Childline

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For Attention: Mr Y I Carrim and Committee Members
The Chairperson
Portfolio Committee on Justice and Constitutional Development
P O Box 15, Cape Town 8000

Dear Mr Carrim and Committee Members

PUBLIC HEARINGS AND SUBMISSIONS ON THE CHILD JUSTICE BILL

Thank you for the opportunity to make submissions on the Child Justice Bill. Childline is delighted that the Bill has been returned to Parliament for finalization. Our submission is attached to this letter.

CHILDLINE SA REQUESTS THE OPPORTUNITY TO PARTICIPATE IN THE PUBLIC HEARINGS IN ORDER TO ADDRESS THE COMMITTEE AND MOTIVATE CHILDLINE'S SUBMISSION ON THE BILL.

Yours Sincerely

Joan van Niekerk
National Coordinator, Childline SA

SUBMISSION BY CHILDLINE SA ON THE CHILD JUSTICE BILL

Introduction: Childline South Africa

Childline South Africa is an affiliation of 8 provincial Child Helplines. Our services to children include:

- a toll free counselling service for children and adults with concerns about children. This service receives about 1 million calls per year many of which relate to child justice issues
- Therapy services to children who have suffered abuse and trauma
- Prevention and Education programmes in Child Protection
- Therapy and diversion programmes for adults and children who have committed offences against children
- Court preparation programmes for child witnesses
- Safe house care for children in need of this service
- Training and education in child protection issues to partners and service providers.

Introductory Comments on the Child Justice Bill

1. Childline welcomes the strong crime prevention element in this Bill.

2. Childline supports the focus on diverting children away from the Criminal Justice System and the Bill's focus on restorative justice processes, diversion and remedial programmes which we believe will contribute significantly to crime prevention strategies.

   Childline has noted with concern the comments in the Report of the African Peer Review Mechanism (APRM) which notes that "it appears that little or nothing is being done to replace disintegrating social support institutions in South Africa, including the family, school, kinship structures and public institutions with new forms of effective socialization and social control. In the absence of such control, children and young people are generally alienated from mainstream society and frequently end up in the streets where they create their own social worlds and fashion new social orders"[1]

   Childline believes that the child justice legislation with its diversion and other remedial provisions for children in conflict with the law when implemented will address some of the concerns about crime and the situation of children as expressed in Peer Review Report.

   The focus on Diversion and other provisions are also congruent with the many recommendations made by the United Nations Committee on the Rights of the

[1] African Peer Review Panel of Eminent Persons: **Country Review Report on South Africa**, NEPAD, 2007, p 280

Child on Children in Conflict with the Law[2] and the Riyad United Nations Guidelines for the Prevention of Juvenile Delinquency.[3]

3. Childline welcomes the strategies provided for in the Bill that are designed to ensure that the placement of children in police cells and prison will be used under limited and specific circumstances and as a last resort. Our experience has been (and this is supported by the report of the Jali Commission) that children are often harmed than helped by these forms of placement.

4. However the language and structure of the Bill is complex and may hamper understanding and implementation of the provisions. Childline requests that the Committee consider simplying the language of the Bill.

Specific issues that arise from the Bill:

1. **Assessment:**
    i. Assessment may take many forms and therefore require a range of professional skills. A child may require assessment relating to

- suitability for diversion
- criminal capacity – which usually requires skills beyond that of a probation officer's basic qualification
- placement in a specific facility
- placement in a specific programme
- whether a child is a child in need of care and interventions that extend beyond those within the criminal justice system

Probation officers have specific skills relating to probation work, and in many instances may not have the skills required to conduct an assessment process to meet certain needs of the criminal justice system, for example criminal capacity, and/or the child and family. The services, knowledge and skills of other professionals must therefore be provided for in the legislation.

ii. Assessment in some instances may require a process of interaction with a child and significant others over a period of time. Probation officers may not have this type of access to the child, and/or significant others for example where the child is placed in a child and youth care centre some distance away from his/her work centre. In therefore makes sense to provide for this assessment through another suitably qualified professional.

