Submission to the Portfolio Committee on Justice and Constitutional Development: The Child Justice Bill, 2007 version

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1. Introduction.

I was appointed by Minister Dullah Omar in 1996 to serve as a member of the South African Law Commission Project Committee on Juvenile Justice. I thus played an essential role in the conceptualisation and development of the Child Justice Bill originally tabled in 2002. I completed a doctorate in juvenile justice in 2001, teach a module on juvenile justice to final year LLB students (the first in the country), undertake practical field work and research in juvenile justice and publish this in national and international journals, have written a book on juvenile justice in African context, and am an acknowledged international expert in the field, having authored the UN Office for Drugs and Crime (UNODC) "Juvenile Justice Toolkit" in 2006, and having undertaken many consultancies internationally in the field, largely in Africa (Mozambique, Somaliland, Zambia, etc).

I have been contracted by the South African Department of Justice and Constitutional development to train magistrates in every province in the juvenile justice sphere in 2004, 2005 and 2006, and have worked with Justice Training College since 2000 writing materials and participating in training on (inter alia) international juvenile justice standards, juvenile sentencing, diversion and the proposed preliminary inquiry. I have twice been an expert witness in juvenile matters, once in the Constitutional Court (in S v Williams, 1995, the case which abolished judicially imposed corporal punishment, and again in DPP v P (2006), which lead to the imposition of a community based sentences upon a girl convicted of premeditated murder.

I have in the past launched and run my own diversion programme for juvenile offenders, which was highly successful in reintegrating these township youth. I have intimate hands-on knowledge of the workings of the South African criminal justice system, including extensive experience in prisons (including serving as a member of the National Council on Correctional Services from 1997- 2004). I am currently preparing the UN manual on juvenile justice for the international development of this sphere of activity.

I have been involved in the drafting of the new Children's Act 38 of 2005, many innovations of which are not reflected at all in the 2007 draft Child Justice Bill. I have also recently made a DVD on the Children's Act (released on 25 January 2005).

I would like the opportunity to address the Portfolio Committee in person. On 5 February 2008, classes commence at my University and I teach all afternoon, hence my availability on that day is restricted to the morning. This submission will address 5 specific themes: age and criminal capacity, sentencing, legal representation of

children, separation and joinder of trials, and data collection. I am also available to brief the Committee on the interface between the Children's Act and this draft law, if this is deemed desirable, and to screen the 20 minute DVD on the Act.

2. Issues relating to age and criminal capacity

2.1 Background

At the time of preparation of the South African Law Commission report on juvenile justice, finalised in 2000, international law on criminal capacity and the minimum age of criminal responsibility was uncertain and imprecise. The Convention on the Rights of the Child had referred to the requirement that a minimum age be established, which should not be too low, given children's age and maturity. However, the CRC Committee had in it's concluding observations to States Parties reports, repeatedly criticized countries whose minimum age was set at lower than 10 years, and frequently commented that the minimum age should be no lower than twelve years. Few, if any, comments had emerged at the international level concerning the existence or retention of the rebuttable presumption that South Africa inherited from Roman Dutch Law, and which prevailed in many former British colonies, and indeed in the United Kingdom itself. The minimum age issue, and the desirability of any rebuttable presumption of incapacity below a certain age (meaning that the burden of proof to prove capacity would rest on the prosecution), occupied our project committee intensively, to the extent that an international seminar just on this topic was convened, and expert views also sought from a wide variety of interested South Africans, from traditional leaders to social anthropologists and magistrates themselves. The key conclusions were:

- ✓ That the minimum age prevailing in South African law must be raised
- ✓ That proper expert evidence in proof of the capacity for younger children was a pre-requisite to allowing any prosecution to proceed
- ✓ That the retention of the rebuttable presumption was only serve a useful purpose if accompanied by such expert evidence presented in advance of the prosecution case
- ✓ That the oft cited idea that 'offenders are getting younger all the time' or that 'younger children commit more and more serious offences' had no basis in fact, but was based on populist hype[1]

[1] This was later born out in a study conducted amongst magistrates in 9 magisterial districts in the Western Cape, published as Sloth Nielsen, J and Mayer, V "Children and Criminal Accountability: Views from the Bench' in Burman, S (ed) ''The Fate of the Child: Legal decisions about children" (Juta, Lansdown, 2004). The respondents said, in short, that they seldom if ever saw children aged below 14 in their courts, and that were such children to appear, it was because the prosecutor was unaware of diversionary possibilities or had failed to pick up on the true age of the child in time (ie before first appearance). They further indicated if a child younger than 14 did appear, they would stand the matter down to enable the prosecutor 'to sort it out' without resorting to judicial proceedings.

- ✓ That there were good reasons for setting a uniform minimum age for the sake of consistency, but that a split age might accommodate the rural/urban divide (on the basis that children in rural areas mature more gradually and are less exposed to negative influence than those in urban areas.

