Phone +27 12 420 4502 E-mail childlaw@postino.up.ac.za Address Law Building (Room 4-31),
Fax +27 12 420 4499 Website www.childlawsa.com University of Pretoria, Pretoria, 0002

THE CENTRE FOR CHILD LAW

WRITTEN SUBMISSIONS FROM THE CENTRE FOR CHILD LAW TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT REGARDING THE CHILD JUSTICE BILL B 49 OF 2002 (CABINET VERSION 2007)

The Centre for Child Law hereby requests that Dr Ann Skelton be permitted the opportunity to make oral submissions at the public hearings to be held by the portfolio committee on 5 February 2008.

Contact details:
Dr Ann Skelton
Centre for Child Law
Law Faculty
University of Pretoria

Email: ann.skelton@up.ac.za

Phone 012 420 4502
Fax 012 420 4499
Cell 082 4432702

1. Introduction

The Centre for Child Law is based at the University of Pretoria. It presents academic courses in child law, and also houses a children's litigation project. Child Justice is an area of child law included in the ambit of the Centre's work.

The author of these submissions has had a long association with the Child Justice Bill. I chaired the Committee at the South African Law Reform Commission that drafted the Bill, and thereafter moved into the Department of Justice and Constitutional Development to head the UN Child Justice Project, the purpose of which was to assist government to prepare for the implementation of the Child Justice Bill. The project oversaw the development of a budget and implementation strategy for the Bill, the first time such a comprehensive costing and planning exercise was undertaken in relation to a Bill (which has incidentally subsequently been recorded as an international good practice example by Unicef). I was also a member of the drafting team that assisted the portfolio committee when the Bill previously served before parliament in 2003. I moved to the Centre for Child Law in 2003.

It is important to note that in the lead up to the introduction of the Child Justice Bill to parliament in 2002, the government departments planned in a highly inter-sectoral manner for the implementation of the Child Justice Bill, and there was a remarkable amount of shared enthusiasm amongst the departmental representatives who presented on the Bill upon its introduction to parliament. The civil society organization representatives who made written and oral submissions on the Bill were similarly enthusiastic, supporting that version of the Bill (the 2002 version) and calling for only minor changes.

The portfolio committee deliberated upon the Bill on and off during 2003. Almost every clause of the Bill was changed, and as these submissions will demonstrate, some of the changes made had far-reaching effects that altered the character of the Bill, and that in some respects will take us backwards from where we are in current law and practice.

The 2007 Cabinet version of the Bill reflects changes directed by the portfolio committee but also includes other changes not so directed, which presumably have been made by the executive since the Bill was last debated in Parliament. Those committee members who are still on the committee who were there when it was debated in 2003 will note that the 2007 Cabinet version of the Bill looks significantly different from the Bill last seen by the Committee.

Of course, it was expected that changes would be made by the portfolio committee, and not all the changes made were negative. There were certain changes made that will enhance the practical workings of the Bill and are an improvement on the 2002 Bill as it was introduced. Three examples spring to mind. Firstly, the idea of the prosecutorial diversion in certain minor offences. This will allow for a large number of cases to be dealt with in a cost effective manner and in a manner that benefits the children it applies to. This addition, made on the directions of the portfolio committee in 2003, in fact accords with current practice on the ground. A second example is shown in the changes that were made to the provisions dealing with the expungement of criminal records. The changed clauses are more protective and administratively less complicated than the provisions of the 2002 Bill as introduced. Thirdly, the preamble to the Child Justice Bill was added at the request of the portfolio committee. It provides a wonderful contextual departure point for the Bill which is much appreciated.

On the down-side is the complexity arising from the many changes. The 2002 version of the Bill read easily and fluently. It was easy to understand, and this had been done deliberately, with the recognition that it would not only be lawyers that would have to work with the Act, but also police, probation officers, child care workers and even children and their parents. Sadly the 2007 Cabinet version is very difficult to follow. It abounds with lists of schedules and incoherent cross references which cause one to flip backwards and forwards in the text. This is an enormous concern for those practitioners (already struggling with having to understand a plethora of new laws pertaining to children such as the Children's Act and the Sexual Offences law) who will now have to decipher this law. The portfolio committee is implored to ensure that

whatever content is included in the final version of the Bill, that it is at least comprehensible and easy to work with.