iii. Probation Officers may not be immediately available to the Court to conduct an assessment process. It is therefore essential to ensure that

[2] The United Nations Committee on the Rights of the Child: General Comment Number 10, **Children's Rights in Juvenile Justice,** 2007

[3] **United Nations Guidelines for the Prevention of Juvenile Delinquency** (The Riyadh Guidelines), U.N. Doc. A/45/49, sections 10 to 38.

children are not denied access to certain provisions in the legislation simply because there is no probation officer available to conduct as assessment. It is well known that there is a shortage of social work and related skills in South Africa at present. This was highlighted in the Costing of the Children's Bill.[4]

It is therefore essential that assessment as defined in the Bill is expanded to take the above into account.

Childline therefore recommends that Section 1, the definition "assessment" be expanded to read "assessment means assessment of a child and his/her family and context by a probation officer or suitably qualified person". The words "as contemplated in Chapter 5" should be omitted to ensure that this definition applies wherever assessment is mentioned in the Bill.

It is also recommended that

i. all children, regardless of the crime committed and their age be assessed by a probation officer or suitably qualified professional.

ii. The assessment process take place in a place that enables privacy and confidentiality without compromising the safety of the person conducting the assessment

iii. That the child may make reasonable requests as to the presence of significant persons, other than parents and caretakers, during the assessment process.

2. The Age of Criminal Capacity

The Bill raises the age of an irrebuttable presumption of Criminal Incapacity to 10 years, (clause 6). A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity unless he or she is provide to have such criminal capacity in accordance with Section 10.

Although it is recognized that children under the age of 12 years can commit serious crimes, Childline South Africa respectfully submits that the age in clause 6 should be increased to at least 12 years.

This is in line with:

[4] Barberton, C: **The Cost of the Children's Bill, Estimates to the Cost to Government of the Services Envisaged by the Comprehensive Children's Bill**, July 2006

i. Research on the development of children and their ability to make appropriate choices about their behaviour and understand the consequences of these choices

ii. The lower age recommended by the United Nations Committee on the Rights of the Child which states "from these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States Parties are recommended to increase their lower MACR (Minimum Age of Criminal Capacity) to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level." [5]

The referral of children under the age of 10 (or 12 if the recommendation to increase the upper limit of incapacity is accepted) to programmes and services as envisaged in clauses 7 and 8 of the Bill is strongly supported by Childline South Africa. This is considered a critical crime prevention strategy.

The full text of the UN Committee's recommendations relating to the age and criminal capacity issue is attached as an appendix to this submission for the information of the Parliamentary Portfolio Committee on Justice and Constitutional Development. (Appendix A).

3. The Exclusion of Certain Children from Diversion Prior to Trial

Childline believes that the exclusion of certain children from diversion is both discriminatory and inappropriate, for example the exclusion of children over the age of 14 years who have committed certain crimes such as sexual crimes as provided for in certain of the schedules contained in the Bill.

With reference to sexual crimes, Childline notes that the age of consent to sexual activity has been fixed at 16 years in the Criminal Law (Sexual Offences and Related Matters) Amendment Act no 32 of 2007 as recommended to Parliament by the Parliamentary Portfolio Committee on Justice and Constitutional Development. From this one can assume that the Committee considered the need to protect children under the age of 16 from their developmental inability to make appropriate decisions about their sexual behaviour. In seems incongruous then that children under the age of 16 years who have committed a sexual crime should be held more accountable for his/her behaviour.

Childline does not suggest that there should be no demand for accountability and the assumption of responsibility, and even negative consequences for these crimes, but rather that the provisions for dealing with the child through diversion, restorative justice options and rehabilitation prior to trial can potentially be applied to all children regardless of the crime and age of the child.

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[5] [5] The United Nations Committee on the Rights of the Child: General Comment Number 10, **Children's Rights in Juvenile Justice,** 2007, pp 8 and 9.