It was on this basis that the original Bill provided for a minimum age of 10, a rebuttable presumption that a child lacks criminal capacity (until the age of 14), to be buttressed by formal proof, in every instance, should prosecution of a child below 14 be instituted, and accompanied by a formal step in the proceedings at which the child's actual capacity to tell right from wrong and act in accordance with that appreciation be established beyond reasonable doubt.

Since the 8 year period since the finalisation of the South African Law Commission Report and draft Child Justice Bill, considerable developments have occurred in international law and in domestic legal reform, including in Africa, as many countries have moved towards establishing separate juvenile justice systems. In addition, developments in practice can be noted.

Based on Concluding Observations and consideration of country reports over a much more extended period than was the case when the South African Law Commission Project Committee was conducting its research (the Convention on the Rights of the Child has now celebrated it's 18th birthday, and some countries have undertaken their third reporting cycle), the CRC Committee issued General Comment No. 10 in February 2007 ('Children's Rights in Juvenile Justice'), to elaborate the nature of the State's obligation.[2]

The obligation is clearly stated, based on universal wisdom: the minimum age should be set at 12 years and progressively raised from there where possible. Any age below 12 is unacceptably low, and in contravention of the Children's Rights Convention. Further, a 'spilt' age such as is occasioned by the retention of the rebuttable presumption for certain categories of children is discriminatory (in contravention of Article 2 of the CRC), it leads to children being treated differently according not just to their age and maturity, but also according to the nature and quality of the rebuttal evidence adduced by the prosecution.

Arguments that the presumption serves as a form or protection for younger children in conflict with the law, to ensure that proper inquiry is made into their psycho-social make up, behaviour and cognitive understanding of the consequences of their actions have been roundly dismissed, with good reason: even in the UK it is now accepted that

[2] This submission cannot address all the matters raised by general Comment no 10, such as the requirement that provision in law be made for review of all diversion decisions. **It is recommended that the Justice Portfolio Committee researcher be requested to study this Comment and extract a full list of required legislative measures**, and draw a comparison to the provisions of the 2007 draft.

rebuttal of the presumption was not taken seriously in the criminal justice system, and that it was simply a formality, a pretence; this lead to it's abolition in the 1990s.[3]

Since the release of the draft Child Justice Bill in 2000, it is evident that cases involving children younger than 12 years occur rarely. While there have been several high profile cases involving young children, these are so exceptional (estimated at less than 7 in as many years) as to warrant the conclusion that stories that 'offenders are getting younger all the time' and 'young children commit more and more serious offences' are just that: myth. Further, in those cases where young children have been accused of serious offences, including 2 murder cases in the Western Cape in 2005, those matters have been diverted to social services and psycho-therapeutic interventions, with the full and absolute co-operation of the National Prosecuting Service. This illustrates that there is no need for a child justice system set up to cater for exceptional and rare instances by means of a low minimum age of criminal responsibility.

One motivation proffered in support of the minimum age of 10 proposed by the South African law Commission was the need to ensure that children do not become prey to unscrupulous adults, using the lack of legal responsibility as a pretext to involve children in illicit activities. Of course, the concern remains that children must be protected from being used by adults in the commission of crime, such as where they are instrumentalised in drug trafficking, in housebreaking and so forth. Indeed, ILO Convention 182 on the Worst Forms of Child Labour, ratified by South Africa, regards the use of children in illicit activities as one of the four categories of worst forms of child labour. The regional Pretoria-based ILO programme Towards the elimination of Child Labour (TECL) has expended considerable effort since 2004 in developing awareness and implementing pilot programmes aimed at eliminating the instrumental use of children – all children aged below 18 years, not just younger ones, or those below the minimum age of criminal responsibility – in criminal activities.[4] There is now vastly increased awareness of this possibility amongst criminal justice role players due to the extensive advocacy, training and practical guidance furnished throughout the implementation of the pilot project, hence enabling much improved detection of instances of the instrumentalisation of children by police, probation officers and prosecutors. More pertinently, though, the Justice Portfolio Committee should take cognisance of the fact that the use of children - again, any child, not just a child aged below the minimum age of criminal responsibility - to commit crime is now an explicit offence in terms of the provisions of section 141(1)(d) of the Children's Act Amendment Bill, 19F of 2006, passed by Parliament in November 2007.

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[3] See Sloth-Nielsen, J. Chapter 5: Age and Capacity in ' The influence of international law on South Africa's juvenile justice reform' (unpublished LLD thesis, University of the Western Cape 2001.

[4] See Children's Rights Project and TECL 'Children Used by Adults to Commit offences (CUBAC): Final report on Pilot Programme Implementation', April 2007, available at www.communitylawceentre.org.za. See too Sloth-Nielsen, J 'Report on the ILO/TECL project on children used by adults to commit offences as a Worst Form of Child Labour 2004-2007: Good practice and Lessons learnt" (impact evaluation submitted to ILO/TECL, copy on file with the author).