These submissions will focus on three major changes that were made to the 2002 version of the Bill. It will be argued that these three changes have a dramatic effect on the envisaged system. A way of rectifying this will be proposed. It also argued that correcting these problems will in and of itself simplify the Bill, as the Bill will no longer be reliant on the many references to schedules which is part of what makes the Bill so difficult to read and understand at present. The three areas to be discussed in these submissions are (i) assessment, (ii) preliminary inquiry, and (iii) diversion.

2. A comparison and evaluation of the systems of the 2002 version and the 2007 version of the Bill

2.1 The system as proposed by the 2002 version of the Bill

The system as proposed by the 2002 version of the Bill was as follows:

Step 1: A child suspected of committing an offence could be warned to appear at a preliminary inquiry by a police officer or be arrested.
Step 2: (to take place within 48 hours) was that the child would be assessed by a probation officer, who would then be in a position to make certain recommendations at the preliminary inquiry regarding the age of the child, suitability for diversion, and whether he or she could be released or detained, and if detained in what kind of place.
Step 3: (to take place within 48 hours) was the appearance of every child before of a preliminary inquiry. This would take the place of the first appearance at court, so it did not represent something entirely new, but what would happen there was quite different from a first appearance in the following ways:

- it would be attended by the magistrate, prosecutor, probation officer, the child and the parent/ other appropriate adult
- it would focus attention on what was to happen to the child, and try to come up with options that would, as far as possible, keep children out of custodial options

- it would be inquisitorial in nature, trying to find out as much as possible about the child, so that the right decisions could be made from the beginning.

Step 4: if the child acknowledged responsibility and the prosecutor agreed (on a consideration of all factors) to the child being diverted, then the case could be diverted.

Step 5: If the child said he/she was pleading not guilty then no further questions about the offence would be asked and the preliminary inquiry would then focus on where the child would be placed to await trial – either released into the care of parents, detained in a placement facility or in certain serious offences (and if the child was 14 years or older) in a prison.

2.2 The system as proposed by the 2007 cabinet version of the Bill

Step 1: A child suspected of committing an offence could be warned to appear at a preliminary inquiry by a police officer or be arrested.

Step 2: Only certain children will be assessed:

- Children below 10
- Children 10-14
- Children who may be in need of care
- If the matter is being considered for diversion (which is limited to certain offences)

Step 3: Only certain children will appear before the preliminary inquiry:

- Children charged with an offence listed in schedule 1 who were not diverted by prosecutor
- Children charged with an offence listed in schedule 2 pr Part II of schedule 3 excluding items 2, 5 or 6

Step 4: Only certain children can be diverted:

- Children charged with an offence listed in schedule 1
- Children charged with an offence listed in schedule 2 pr Part II of schedule 3 excluding items 2, 5 or 6
- Children below 14 charged with rape or compelled rape as per item 1 or an offence in terms of item 3 or 4 of Part II of schedule 3 (and if the matter qualifies in terms of prosecution guidelines).

3. What are the implications of these changes to the proposed system?

3.1 Assessment

It is already an accepted goal of probation practice to provide an assessment of all child offenders within 48 hours of the arrest, as provided for by the Probation Services Act 116 of 1991 (as amended by the Probation Services Amendment Act 35 of 2002). The importance of assessment is to gather as much information about the child, his or her family, the circumstances surrounding the offence, whether the child has been in trouble before etc, in order to provide as much information as possible to guide decision making. (Sometimes it will be necessary to undertake a more in-depth assessment, and the Bill allows for this). The assessment will guide decisions such as: Is the child a child in need of care? Is the child a good candidate for diversion? Is the child able to managed by his or her parents? Is it possible to release the child to the parents or does he/she pose a risk to the community? Will the child respond well to a particular child and youth care centre's programme? Is prison – the last resort – necessary in the case of this child?

It is thus nonsensical to say, as the 2007 version of the Bill does, that children in need of care may be assessed, because it is the very assessment process that will determine whether the child is in need of care. The 2007 version of the Bill ignores the fact that assessment is a necessary service that must be provided in order to assist officials to make good decisions, and treats it instead as some sort of benefit of which only certain children are deserving. Where a child is charged with a serious offence (and the child is 14 years or older), the 2007 version of the Bill will not provide this service. This makes the unfortunate assumption that the child is guilty of the offence with which he/she is charged (and this before he/she has even appeared in court). More fundamentally, it misses the point that even if the offence is serious and is obviously not going to be diverted, the assessment is of crucial importance to determine where the child will stay during the awaiting trial period. This is a service that benefits not only the offender but also society.

