

The Child Justice Bill

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International Commitments

- South Africa has ratified the UN convention on the rights of the child
- This has clauses relating to the child in trouble with the law - sections 37 and 40

Section 37 of the Convention on the Rights of the Child

Provides for:

The prohibition of torture, cruel treatment or punishment, capital punishment, life imprisonment and unlawful arrest or deprivation of liberty

The principles of:

- appropriate treatment,
- separation from detained adults,
- contact with family,
- Access to legal and other assistance

Section 40 of the Convention on the Rights of the Child

Provides for

- The recognition of the rights of children alleged or who have committed offences
- The child's right to due process of law
- Legal assistance in preparing and presenting their defence

It also establishes the principle that recourse to judicial proceedings and institutional placements should be avoided wherever appropriate and possible.

The Charter on the Rights and Responsibilities of the African Child

Provides for children in conflict with the law

- Right to special treatment
- Specially trained legal representation
- A special court for children in which they are treated well and politely
- If imprisoned, the child should not be tortured and treated badly
- Children should not be put in the same court or prison with adults

Other international commitments include

- The United Nations Rules for Juveniles deprived of their liberty

Provisions in our Bill of Rights in the National
Constitution for the child in trouble with the law

- Section 28 (1) (g)
- (Every child has the right)..Not to be detained except as a matter of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be:

Section 28 of Bill of Rights continued

- i. Kept separately from detained persons over the age of 18 years and
 - ii. Treated in a manner, and kept in conditions, that take into account the child's age
 - To have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result
- (2) A child's best interests are of paramount importance in every matter concerning the child
- (3) In this section "child" means a person under the age of 18 years.

The reform of domestic Legislation in SA

- Began in 1997/8
- Included
 - Children in trouble with the Law
 - Sexual Offences Against Children
 - Children's Act
 - Films and Publications Act

Progress

- Draft of Child Justice Bill completed by SALRC in 2002
- The Child Justice Bill was costed during 2002
- Drafts of Children's Bill and Sexual Offences Bill completed in Dec/Jan 2003
 - All three Bills completed after a long period of
 - consultation with wide spectrum of role players and experts
 - Consultation with children
 - International comparisons
 - Research

Progress through Parliament

- Child Justice Bill and Sexual Offences Bill are the responsibility of Department of Justice and Constitutional Development and after consideration by Cabinet were sent to the Parliamentary Portfolio Committee on Justice and CD
 - The Children's Bill is the responsibility of Department of Social Development, and after Cabinet approval it was sent to the Parliamentary Portfolio Committee on Social Development
 - All 3 Bills have undergone considerable re-drafting without further consultation.

Amendments to the Films and Publications Act (2004)

- This Bill was passed in December 2004
- Improved definition of child pornography - eg expanded to include written as well as pictorial child pornography

- Simplified investigation procedures
- Increased penalties for possession and use of child pornography

Present status of the Child Justice Bill

- At present the Bill has not been placed on the PPC JCD for further debate, therefore one cannot predict when it will be passed through the House of Assembly
- However the National Treasury has allocated funds to set up the processes and programmes that will facilitate the implementation of the legislation when it is passed including the development of diversion programmes
- Terms of reference and standards of good practice have been drafted for diversion programmes.

Objects/Purpose of the Bill

- (a) protect the rights of children as in the Constitution;
- (b) promote the spirit of *ubuntu* in the child justice system through—
 - (i) fostering children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by **holding children accountable for their actions and safe-guarding the interests of victims and the community;**
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in order to encourage the reintegration of children;

Objects/Purpose of the Bill cont

- (c) prevent children from being exposed to the negative effects of the formal criminal justice system by encouraging the use of diversion in appropriate cases; and
- (d) promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.