This provision reads:-

‘141.(1)No person may –

(a)...

(b)...

(c)...

(d) use procure or offer a child or attempt to do so for the commission of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure act (Act no. 51 of 1977)’

A consequential amendment to the provision which creates the criminal offences attached to the Act, section 305 of Act 38 of 2005 (the principal Children’s Act) ensures that contravention of this section is explicitly proscribed. Hence an adult can be independently prosecuted for **this** offence, in addition to any other offence he or she may be liable to be charged with (eg conveyance of drugs, or housebreaking) as perpetrator, accomplice or accessory.

It is therefore submitted that this Portfolio Committee need not be concerned that any inducement to involve children in the commission of offences will be created by the mere establishment of a minimum age of criminal responsibility.

Also, the fact that the use of children in offences has now been criminalised elsewhere, renders clause 94 (Involving children in crime to be regarded as an aggravated circumstance) unnecessary and vulnerable to constitutional attack as constituting an infringement of the prohibition against double jeopardy – being liable to double punishment for the same offence). It should be deleted.

2.2 The 2007 version of the Child Justice Bill

2.2.1 Part 1

As is clear from the discussion above, the portfolio committee should not legislate in a manner contrary to international law and should provide that the Act applies to all children between the ages of 12 years and 18 years. If the rebuttable presumption is to be retained in any form at all, it should then only apply to children above the minimum age of 12 years.

The exception created by clause 4(2)(b) for persons between the ages of 18 and 21 years in specified instances to benefit from the provisions of the child justice act is entirely consistent with the international trend, with the CRC Committee specifically commending countries who allow for this in exceptional circumstance in general Comment No 10.

The provisions concerning which route is to be taken in the child justice system, depending on the nature of the charges, and that, where multiple charges are involved, the most serious of these dictates the course of action is undermining of the individualisation of responses to the child, as required by international law. Determination of the processes and fora in which to address the child’s alleged

offending should be determined by assessment and, where necessary, exploration of the issue with all stakeholders at a preliminary inquiry.

2.2.2 Part 2

(i)The cross reference in clause 6(1) to 'section 8' is incorrect, and should refer to section 7.

(ii)The final part of clause 6(2) is missing. The section to which the reader is referred must be added.

(iii) As stated, the minimum age for criminal responsibility should be 12 years (and **MACR** (minimum age of criminal **responsibility**, not capacity), has now become accepted in international law and practice as the way in which to refer to this issue.

(iv) Clause on 7(3)(a)(i) refers to clause 51, which in turn should be updated to reflect the Children's Act 2005, rather than the Child Care Act 74 of 1983, which is to be repealed.

(v) Whilst being fully in agreement that any referral of a child lacking criminal capacity (or rather legally below the minimum age of criminal responsibility) should be predicated upon the child's need for services, rather than on requiring or assuming an acceptance of guilt, the provision of clause 7(3)(b) is in my view inelegantly worded and likely to fuel public perceptions that such children who are in conflict with the law are 'getting away scot free'' (though the use of the words 'may not in any way require a child to be held responsible'); a perception which the NGO sector do not agree with and one with which the portfolio committee should be at pains to avoid. It is also potentially factually incorrect, as children may very well be held responsible in the loose sense of the word (eg through delictual claims against their parents!)

A better formulation might be: 'Any action taken under paragraph (a) may not suggest or assume that the child is criminally liable for the incident that led to the assessment.'

(vi) the reference in clause 7(4)(a) to 'an act committed with serious consequences' is most strange. Planning a murder, or attempted murder, constitutes a serious event, but may not (as an incomplete act) have any consequences at all, let alone serious ones. A seemingly minor incident maybe indicative of serious emerging problems in a child life, as numerous studies have shown, without their yet having serious consequences (eg inappropriate sexual contact at an early age). Furthermore, the phrase is undefined, leaving scope for much confusion about when a meeting needs to be convened, and when it does not. These decisions are better left entirely to the probation officer, who can assess the need for such a meeting on the basis of expertise rather than linking it (in a roundabout way) to acts with serious consequences.

It is recommended that the phrase 'who is alleged to have committed an act with serious consequences' in clause 7(4)(a) be deleted.

(vii) The insertion of a criminal justice role player – the magistrate – in a non-judicial process (by requiring the submission of any decision of the probation officer, including the decision to take no action in every petty case, or the decision to arrange support services or

go through the child's school) is unwarranted bureaucracy, and flies in the face of the exhortation in article 40(4) of the CRC to deal with cases wherever possible without resorting to judicial proceedings. If the decision is to be made an order of court, it is by definition a judicial process, and not an alternative. Notably this provision applies to every single instance of a child in conflict with the law below the minimum age, not to high profile or serious cases only – the words used are 'must'.