The Centre for Child law submits that ALL children must be assessed within 48 hours of the arrest. This is subject to a clause (which appears in the Bill at clause 48(5))

that allows for the possibility that assessment can be dispensed with (provided reasons are given) in cases where it is in the best interests of the child to do so.

Other submissions by members of the Child Justice Alliance propose that the practical problem that there may be an insufficient number of probation officers (who are all qualified social workers) can be dealt with by allowing for other qualified persons to also undertake assessments. The Centre for Child Law concurs with this view.

3.2 Preliminary inquiry

The idea of the preliminary inquiry (a unique process) was premised on an unfortunate reality of the courts that had been observed by many practitioners and researchers. The problem was (and still is, because the law is as yet unchanged) that children are arrested, held in police cells, appear in court but the parents are often not there because the police have failed to notify them, they are remanded for 14 days in custody. If their parents come to court and the offence is not too serious, they may be released. If not, they get swept up in a cycle of 14 day remands, and often stay in custody for several months before someone decides what should be done with them. Quite often the charges are ultimately withdrawn or the children are acquitted. By then their lives have been damaged. Their experiences in detention have hardened them, and they are now much more likely to commit further crimes.

It was this “conveyer belt” that the preliminary inquiry was designed to halt. The idea was that the system would, very early on, put the brakes on the conveyer belt for a moment, and pull the child off the production line for a thorough consideration of what should be done. The assessment would help to provide the information needed and the professionals at the preliminary inquiry would all carefully consider the child’s specific circumstances and the various options available.

The preliminary inquiry was not designed solely to facilitate diversion. That was certainly one of its functions, but it was intended to do much more than that. It was meant to make sure that an individualized response was used in each case, that decisions were made on as much information as could possibly be obtained in such a

short time, that the child and the parent would be included and would participate in the discussions. The preliminary inquiry was also aimed at reducing pre-trial detention. As statistics provided by the CSPRI (page 5 of the CSPRI submissions) indicate, although the number of children awaiting trial has remained steady in recent years, the proportion of children awaiting trial (as a percentage of all children in prison) is 59% whereas the proportion of adults awaiting trial is only 25 % of the total number of adults in prison. This is a remarkable figure. It demonstrates that presiding officers make more carefully considered decisions at sentencing than they do regarding pre-trial detention decisions. This is probably due to the fact that there is more time for reflection, and that they have the pre-sentence report (compiled by a probation officer) to point out the various options, indicate the risks and so on. The preliminary inquiry in its 2002 version of the Bill form would go a long way to providing the same conditions, and would thus be very likely to reduce pre-trial detention in prisons.

The remnants of the preliminary inquiry serve a much reduced purpose. The system as reflected in the 2007 Cabinet version has lost its “conveyer-belt brake” for any children other than those who have not already been diverted by the prosecutor, and the remaining few who qualify in terms of the new restrictions placed on diversion.

One of the changes made at the direction of the portfolio committee in 2003 was that offences listed in schedule 1 (minor offences) could be diverted by a prosecutor without the child appearing at a preliminary inquiry. As has already been noted, this is a practical, time-saving and efficient suggestion, and if it is preceded by an assessment, it will be safe to allow such prosecutor-diversions.

The Centre for Child Law thus supports the inclusion of chapter 6 of the 2007 Cabinet version of the Bill.

Subject to that one exception, the Centre for Child Law proposes that every child shall appear before a preliminary inquiry. It is important to note that the preliminary inquiry takes the place of a first appearance in court, and involves the same role-players who would usually be there (save for the probation officer, who might not always be present- but there is a provision allowing it to proceed in the absence of

the probation officer if to do so would prevent delay and be in the best interests of the child, see section 45(3)(b)). The Centre for Child Law supports the submissions made by other partners of the Child Justice Alliance that the group of workers who can undertake this kind of work be extended beyond a probation officer to other practitioners who are suitably qualified. These points are made to underscore the fact that it is not difficult in practice to hold a preliminary inquiry. Thus if the limitations placed on the role of the preliminary inquiry in the 2007 Cabinet version of the Bill are resource driven, the members of the portfolio committee should be assured that the preliminary inquiry is really just a unique and different way of working at a first appearance, rather than a completely new process with different role players.

3.3 Diversion

Diversion is, in many ways, the core of the Child Justice Bill. The many benefits of diversion, in terms of its linkages to crime prevention and better prospects of reintegrating young people and keeping them away from lives of crime are now well known, and are discussed in other submissions serving before this committee.