Childline has 20 years experience providing rehabilitation programmes to child sexual offenders. Child and adult offenders are referred to these programmes through the criminal justice system, other NGO's working in the field of child abuse, state departments, and sometimes by families and offenders themselves.

Childline's experience with young sexual offenders indicates that the vast majority of these children have been exposed to adverse circumstances through their childhood and have been exposed to various forms of abuse and violence.[6] This research further indicates that these children have little understanding of their sexual behaviour and the impact of this on others and have distorted beliefs about sex and sexuality.

A further problem is the low rate of convictions and high level of withdrawals in sexual offences cases, which could result in children who are not being considered for diversion prior to trial and who then have charges withdrawn or who are acquitted, are not given the opportunity to acknowledge their offence and receive no assessment and remedial action.

Childline respectfully submits that all children should be assessed and that the potential for diversion be available for any child in conflict with the law if this is considered the appropriate course of action for the child. It is also noted that this is sometimes a more victim friendly option. Research indicates that the criminal justice process is often experiences as traumatic for child witnesses.

It is therefore recommended that clause 11 (e) is deleted from the Bill as well as clause 16 (2) (a) (ii), and (3) (c), clause 57.

4. The Protection of Children in Police Custody

Childline submits that the provisions in clause 28 are inadequate. Childline has received calls on the psycho-social neglect of children in police cells, failure to take a child for medical assessment and treatment. It is critically important that the care and protection of children in police cells is holistic.

Childline suggests that the word healthcare in S28 (1) (d) be replaced by "health and psycho-social care in the event of any illness, neglect or psycho-social distress" and that section 2 (a) and (b) read as follows:

(a) If any complaint is received from a child or any other person during an arrest or while in detention in police custody relating to any injury, psycho-social distress and/or neglect sustained by such child or if a police official observes that a child has been injured, is experiencing psycho-social distress or neglected, that complaint or observation must, in the prescribed manner be recorded and reported to the station commissioner, who must ensure that the child receives immediate and appropriate (medical - omit) treatment if the station commission is satisfied that any of the following circumstances exist:

(ii) there is evidence of physical, psycho-social distress and/or neglect;

[6] Dhabicharan, Master's Dissertation, UKZN, 2003.

(iii) where the child appears to be in pain or distressed as a result of an injury or neglect;
(iv) where there is an allegation of sexual abuse of any nature; or
(v) any other circumstances which warrant medical or psycho-social treatment and/or intervention.

(b) in the event of a report being made as contemplated in paragraph (a), that report must, in the prescribed manner, as soon as is reasonably possible, be submitted to the National Commissioner of Police indicating –

(i) the nature of the injury, psycho-social distress and/or neglect suffered by the child
(ii) an explanation of the circumstances surrounding the injury and/or neglect; and
(iii) a recommendation as to whether any further action is required.

(c) A copy of the (medical) report, if applicable…….

A further sub section is recommended to this section

(5) Where children are detained in police cells, there must be daily contact with the child by a probation officer or suitably qualified professional person.

5. Diversion

Childline welcomes the provisions for diversion and would like to make the following comments relating to diversion:

- diversion should be an option that may be considered **for any child, regardless of age or offence.**

- At present diversion programmes are not universally available to all children who require such programmes. Therefore provision must be made for provisional registration of such programmes, possibly through the regulations on the Act.

- That persons running and managing specialized programmes such as those for child sexual offenders be included in the assessment of children who have the potential to be admitted to these programmes to avoid the inappropriate placement of children, and provide for additional assessment by the diversion service provider. The Preliminary Inquiry therefore needs to be open to all children.

- That persons managing such programmes should not be required to attend the court proceedings unless their presence is specifically required by the Court.

- That the duration of a child's attendance at a diversion programme be determined by the child's need for assistance and rehabilitation, for example Section 58 (4) (a) stipulates that a child below the age of 14 years may not be ordered to attend a programme more than 12 months in duration. This may be too brief for a child with a persistent behavioural difficulty who may require extended assistance and monitoring.