It is highly likely, too, that magistrates themselves will not want to be record keepers and shepards of probation practice. The last question that arises is what if the magistrate in his or her consideration of the plan disagrees with it? Can he or she exercise a quasi- judicial function and quash it, alter it or add to it? Or is the role merely to rubber stamp it (a role I do not think magistrates would relish either!)

Clause 7 (7) is unnecessarily bureaucratic, draws children below the age of criminal responsibility into justice processes and undermines the functioning of the judiciary, and should be deleted in its entirety.

2.2.3 Part 3 children aged 10 years or older but below 14 years

The central objection to the provisions in this part relate to the watered down manner of proof of actual capacity of a child. As noted above, at the heart of the recommendation of the South African Law Commission to retain the rebuttable presumption at all (in the face of mounting pressure against the presumption, including its ignominious demise in the very country whose colonial procedural law South Africa inherited) was the belief (and, more to the point, concrete proposals to this effect) that **serious and expert attention would be paid to the manner of rebuttal of the presumption in each and every instance**– so that it would serve as a 'protective mantle'. This is no longer the case, and there is consequently no support for it's retention at all; indeed it's appearance in this guise on the statute book is something of an embarrassment to those of us who have to confess that we mooted the idea in the first place!.

How, and on what basis, for instance, is the prosecutor supposed to **decide** whether to divert a child in terms of section 11(b) whether criminal capacity is likely to be proven? Must he or she interview the child? Au contraire, may he or she take this decision without speaking to the child? Must anyone else – teacher, parent, neighbour – be consulted? Maybe the prosecutor need only consult his or her law books?

Further to this, the provision as it stands contemplates a **judicial** function for the **prosecution**, since the 'decision' that criminal capacity is likely to be proven is, unmasked, a quasi-finding of criminal liability, giving rise to the imposition of compulsory measures (with consequences for non compliance) and with deleterious long term effects (the child's name potentially being held on the diversion register for some years).

The provisions of clause 10 are objectionable in numerous respects: notably, the dilution of the requirement of

(a) a compulsory evaluation of a child's criminal capacity before prosecution of a child in a child justice court

(b) at state expense

(c) by a suitably qualified person, which is not, it is submitted, a probation officer as insinuated by the provisions of clause 10(2). The assessment report is, if the matter is not to be diverted by the prosecution or at the preliminary inquiry, simply not a suitable basis on which to base a judicial determination as to a child's cognitive, psychological and emotional development such as upon which to premise a finding of guilt. The risk looms large that the suggestive aspect of clause 10(2) will become the norm: seldom, if ever, will proper evaluations be sought, and the rule will be to rely on the one or two line recommendation of the assessment report (which does NOT have as it's focus the determination of criminal capacity at all, rather surveying the ecological circumstances surrounding the commission of the offence in toto, of which the child's appreciation of wrongfulness is but one facet).

This represents no advance on the present practical situation at all, and by encoding it in legal provisions, it provides the stamp of approval of a lacksadaisical attitude towards the real issue of children's criminal capacity. It is not in children's best interest generally, or any specific child's best interests.

At minimum, the provisions contemplated ion the 2002 version of the Bill should be restored, to provide for compulsory evaluations of criminal capacity when matters proceed to trial, in all instances where the rebuttable presumption applies. However, there is evidence of an absence of will to ensure that proper attention is paid to whether younger children are really bearers of criminal capacity on a case by case basis, I urge the Portfolio Committee to raise the minimum age of criminal responsibility to 12, as international law clearly requires, and consider abandoning the mock protection of the rebuttable presumption.[5]

3. Sentencing

I am aware that other submissions from members of the Child Justice Alliance will address in a comprehensive fashion the issue of sentencing, and therefore confine my submission to certain key points.

3.1 Clause 78

This section no longer meshes with the provisions of the minimum sentencing legislation promulgated in 31 December 2007, and particularly clause 78(3) will need to be substantially redrafted. Given that the Constitution provides that the detention of children should be a matter of last resort and when imposed **for the shortest period of time,** the imposition of minimum sentences upon children of 16 and 17 is in principle objectionable, as the Supreme Court of Appeal found in the Brandt v S in 2005. **It is recommended that the Portfolio Committee expressly exclude children from the ambit of any minimum sentencing legislation, specifically the Criminal Law (Sentencing) Amendment Act 2007, through an amendment effected by the Child Justice Bill in schedule 6.**

[5] Other developing countries, including those in Africa, who have raised their minimum age of criminal responsibility to 12 or higher include: Uganda, Ghana, Nigeria, Mozambique, and The Gambia, to name a few.

