI before them included the changes made by the previous Justice Portfolio Committee when it last deliberated upon it in 2003.

Adv Joubert noted the heavy legislative load and expressed concern that they would run of time.

Professor Bernadine Dohra, Professor at North-western University School of Law, Chicago, Illinois, USA, pointed out that serious cases involving children accounted for about only 1% of cases involving children, and that the drafting of the Bill, should be designed for the children who commit small crimes, that they should not be guided by “tyranny of small numbers”.

Adv Said drew attention to a recent case in the Constitutional Court that had considered the best interests of the child. They had elaborated on the principles that need to be taken into account

when interpreting the best interests of the child, especially the way the Constitution was drafted.

Mr Basset noted that the Catholic Institute of Education had objected to clause (3)(d) as being subjective as it was difficult to determine cultural values. They said that principle needed to be stated more clearly that the cultural values and beliefs of the child must be respected, where such values and beliefs are established practice in the community from which the child comes and that culture should not be abused in the administration of justice.

Dr Louw was of the opinion that the current guideline was sufficiently adequate.

Mr Carrim noted that the Child Justice Alliance had a comment on clause 3(e) had been removed from the 2007 version. It stated that each child had the right to maintain contact with his or her family and to access social services. The Constitution guaranteed children access to social services and this law should not do less. The Department of Justice believed their suggestions were impractical to implement.

Ms Skelton elaborated, saying that it was only the missing section on access to social services that they found problematic. She noted that that the Bill provided for such access when a child appeared in a courtroom but she maintained that a child should have access to social services from the inception of the criminal justice process and that the Bill did not cater for this. She pointed out that the constitutional right to access social services was immediate and unqualified.

Mr Bassett noted that the Bill dealt later with this and that it should not be a concern when dealing with the guiding principles.

Dr Louw pointed out that all constitutional rights could be limited under section 36, the limitation of rights clause.

Ms Skelton said that perhaps it was better not to have it in the Bill, as it was already in the Constitution and one did not want to qualify an unqualified constitutional right in this Act.

Dr Louw responded that a better argument was that it had been left out, as a constitutional right can be limited under the limitations clause, and that an ordinary Act of Parliament would not contain such a clause.

Mr Carrim wondered if the section could be drafted in such a way that was not unduly onerous and that was not unconstitutional.

Adv Said pointed out that s28(1)(c) of the Constitution was subject to progressive realisation.

Ms Skelton disagreed and pointed out two recent constitutional court judgements which considered this section. Section 26 and 27 involved progressive realisation, but they applied to adults, not children. The cases were Centre for Child Law v Home Affairs and Centre for Child Law v MEC for Education (Gauteng).

Ms Louw noted that some of the comments on the guiding principles were very specific, whilst the principles themselves were meant to be broad.

Clause 4 Application of Act

Ms Skhosana explained that Clause Four stated that this Act applied to those who committed an offence whilst ten years or older and under 18 years of age. The Act also provided for those 18 years or over but under 21 years to be governed by this Act under exceptional circumstances.

No comments were received on this clause. However, Ms Louw noted that comments on the definition of “child” had been received in respect of Clause One, which states that:
"child" means any person contemplated in section 4(1) and, in certain circumstances, means a person contemplated in section 4(2)(a) or (b);

She noted that submissions had been received from the Legal Aid Board and Catholic Institute of Education (CIE) about the created 18 - 21 year category. She explained that these were limited exceptions, to allow for more flexibility in prosecution, where a child of 18 years or over but who was still at school may benefit from diversion. Further, it could be artificial to split a case involving multiple co-accused children, where some were above 18 and others below 18.

The Committee decided to flag this clause until the definitions had been finalised.

Clause 5 Multiple charges
Ms Skhosana said that this was a new provision introduced after the introduction of the first draft. This clause provides that when a child was charged with more than one offence, the most serious offence will guide how the process was to proceed. Offences were divided into three schedules, with Schedule 1 being least serious and Schedule 2 and 3 being the most serious offences.

Mr Bassett noted that CIE had objected to this, stating that it should be guided by the best interests of the child and not the severity of the offence.

In providing clarity on what CIE was stating, Adv Said thought that they were alluding to the guiding principle 3(a) which is about proportionality in respect of the offence, and CIE were arguing for the “child’s best interests” principle to be the guiding factor. Whatever principle one chose to be guided by, any actions taken under it would be in guided by the Constitution.

Ms Skelton said that the whole Bill was in the best interests of the child. This clause of the Bill is what directs where the child is going to go be sent – the term is bifurcation - and the starting point is the offence.

Mr Bassett agreed that this was the fundamental approach.