Of course, not all cases are going to be diverted. Firstly, children have to acknowledge responsibility for their offences to be considered for diversion. So those pleading not guilty will not be diverted. Secondly, those who have committed several offences and have been diverted before will be deemed at some point to have “used up” their chances, and will not be diverted. Thirdly, there are some offences which (when all the circumstances, the details of the offender, and the seriousness of the crime have been considered) will be considered inappropriate for diversion.

We are in the fortunate position that diversion is currently practiced in South Africa. It began in 1992 and has been gaining popularity ever since. We therefore have a very good idea of how it works on the ground. In the current system diversion happens solely through the prosecutor’s discretion. The prosecutor has the power to decide whether or not to prosecute. Diversion is an exercise of the discretion not to prosecute, based on certain conditions. Prosecutors currently enjoy this discretion in relation to all offenders, not just children. They also enjoy the discretion in relation to

all offences. This is, however, subject to prosecutorial guidelines. It should be noted that currently the guidelines say that certain cases are not suitable for diversion.

The 2002 version of the Bill, in deference to the fact that the prosecutor is dominus litus (meaning that he/she decides what cases to prosecute) allowed the practice of diversion to continue to rely on prosecutorial discretion. Thus it was possible for any case to be diverted, though it was always understood that certain cases would not be diverted due to prosecutorial guidelines. This allows for flexibility to deal with very unusual cases.

The Centre for Child Law accepts that (as is now the case) there will always be a cohort of cases that the prosecution will refuse to divert. Why, then, is it so important to leave that as a matter of discretion and not limit the discretion via the legislation as the 2007 Cabinet version aims to do?

One reason is that children should have at least the same opportunities and benefits as adult offenders. They definitely should not have less. The effect of limiting diversion to certain offences via the Bill will result in children not being able to be diverted in cases where there is no legal bar to adults being diverted. This is unequal treatment that negatively affects children.

It would also place children in a less advantageous situation than they are today. The prosecutors have used their discretion, guided by the guidelines. There has been no outcry about this. There have been no allegations that too many cases are diverted.

The Centre for Child law submits that the prosecutor should decide on which cases to divert, subject to prosecutorial guidelines.

4. Suggestions for redrafting

The following changes are proposed:

Clause 11 Referral of matters

It is proposed that clause 11 should fall away. If all children are to be assessed, all to go to a preliminary inquiry (other than those diverted by a prosecutor in terms of chapter 6) and all are eligible for diversion subject to guidelines then there is no need for a complicated list relating to referral. No such clause appeared in the 2002 version of the Bill. This has the added advantage of considerably simplifying the Bill.

Clause 35 Duty of probation officer of other suitably qualified person to assess the child

Clause 35 should be replaced with the following wording:

Section 35 Every child who is alleged to have committed an offence must be assessed by a probation officer or other suitably qualified person before the child is diverted by a prosecutor in terms of chapter 6 or appears at a preliminary inquiry.

Clause 44 Nature and purpose of preliminary inquiry

Clause 44 should be replaced with the following

44. (1) (a) A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence and who has not been diverted pursuant to chapter 6

Clause 57 Diversion of certain sexual offences cases by child below 14 years

To be deleted in its entirety.

5. Guard against Bifurcation

The Centre for Child Law wishes to reiterate that the system should not be bifurcated or divided into streams that cut certain children off from services. Decisions should not be made solely on the basis of the offence category with which the child has been charged.

Another form of bifurcation that has occurred in the 2007 Cabinet version of the Bill is the fact that 16 and 17 year olds are treated differently from 14 and 15 year olds. Whilst it makes sense treat those below 10 as a special category (because they lack criminal capacity entirely), as well as those who are 10 and older but not yet 14 (because they are presumed to lack criminal capacity until the contrary is proven), there is no logic to treating 14 and 15 year olds differently from 16 and 17 year olds. Of course the courts will take age into consideration when deciding how to treat a young person in the system, particularly with regard to sentencing, the hands of the court should not be tied in the manner provided for in the 2007 Cabinet version of the Bill. In this regard the Centre fully supports the submissions of the CSPRI and the Child Justice Alliance.

6. Conclusion

The Child Justice Bill provides an important opportunity to turn around problems of crime in South Africa. The 2002 version of the Bill attracted international acclaim. Several African countries (Lesotho, Namibia, Sudan, Mozambique) have drafted Child Justice Bills based on the 2002 version of the Bill. South Africa should remain a leader in Child Justice on the continent – and even in the world. These submissions are offered in support of that goal. They are further offered in order to ensure that South African children have access to a fair, protective, individualized and effective system when they get into trouble with the law.