

SUBMISSION ON THE CHANGES MADE TO THE CHILD JUSTICE BILL BY THE NATIONAL COUNCIL OF PROVINCES

I have read the committee report of the Select Committee on Security and Constitutional Affairs on the Child Justice Bill. Whilst the majority of amendments proposed by the NCOP are of a superficial nature, the amendments to section 80 are substantive.

In the version of the Bill approved by the National Assembly, section 80 read in such a manner that there were 5 requirements to be complied with by legal representatives of children. These were set out in 80(1) (a) – (e).

- 80.** (1) A legal representative representing a child must—
- (a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;
 - (b) explain the child's rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;
 - (c) promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility;
 - (d) 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.

Section 80(2) provided that if a presiding officer is of the opinion that a legal representative at any stage during the conduct of the proceedings acted contrary to any of the five requirements in subsection (1), then her or she must record his or her displeasure by way of an order which includes and appropriate remedial action or sanction.

Apparently the members of the NCOP select committee viewed the requirement set out in s 80(1)(a) (i.e. allowing the child to give independent instructions) as being different from the others. The committee considered this to be a requirement which was not essential, and that if the lawyer was found to be acting contrary to this requirement, the presiding officer should not record displeasure through the making of an order.

In order to achieve the committee's desired result, it proposed that section 80(1) and into two separate subsections : (1) and (2). The requirement to allow the child to give independent instructions falls into subsection (1). The sanctions provision only applies to subsection (2). Thus there are no consequences if the legal representative does not allow the child to give independent instructions.

It is submitted that this is incorrect. The requirement that a legal representative should allow the child to give independent instructions (as far as is reasonably possible) is a very important requirement. It is aimed at avoiding a situation where the parent is doing all the talking, and the lawyer is listening to the parent instead of to the child. It is also aimed at avoiding a situation where the lawyer just acts on his or own ideas instead of listening to what the child is saying. For example, the lawyer decides that he or she knows what is in the child's best interests, and puts this forward instead of putting across what the child has said. A child's legal representative in the criminal court is not a "best interests" lawyer. The court will concern itself with the best interests of the child, a probation officer's report can also do so. The lawyer is there to defend and represent the child, which is a different role, and it is a role which is dependent on the child being able to give independent instructions. Of course, a child lacks maturity and may choose a strategy which is unwise or unsound in law. The legal representative must provide information to the child and debate the matter with the child, to propose more viable strategies. However, this should not amount to completely usurping the views of the child. The child has a right to participation, and this is not achievable if the legal representation does not act on the instructions of the child.

If it were to be revealed during the course of the trial that the legal representative was not allowing the child to give independent representation, that would be very serious.

If an adult defendant found that a lawyer was not allowing him or her to give independent instructions he or she would be at liberty to fire his or her lawyer on the spot. It thus seems unwise to remove this requirement from the protective provisions aimed at the presiding officer making remedial orders.

A hypothetical scenario may assist to illustrate the point. Mr X is representing a 14 year old boy on a charge of assault :

Court: How do you plead to the charge?

Lawyer: Guilty, your worship

Child defendant: No that's wrong, I want to plead not guilty. I didn't start the fight, I was just stopping him from hitting me with the baseball bat again.

Court: Do you want to confer with your client Mr X?

Lawyer: No that is not necessary your worship, I know what his view is but I think it is very unwise for him to plead not guilty, given what happened. I have discussed it with his father, and he agrees with me we should just get this over with, I will be asking for a lenient sentence.

Court: Well it seems a bit irregular, but this falls under section 80(1), so I am not required by the Act to express my displeasure. You can proceed Mr X.

Whilst we hope that such a scenario would never really be seen to happen in our courts, it is useful to show why the revised version of the Bill is not viable. As can be seen from this scenario a legal representative who does not allow his client to give independent instructions is simply not doing his or her job properly. The clause "as far as reasonably possible" is there to cover situations where a child is so immature that he is unable to give instructions.

It is submitted that section 80 as it appeared in the version of the Bill approved by the National Assembly is the version that presents the correct position, and will provide protection for the child, and a platform for the child to participate meaningfully in his

her own case. It is important that we build a cohort of legal representatives for children who know what their duties are.

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