Further comments

1. It is not appropriate to mention black children as occurs in the Preamble to the Bill. It mistakenly gives the impression that children of a certain colour are more prone to conflict with the law than other children. Childline recommends that this reference to a child's colour is omitted.

2. Clause7 (1) - 48 hours is too long a period for a child under the age of 10 years to await a placement in a child and youth care centre or to be returned home. Childline suggests that the sentence should read "must immediately take such child to the child's home… etc."

3. Clause 10(2) it is respectfully submitted that the probation officer's assessment should not be considered adequate to decide on the criminal capacity of a child but that this assessment should be referred to a professional with a higher level of expertise.

4. Clause 10(3) the word "moral" should be inserted into the phrase "assessment of the cognitive, emotional, psychological and social development of the child".

5. The term "lock up" should be excluded from the definition "police cell or lock up" in both the definitions section and clause 27 (a). The broadness of the use of this term could result in children being detained in highly unsuitable circumstances. Indeed Childline has had allegations of children being kept in coldrooms, and storerooms without adequate ventilation.

6. All references to the Child Care Act 1983 should be changed to Children's Act no 38 of 2005 as amended.

7. Pre-sentence reports clause 72: the following recommendations are made:

(1) (a) reports should be prepared by a probation officer or any other suitably <u>qualified</u> person.

(2) certain assessments take more time than 4 weeks – a period of 6 weeks is preferable. Child sex offender assessments require the development of a trusting relationship in order to enable the child to discuss intimate details of his/her behaviour with the assessing professional and also to enable the gathering of collateral information.

A further clause is recommended in this section:

<u>(5) The format, content and sources of information for the pre-sentence report should be prescribed by regulation</u>

8. It is recommended that the schedules at the end of the draft Bill be simplified.

Joan van Niekerk
National Coordinator
Childline South Africa.

Appendix 1: excerpt from The United Nations Committee on the Rights of the Child: General Comment Number 10, Children's Rights in Juvenile Justice, 2007, pp 8 and

C. Age and children in conflict with the law

16. The minimum age of criminal responsibility (MACR).

The States Parties reports show the existence of a wide variety of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a number of States Parties use two minimum ages of criminal responsibility. Children in conflict with the law who are at the time of the commission of the crime of an age at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices.
In the light of these wide range of minimum ages for criminal responsibility the Committee feels the need to provide the States Parties with clear guidance and recommendations regarding the minimum age of criminal responsibility.
Article 40 (3) CRC requires that States Parties shall seek to promote inter alia (see under a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard.
The committee understands this provision as an obligation for States Parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below the MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interest;

- children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years (see also hereafter para. 19 – 21) can be formally charged and subject to penal law procedures. But these procedures, including the final dispositions, must be in full compliance with the principles and provisions of the CRC as elaborated in this General Comment.

Rule 4 of the Beijing Rules recommends that the beginning of that MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States Parties not to set a MACR at a too low level and to increase an existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States Parties are recommended to increase their lower MACR to

the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

17. At the same time, the Committee urges States Parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40(3)(b) CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected. In this regard, States Parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above the MACR.

18. The Committee wants to express its concern about the practice of allowing exceptions to a MACR which permit the use a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States Parties set a MACR that does not allow, by way of exception, the use of a lower age.

19. If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible (see also below para. 22).

20. The upper age limit for juvenile justice.

The Committee also wants to draw the attention of States Parties to the upper age limit for the application of the rules of Juvenile Justice. These special rules for juvenile justice – both in terms of special procedural rules and in terms of rules for diversion and special dispositions – should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years.

21. The Committee wants to remind States Parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated under the rules of juvenile justice.

The Committee therefore recommends States Parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or that allow by way of exception that 16 or 17 year old children are treated as adult criminals, to change their laws with a view to achieve a non-discriminatory full implementation of their juvenile justice rules to all persons under the age of 18 years.

The Committee notes with appreciation that some States Parties allow for the application of the rules and regulations of juvenile justice to persons age 18 and older , usually till the age of 21, either as a general rule or by way of exception.