The possible imposition of a sentence of imprisonment upon a child aged below 14 is also in principle objectionable (see clause 78(4)(a)), and flies in the face of accepted government policy that prisons are not suitable facilities for children aged below 14 (see the 2005 White Paper on Correctional Services, approved by Cabinet). As the law stands in present form, it would be **possible to sentence a 10 year old to imprisonment**, which would make South African child justice law amongst the most repressive in the world! There are in any event sufficient alternatives to imprisonment to cater to the very few children below 14 who are convicted of serious offences, and even then, recent experience has shown that children below 14 years convicted of serious offences are successfully dealt with by means of community based sentences (eg DPP v P, 2006, in which the SCA confirmed a community based sentence with appropriate conditions for premeditated murder.)

An express prohibition on the sentence of imprisonment for children aged below 14 years should be drafted, as originally provided for by the South African Law Reform Commission. [That a mirror provision prohibiting the pre-trial detention in prison of children aged under 14 is a minimum requirement goes without saying.]

The length of sentences where the imprisonment of children is concerned (25 years according to section 78(5)) is plainly absurd, this constituting the maximum period of time that an adult would service before his or her case comes up for consideration for release on parole (according to the Correctional Services Act, and then in the case of a prisoner serving a sentence of life imprisonment),; this is hardly a 'discount' for youthful immaturity and is arguably an explicit contravention of the constitutional provision that detention of children should be for the shortest period of time! Moreover, experience and research since 1996 in the sentencing sphere has shown that lifting the maximum tariff encourages more punitive sentencing practices,[6] so the mere suggestion that sentences are competent is likely to further their use for child offenders!

It is therefore proposed that unless a realistic maximum (such as 10 or 15 years) can be agreed upon, no statement of any maximum sentence be included in the Child Justice Bill.

The provisions of clause 78(6) are, however, in accordance with good practice and in the best interests of the child, and are welcomed.

4. Legal representation (Chapter 10)

4.1 introduction and background

The South African Law Commission recognised, during the period in which the draft bill was being formulated, that the delivery of legal aid services was undergoing radical transformation, and predicated the proposals is put forward and ultimately included in the tabled Bill of 2002 explicitly on this premise. At the time, the justice centre model was in its infancy, and it was entirely unclear whether, and to what extent, this new initiative would

[6] Giffard C and Muntingh, L The effect of sentencing on the size of the prison population'' (2006) at www.osf.org.za.

replace or be a substitute for legal aid delivered under the judicare[7] model prevailing at the time. In addition, in the hangover days after transition from apartheid, many children were still evidencing reluctance to utilise state sponsored legal aid, refusing legal representation and preferring to conduct their own defence.

In the intervening 8 years, much has changed. The extent of development is detailed in a recently completed report (December 2007) on the delivery of legal services to children, commissioned by the African Child Policy Forum, a pan African organisation aimed at furthering children's rights and child policy on the continent, based in Addis Ababa. The study is based on interviews with Legal Aid Board and Justice centre staff, with staff at university legal aid clinics, and practitioners in private practice, amongst others. Although not yet formally released, data from the study[8] is used with permission. It is argued that this information can assist the portfolio committee to reformulate the provisions in the revised child justice bill in order to match emerging practice.

4.2 Key findings of the 2007 study on child legal representation

Unsurprisingly, the study confirms that the main provider of legal services to children in the justice system is the Legal Aid Board (LAB). However, new facts emerging concerns the extent of delivery of legal services to children and the manner of such delivery. The study records that between April and October 2007 – a 7 month period – 24,741 children were provided with legal representation in criminal matters (see Table 1, reproduced from the study and attached as an appendix). Moreover, these services were almost entirely delivered by the LAB itself, through the establishment at each Justice Centre – the study records that there are now 60 Justice Centre[9] - of Children's Units, staffed by professional attorneys with at least 5 years experience, and furthered assisted by candidate attorneys. Specialist training in child law is being provided, and it is recorded that improvements in access and quality are fast diminishing children's formerly negative perceptions of legal representation.[10]

At the three one stop child justice centres currently in existence[11] - Mangaung, Port Elizabeth and Port Nolloth – are served by dedicated LAB representatives, and the LAB business model envisages such services at all future one stop child justice centres. Justice

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[7] The Judicare model rests on outsourcing, on a case by case basis, the provision of legal representation to attorneys, and sometimes counsel, in private practice.

[8] Redpath J,. and Sloth-Nielsen, J 'Realising children's rights to legal representation and to be heard in judicial proceedings: emerging good practice, South Africa' (African Child Policy Forum, 2007, unpublished, copy on file with author). Note that the study covers both civil and criminal cases; however, the information in this submission is confined to the prevailing situation as regards criminal cases.

[9] Each centre serving between 10 and 20 courts.

[10] Redpath and Sloth-Nielsen, p24.

[11] The further roll out of one stop child justice centres was halted by the Department of Justice due to the slow progress of the Child Justice Bill in parliament, and hence despite initial plans for far more such centres, developments have stultified.

