

**SUBMISSION TO JUSTICE PORTFOLIO COMMITTEE ON THE CHILD
JUSTICE BILL 49 of 2002**

Submitted by The Campus Law Clinic

University of Kwa-Zulu Natal, Durban

**The Campus Law Clinic wishes to make oral presentations to the
Portfolio Committee on 5 February 2008 at the public hearings on the
Child Justice Bill**

INTRODUCTION AND BACKGROUND

The Campus Law Clinic is a Human Rights non-profit organization which has been providing legal services to indigent people who cannot afford a private legal practitioner since 1973, thereby increasing access to justice to poorest of the poor, and creating greater respect for the rule of law.

The Campus Law Clinic, due to its clinical legal education finds it convenient and opportune to be located at the University. In addition it forms part of the law faculty as one of its main objectives is to provide practical legal training to Law students to enable them to serve clients in an effective, efficient, ethical, business minded and socially conscious manner.

The Campus Law Clinic has played an important role in the advocacy for children's rights in furthering children's access to legal and social justice and in highlighting the plight of many vulnerable and disadvantaged children in our society.

The Campus Law Clinic wishes to point out that legal representation in criminal matters is a due process right included in Section 35 of the Constitution which is essential in allowing an accused person to properly defend the case against him.

It is apparent that one of the issues of national concern is the protection of the rights of children and the Constitution of the Republic of South Africa Act 108 / 1996 reflects government's commitment to improving the conditions of children.

On 16 June 1995 South Africa rectified the United Nation's Convention on the Rights of a Child (1989). This important convention deals with a broad range of children's rights and provides a comprehensive framework within which the issues of children's rights must be understood. By rectifying the Convention, South Africa is now obliged to revise its current legislation and policies or to introduce new legislation and policies to come in line with international standards.

Although children are expressly mentioned in Section 28 of our constitution, it needs to be remembered that the rest of the Constitution also applies to children. Sections such as those that prohibit discrimination and require respect for human dignity, freedom and security of a person are also relevant to children.

However, these rights are rendered useless unless people are made aware of them and are assisted to access and realize these rights. These rights are rendered no more than lofty ideals without the myriad of service providers and community organizations who work tirelessly to give meaning and substance to these rights.

Presently these rights, as noble as they sound are only paper rights and in reality they are not protected, enforced and maintained. To date, government has not been able to put into place the relevant mechanisms to ensure the protection and enforcement of these rights. The constitution does, however, place a positive obligation to the state to apply all necessary legislative and other measures within the available fiscal resources, to achieve the progressive realization of these rights.

Children in conflict with the law

This refers to those children who are passing through the criminal justice system arising out of being involved in some kind of criminal activity. At present the criminal justice system in South Africa is not designed for child's best interests. Our criminal justice system is currently governed by the Criminal Procedure Act 51/1977 which treats both adults and children alike. There are few provisions in the Act which relates to children, like those that provide for reform schools as sentences for children and provisions which states that courts hearing children's matters must sit in cameras.

The Child Justice Bill seeks to address problems encountered in the field of child justice as it exists within the framework of the current legislation. The effect of the Bill being adopted as legislation will be to revolutionize the criminal justice system in so far as it affects children in conflict with the law, while ensuring that the child's sense of security, dignity and self worth are recognized.

The formal introduction of diversion and the underlying principles of restorative justice in our child justice system are very exciting. It encompasses an ultimate goal of achieving a system that allow child offenders to participate in a meaningful process of recognizing their behavior, making amends for them and preventing re-offending.

However, until the Bill becomes a law, there are still many areas of concern for child justice advocates:

- Children are abused and brutalized during the arrest and charge procedures – a common form of assault is the use of police dogs;
- The conditions under which children awaiting trial are held are appalling – besides overcrowding, general prison conditions are not maintained;
- Trial proceedings are slow and presiding officers, court officials and defense lawyers are not sensitive to the needs of such children;
- The sentencing of children is a huge area that needs to be looked at more carefully in terms of our constitution;
- There are far too few facilities providing effective services to children especially with regard to reform schools, places of safety, diversion programme, etc;
- There are few lawyers that are trained and skilled to provide effective legal services to children.

It is to our submission that legal representation is essential for a child when the offence he has committed may result to a harsh sentence. Generally, a child that is in conflict with the law is in no position to prepare his or her own defense and is in a difficult position when left to his or her own devices in meeting the case of the State.