Adv Johnson referred back to Clause 3 and expressed concern over the guiding principle in clause 3(g) that stated that the same services should be provided for all children. However there were differences between urban and rural areas and one could not provide the same services and infrastructure in areas with a much lower case load. She suggested that the use of ‘similar’ instead of same’ would be a better choice of word.

Ms Louw noted that the new clause 3(g) replaced the old 3(h) which was a more nuanced version which stated that every effort must be made to ensure children received similar treatment if suspected of committing similar offences. However, there was a worry that certain children could be left behind, due to a lack of resources which had led to a redraft.

Clause 6 Criminal capacity of child below 10 years of age
Ms Skhosana said that this clause provided that a child under 10 was doli incapax, that he or she did not posses any criminal capacity. A child over 10 but under 14 was presumed to lack capacity, but this presumption may be rebutted by leading evidence to the contrary. If a child in this category was charged, a certificate must be issued by the Director of Public Prosecutions (DPP) within 14 days stating their intention to proceed with prosecution. Several factors to be

considered before issuing such a certificate were listed. This amended the common law, as currently children below seven were considered to be incapable of possessing criminal capacity, whilst a child between 7 -14 was presumed not to have capacity, but this presumption could be rebutted by leading evidence to the contrary.

Adv Joubert asked whether the common law was being repealed or amended.

Adv Johnson noted that this point was also made by the Legal Aid Board.

Ms Louw pointed out that the presumption of doli incapax was not being repealed, but they were just changing the age of criminal capacity.

Mr Basset read out an objection from the CIE, who stated that in the Catholic tradition the age of criminal capacity starts at seven, and by increasing the age to 10, it might encourage criminals to exploit children under this age. Further, the CIE asserted that in Catholic tradition, seven was regarded as the age at which criminal capacity began.

Mr Bassett continued on with an objection from the Legal Aid Board, which objected to section 6(1) which stated that a child under 10 cannot be prosecuted for that offence. They requested the insertion of the phrase “which would otherwise be a criminal offence”.
The DOJ response was that the fact that a child had committed the offence was not the issue, but what was important was that below 10 one could not be prosecuted and therefore it should stay unchanged.

Clause Six provided that a child below 10, suspected of a criminal offence, may not be arrested, and provided for a procedure to be followed. There were options for children to be placed in programmes.

Clause 7 Manner of dealing with child below 10 years of age
Ms Louw provided some background to the clause, which had been included in the original 2002 Bill. The South African Law Commission had proposed that one would fail to protect a child if one did nothing for a child that found himself or herself in trouble below the age of 10. Therefore, the child may still be subject to some procedures in term of this legislation but not in the criminal justice system. It was thought that early intervention could halt further progress into the criminal justice system.

Ms Louw said that she had a comment from the South African Police Service on Clause 7(1) which provided for a child under 10 suspected of committing an offence, to be taken home, or if lacking a home, to a place of safety. The question asked was what a police officer should do if he takes the child home and finds that the child would be confronted with a criminal situation at home. What were the alternatives?

Mr Bassett read out an objection from Prof Sloth-Nielsen, which proposed a redraft of clause 7 so as not to create the impression that the child was getting off without any consequences.

Mr Bassett stated that another objection to Clause 7(7) from the CIE was that it was unnecessarily bureaucratic. It drew children below the age of criminal responsibility into justice processes and undermined the functioning of the judiciary. They proposed that it should be deleted in its entirety.

Objections from the South African Human Rights Commission and the Child Justice Alliance were read out.

Mr Bassett continued onto an objection received from Childline who submitted that 48 hours was too long and a child should be taken home immediately. He noted that section 7(1) already provided for this and that the reference to 48 hours was to cater for exceptions in order to allow a flexible and pragmatic approach.

Mr Bassett said that the Legal Aid Board wanted to know why children under 10 were considered at all if they had not committed an offence in terms of this Bill. The response of the DoJ was that section 7(3)(a) read in conjunction with (b), stated that action taken under this clause may not require the child to be held responsible in any way.

Adv Johnson concluded that the child may in any case require counselling and that this possibility should not be removed.

Clause 8 Assessment of child below 10 years of age
Mr Basset stated that no comments had been received for this clause. Clause Eight provided that a child under 10 may receive an assessment as contemplated in Chapter Five, but that some sections were excluded.

Clause 9 Criminal capacity of child aged 10 years or older but below 14 years
Ms Skhosana said that this clause provided for a rebuttable presumption against criminal capacity for child above 10 but below 14.

Mr Bassett noted that there were numerous comments and objections from non-government organisations to change the age of criminal capacity to 12. This would also entail the abrogation of the rebuttable presumption that would apply to those between age 10 and 14.

The meeting was adjourned.

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