Centres in areas where a one stop child justice centre is likely to be established are being capacitated in advance to delivery legal representation to children, as it is expected that the demand for services will increase.[12] It is important to record that services to children in children's courts are also set to increase exponentially with the promulgation of the Children's Act 2005, and that the LAB is gearing itself up for this. Since it is expected that where one stop child justice centres exist or are established, these will incorporate a children's court, the LAB is envisaging the appointment of an additional 272 staff member to service the needs of children requiring legal representation by 2010/2011, at a cost of R79 759 333.00.[13]

An interesting development showcased in the study is the extension of legal representation and related services to arenas beyond the formal court room itself by LAB staff, who have been undertaking ongoing monitoring of children in prison through prison visits. They also have been conducting events at schools, and in communities, to sensitise the public to the service offered to children and to ensure that children are aware of their services.[14] Part of the new direction is contained in the 'LAB Business model: Children's Units'; it requires staff at these units not only to follow up cases involving children in detention, ensure speedy conduct of bail proceedings, maintain contact with IPVs (Independent Prison Visitors appointed by the office of the Inspecting Judge of Prisons), ensure that investigating officers trace parents or guardians, but further, to ensure that **ALL** practitioners (ie including those in private practice) handling children's criminal matters are equipped to represent children and to provide them with required support for their cases.[15]

As regards the criteria for determining which children should qualify for legal aid at state expense through the justice centre model, it is evident that the LAB has adopted an expansive, rather than restrictive, approach to their constitutional brief to provide representation to the indigent in order to avoid substantial injustice. **It is submitted that the portfolio committee should be guided by the policy of the LAB, and not set conditions for qualifying for legal representation at state expense that are more limited than current (state) policy.**

Although the 2002 Legal Aid Guide is silent as to whether different criteria to the ordinary apply in respect of applications for legal aid submitted by child clients, the criteria for the award of legal aid are assumed to be met of the case is to be prosecuted in regional or high courts.[16] In relation to district court trials, the Guide lays down requirements related to which offences are likely to meet the requirements that the accused would, if convicted, probably be sentenced to imprisonment, either with or without the option of a fine, and, if granted the option of a fine, whether this is likely to remain unpaid two weeks after the imposition of

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[12] Redpath and Sloth-Nielsen, p 23.

[13] This figure includes salaries and related costs, such as additional administrative staff, office rental, telephones and sundries. See Redpath and Sloth-Nielsen p 29.

[14] Redpath and Sloth-Nielsen, p23.

[15] Redpath and Sloth Nielsen, p25.

[16] Redpath and Sloth-Nielsen, p 24.

sentence (the elaboration in practice of the substantial injustice test).[17] The LAB will also provide legal representation in any case where it has been ordered by a Court.

4.3 The provisions of the Child Justice Bill, 2007 version

4.3.1 Clause 81

Even in view of the fact that private sector involvement in providing legal representation to children is patently of less import than was previously the case, it is submitted that it is entirely appropriate to bind legal representative to child-friendly practice and standards. However, remedial sanctions consequent upon practices which do not serve the best interests of the child (81(2)) can be significantly strengthened by the addition of :-

- A subclause requiring notification of the head of the Justice Centre of malpractice, where the legal representative is employed by such centre; and
- A subclause providing for the possibility of notification to the professional body concerning (the relevant Law Society) in the case of private practitioner, in appropriate instances

Further to this above, the formulation of the provisions contained in clause 84 are an improvement over the version originally tabled.

4.3.2 Clause 82

The international law requirement stipulates that legal representation should be available/permitted from the commencement of the proceedings. This is evidence not only from the provisions of article 40((2)((b)(ii) of the Convention on the rights of the child, elaborated in par 49 and 50 of General Comment no 10 (Children's Rights in juvenile justice) and article 14 (3)(b) of the International Covenant on Civil and Political Rights (which South Africa has also ratified).

At the time of the formulation of the draft Child Justice Bill, the South African Law Commission were of the view that whilst legal representation at the preliminary inquiry would have to be possible, in order to comply with constitutional imperatives, waiting for legal aid decisions to be made might delay proceedings, and prejudice children; further, the original provisions were influenced by a prevalent concern that most lawyers, including the many briefed by the LAB in the judicare model, would be ignorant of, or frustrate, access to diversion – hence that their presence at a preliminary inquiry might actually be undesirable.

This situation no longer obtains for two reasons: first, knowledge of diversion amongst juvenile justice practitioners is generally endemic, it having been mainstreamed through

[17] Redpath and Sloth Nielsen, p 24.

training over a decade and a half;[18] second, the bulk of legal representation to children is clearly being provided for via the children's units of the LAB, whose staff are fully appraised of child justice developments, including the desirability of diversion. That permanent staff will be allocated one stop child justice centres once these are all established is testimony to the fact that the child's legal representative will be part of the one stop team, and should as a matter of course therefore attend the preliminary inquiry.