Furthermore, in terms of Article 12 of the Convention on the Rights of the Child a child is afforded a right to legal representation in two aspects namely:

- A child's right to express his/ her views;
- A child's right to be heard, in person or duly represented.

However, we further submit that legal representation is not aimed at not charging children at all, but rather for young offenders to be afforded reasonable punishment for crime they have committed.

Therefore we submit that legal representation has a positive effect as the young offender may be unable to defend the case against him due to the complexities of law and practice

Legal representation is also vital for the fact that it may result to a lesser approach to that crime as it may assist the child in providing a defense to the charge and a balanced argument for sentence if convicted. It would counter any high-handed approach taken by the State towards the child and ensure that the court is in a position to precede the best possible outcome for the child and society.

Furthermore, a lesser approach to crime committed by a young offender as opposed to the tougher approach stands to have harmful consequences as the child is vulnerable and immature, the long term consequences of him having a criminal record can be reduced.

However, it is submitted in the South African Constitution that every person who is arrested, detained or accused has a right to a fair trial, which includes the right to have a legal representative.

This right is complementary to Section 28 of the Constitution where children's rights are given significant prominence and provides that:

“Every child has a right have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child if substantial injustice would otherwise result”.

The Campus Law Clinic argues that Child Justice Bill tries to give its own interpretation of Section 35(2)(c) of the Constitution in the matter concerning children accused of crimes, but completely excludes all children who face the possibility of imprisonment as a sentence as well as children aged 16 or 17 years who are in detention from this interpretation .

We point out certain issues as follows:

1. Section 75(1) of the 2002 Bill provides that in certain instances:
“1) Subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), a child must be provided with legal representation at State expense at the conclusion of the preliminary inquiry if no legal representative was appointed by the parent or appropriate adult...”
2. Section 74(2)(a) of the 2002 Bill provides that:
“The parent of a child or an appropriate adult may appoint a legal representative of his or her own choice, in which case the payment of the fees for the legal representation rests with that parent or appropriate adult, as the case may be”.
3. Section 73(2) of the 2002 Bill provides that:
“A legal representative representing a child **in terms of this Act** must have been admitted as an attorney or an advocate.”

Whereas Section 74 (b) provides that:

“ A legal representative appointed in terms of paragraph, (a) does not have to be accredited in terms of section 77.”

Which provides that:

“77. A legal representative appointed by the Legal Aid Board pursuant to section 75(1) must be accredited in the prescribed manner”.

This creates confusion as to what is meant by “prescribed manner” in the Act.

4. We further approve of the provisions of Section 76(2) and (3) which provides that”

(2)“If a child provided with legal representation declines to give instructions to the appointed legal representative, the legal representative must bring that fact to the attention of the child justice court, whereupon the child justice court must question the child to ascertain the reasons for the child's declination and must note the reasons on the record of proceedings.
(3) If the child does not wish to have a legal representative, the child justice court must instruct a legal representative to assist the child.”

5. In the new Child Justice Bill, there is no definition of the term “Legal Representation

If the Portfolio Committee is of the opinion that legal representation needs to be defined, we submit it can be defined as a representation that is recognised by the court of law and whereby such representative must be admitted as an attorney in terms of the Attorneys Act of the Republic of South Africa, or an Advocate of the High Court in terms of the prescribed rules.

6. Section 81(1)(d)and(e) of the Bill provides that:

- (d) “A legal representative representing a child must ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance; and
- (e) Uphold the highest standards of ethical behaviour and professional conduct.”

Such provisions were not contemplated in the 2002 Bill, and yet the best interests of a child prevails in every matter concerning a child and therefore we approve of this provision.

7. Section 82 of the Bill provides that:

- 82.** “Nothing in this Act precludes a child from being represented by a legal representative of his or her own choice, at his or her own expense, at an assessment or a preliminary inquiry if the probation officer, in the case of an assessment, or the inquiry magistrate, in the case of a preliminary inquiry, consents thereto as contemplated in section 39(3)(d) or 45(4), respectively.”

Conclusion

It is to our submission further that the best interests of a minor child are put first in every matter that concerns a minor child. Therefore the legal

representation of a child should be considered as of high quality and not intimidating and should make it conducive for a child to give evidence.

It is further to our submission that the recent version of the Bill has rather some advanced provisions compared to the 2002 version.

The Child Justice Alliance has made an amendment of Section 83 of the Bill. This amendment is, most importantly to the point and clear.

Furthermore, most sections with respect to legal representation are clear. Further, the relevant departments should examine the current law and make necessary amendments to the needs of children. This can only be done by lobbying for change to our current law.