Hence the present formulation of clause 82 is too restrictive, requiring as it does the permission of the inquiry magistrate for the child's legal representative to attend. There can be no doubt that the preliminary inquiry is a 'proceeding' within the ordinary meaning of the word, and that the child should be entitled as of right to have his or her legal representative attend, without first requiring permission.

In addition, the current wording could be taken to mean that a state appointed legal representative is not entitled to be present at all at a preliminary inquiry, given that the 'consent' relates the legal representative of his or her own choice, appointed at his or her own expense. This could be taken to mean that no consent should be given to LAB representatives (with the accepted principle of legal interpretation that expressly stating one possibility is regarded as excluding the other). This is surely neither desirable (given that the LAB is now the bulk service provider in this sphere) nor constitutional, resulting as is does in discrimination between children who can afford to hire their own lawyers and those who cannot.

At minimum, the last phrase in the clause [consents thereto as contemplated in section 39(3)(d) or 45 (4)] should be deleted. Further, the reference to 'of his or her own choice, at his or her own expense' should be deleted to make it clear that any legal representative as of right may attend the preliminary inquiry.

It is arguable that an assessment is not strictly speaking a 'proceeding' and that the considerations outlined above do not apply. Hence, I would suggest that the consent requirement be maintained insofar as a legal representatives attendance at assessment is concerned, as this accords with standard professional social work practice regarding privacy and confidentiality of interviews.

4.3.3 Clause 83

This clause is intended to spell out the criteria for meeting the substantial injustice test for the award of legal aid. The current criteria, as detailed above, were developed in 2002 by the Legal Aid Board **subsequent** to the preparation by the South African law Commission of the draft child justice bill. There is now a disjuncture between the two sets of criteria, which may in practice lead to considerable problems. In particular, the present provision does not refer to the **likelihood of a sentence of imprisonment** at all (the cross reference to section 77 in clause 83(1) entails a reform school sentence, which, as mentioned above, must be altered to reflect the new wording of the Children's Act). There is also no reference to the possible imposition of a fine which, if not paid,

[18] See Sloth Nielsen, J 'A short history of time: charting the contribution of social development service delivery to enhance child justice 1996- 2006' 2007 vol 43(4) Social Work/Maatskaplike Werk 147 – 166.

may result inadvertently in a child's detention, which the LAB lists as an existing criterion. It remains totally unclear why 16 and 17 year olds who are in detention awaiting trial – presumably charged with serious offences – should not warrant legal representation at state expense, which they undoubtedly do under present legal aid policy. Existing policy, taken for granted, that children (and indeed adults) appearing in regional and high courts automatically qualify for legal representation should be spelt out: the risk, otherwise is that this provision might be regarded as superceding prior policy commitments, resulting in a much less favourable dispensation for children in the future.

In short, these provisions diminish current access that children have to legal representation at state expense, and are hence constitutionally suspect as a retrogressive measure. Moreover, they appear to entrench a pernicious form of discrimination (notably clause 83(1)(b) which can easily argued to be unfair terms of section 9 of the Constitution; nor is it rescued by the limitations clause in section 36, should this be called into the equation, given that these children are current beneficiaries of legal representation at state expense, and that goal of the limitation is not reasonable and justifiable in an open and democratic society.

It is recommended that the portfolio committee reappraise these criteria in consultation with the LAB, and elaborate them more precisely to match existing practice.

At minimum, a child facing a sentence involving deprivation of liberty must be provided with legal representation at state expense, as well as all children facing charges in regional and high courts.

4.3.4 Clause 84

This clause is, as noted above, of far less importance than it was at the time that the South African Law Commission drafted the Child Justice Bill, for the simple reason that the LAB is working hard, and with success, to ensure that suspicion of their services amongst children diminishes, and that fewer children refuse legal aid. However, the need for the section does remain. It is far more truncated than the original version, leaving out entirely the actual role that the replacement appointed to assist the Court will play. Until the Rules of Court address this, it is not possible to offer further comment.

It is recommended that the Portfolio Committee require the Rules Committee of the Courts to prepare draft rules (see further section 89) such as to elaborate the role that the substitute legal representative will play in child justice trials, and to permit public comment on these provisions prior to their adoption.

4.3.5 Clauses related to legal representation in the 2002 version not included in the 2007 version

The main difference between the South African Law Commission's vision and the Bill now tabled relates to the accreditation of legal representatives to serve as defence layers in children's cases, and the minimum period of 12 months experience for candidate attorneys to have served before being permitted to represent child. These provisions were proposed for good reason: to counter prevailing ignorance amongst practitioners about defending children; to act as a stepping stone to the delivery of in

service training and information concerning child justice development; and to prevent juvenile courts, as they so often are, becoming the teething ground for the most junior appointees. While the notion of accreditation, a decade on, no longer seems feasible (from the perspective of the legal profession and also because of the dramatically changed nature of legal aid service delivery to children that has occurred, as the Redpath and Sloth-Nielsen study shows), the legal profession are not in any way exempt from the international law requirement of specialisation in child justice matters, as set out eloquently in General Comment no 10 of the CRC Committee.

It is suggested that section 95 (1) be amended to as to include a provision empowering the Cabinet member responsible for the administration of justice to gazette, every 5 years, a national policy concerning training and specialisation in child justice, which policy should include members of the legal profession.

5. Separation and joinder of trials (adults co-accused with children or a child)

This is a thorny issue insofar as it affect criminal justice practice in several ways – eg if trials are separated where does the docket go, and can adults not use the absence of a child co-accused to escape with impunity? These and other considerations, such as the emerging good practice of de facto separation of trials at one stop child justice centres did occupy the minds of the South African Law Commission project committee, and were debated at length with relevant stakeholders, such as the National Prosecuting Authority.[19]

In order to promote the maximum degree of integrity of a specialised and separate system of justice for children, it was proposed that a presumption of separation prevail, which can be overturned through a simple application by any party (see section 57(1) of Bill 49 of 2002). The test for rebuttal was indeed hardly onerous: it had only to be adduced to be in the interests of justice to permit joinder. This arrangement has obvious benefits to children, some of whom may have been used by those same adults in the commission of crime (CUBAC) and who may then conceal this due to the presence of the adult at the trial. Further, separation can promote the possibility of diversion during the course of proceedings, which would be far less likely to occur whilst an adult co-accused was still before the court. Morevoer, once a significant number of children are accommodated in one stop child justice centres, geographically separate from conventional criminal courts, separation will not only be the ideal, it is virtually inevitable (unless the one stop child justice centres are to be populated by adult offenders!)

It is submitted that the present version of the Child Justice Bill is vague on the question of separation of trials, more so in that it is mentioned only obliquely in clause 63(2), insofar as that clause contemplates the possibility of joint trials. Far more concrete direction should be given to the prosecution services in this regard, and it is **proposed that clause 57(1) be reinserted as a guideline in this regard.**

6. Data

[1919] See the detailed discussion at Para 9.10 of the *Report on Juvenile Justice.*

I have been working in the child justice sphere at an academic and practical level for more than 15 years. As members of the portfolio committee would know full well, the world has undergone a sustained, pervasive and world changing technological revolution during this time. Indeed, South Africa recently recorded that more than 33 million people now have cellphones: fully 75% percent of the entire population! And probably closer to 90% of the population aged over 10 years! Hence, it remains inconceivable after substantial advocacy efforts, meetings, transformation processes, technical advice projects and a significant investment in technology that **we are no closer to knowing how many children come into conflict with the law (through the formal process of arrest)** each year than we were in **1994.** This is the **absolute bottom line** for planning and development, as the difficulties experienced by efforts of the departments of social development at provincial level to map and budget for secure care facilities and to convince treasury of the costs drivers in this regard have illustrated in recent times. Without knowing the numbers, it is impossible to know how many alternative placements to provide for. Or legal representatives, Or diversion programmes. Or to measure success in reducing recidivism or any other indicator of progress.

General Comment No. 10 makes the point that data collection, research and impact evaluation are crucial. The UNICEF indicators on juvenile justice (2006) count 'number of children deprived of their liberty' as one of the core indicators (out of the fifteen).[20] This includes children in police cells, in places of safety or secure care facilities, in reform schools, in mental facilities, in child and youth care centres (the new terminology of the Children's Act, 38 of 2005), and in prisons (in respect of which we do have excellent, quality and disaggregated information for the Department of Correctional Services and have had all along.

The requirement to collect decent data should not be left in the vague form they are sort of provided for in clause 95, and left to regulation and should contained in the principle Act. All concerned Departments should be required by law to keep such statistics as are relevant to determining the number of children who come into contact with the system, the length of time they spend in it, the flow of cases (eg diverted out of the system), and on convictions and all forms of sentence. **The primary responsibility for systems information, in the first instance, should rest with the Department of Justice** (as is largely the case elsewhere: see for instance Canada and the USA).[21]

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[20] See Sloth-Nielsen, J 'New international law on juvenile justice' presentation at the expert meeting on Harmonisation of child law in Eastern and Southern Africa, May 2007, available on the website of the African child policy forum <wwwafricachildforum.org> (last accessed 25 January 2008).

[21] It is a source of great concern - and some irritation- that many and varied demands are placed in the 2007 draft on the Departments of Social Development – eg concerning record keeping on diversion, for instance, whilst the Department of Justice (and National Prosecuting Authority, even though they have recently been able to produce reasonable data) escape virtually completely unscathed, exempt even from the legal obligation to disaggregate the numbers of children tried in district courts from those tried in regional and high courts!