This legislation will work best if all of us work together

Summary of Provisions in the Child Justice Bill

- To establish a criminal justice process for those children accused of committing offences so as to protect the rights of children entrenched in the Constitution and provided for in international instruments;
- to provide for the minimum age of criminal capacity of such children;
- to incorporate diversion of cases away from formal court procedures as a central feature of the process;

Summary of Provisions in the Child Justice Bill cont

- to make provision for the assessment of children and the holding of a preliminary inquiry;
- to make provision for child justice courts
- to extend the sentencing options available in respect of children;
- to entrench the notion of restorative justice in respect of children;

Guiding principles for implementation of the Bill

- Children have the right to participate in all proceedings
- Every child should be spoken to in a manner appropriate to his or her age and intellectual ability. in his or her language of choice, through an interpreter if necessary.
- Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- All procedures should be conducted and completed speedily.
- Parents and appropriate adults should be able to assist children and, wherever possible, to participate in decisions affecting them.

Guiding principles cont

- All consequences arising from the offence should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
- A child should not be denied access to any of the services provided for in the Bill on any of the grounds referred to in section 9 of the Constitution (the equality clause).
- Children who commit similar offences should, as far as possible, receive similar treatment, within an individualised approach

Who does the Bill apply to?

- Children under the Age of 18 years
- Under certain circumstances the provisions can be applied to youths between 18 and 21 years
- Some provisions apply to/include/place responsibilities on parents and caretakers of children

The Age of Criminal Capacity - present position

- At present a child under 7 years is under the age of criminal capacity
- 7-14 - rebuttable presumption of "doli incapax"
- Considered by the United Nations Committee on the Rights of the Child as a violation of the rights of young children
- Recommendation - 14 years in line with most countries internationally

Age of criminal capacity - present position

What does criminal capacity mean?

- Able to understand the consequences of one's behaviour
- Able to act in accordance with that understanding

Often mistakenly equated with level of intelligence and level of education

Often only the first test applied to children

Age of criminal capacity established in the Bill

- To be increased to 10 years - irrebuttable presumption - children under the age of 10 years cannot be held responsible for criminal behaviour
- 10 - 14 years - rebuttable presumption - state must prove criminal capacity

How does one test for criminal capacity?

- A prosecutor who is required to make a decision whether to prosecute a child between 10 and 14 years must take the following factors into consideration:
 - (i) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;
 - (ii) the nature and gravity of the alleged offence;
 - (iii) the impact of the alleged offence upon any victim of such offence and the implications thereof;
 - (iv) a probation officer's assessment report;
 - (v) the prospects of establishing criminal capacity in terms of section 60 if the matter were to go to trial;
 - (vi) the interests of the community; and
 - (vii) any other relevant factor

Children under 10 years

- But children under the age of 10 years can commit some serious crimes - what should happen?
- The Bill provides for children under the age of 10 who commit crimes to undergo a special assessment and treatment process appropriate to their age and circumstances
- Parents and caretakers are to be involved in the assessment and treatment process
- Government is obliged to provide for this assessment and treatment
- A confidential register of such children is to be kept

Age assessment

- Can be completed by a probation officer - a process is laid down in the Bill for this taking into account a number of factors, including baptismal and school records and a possible medical assessment.

- Can be determined by a magistrate, who may call upon experts to assist in this process
- Provision is made for certain processes where errors have been made in age assessment

Procedures for arrest, summons and warnings

- Arrest is provided for - but not for Schedule 1 crimes unless exceptional circumstances
- Child must be informed of reason for arrest, his/her rights, procedure to be followed
- Parents/caretakers should be informed
- Immediate referral to a probation officer but at most this must occur within 24 hours

Summonses and written warnings

- Can also be given to a child to appear at a preliminary inquiry
- Have to be given in the presence of a parent or appropriate adult unless impossible
- The police must inform and explain to the child and parent/appropriate adult the allegation, the rights of the child and the procedures to be followed
- Inform the probation services of the above

Release, detention and care of children prior to sentencing

- Provision is made for children to be released into the care of parents and appropriate adults or detained at any stage of the criminal proceedings
- Release is on warning in lieu of bail
- Release not indicated if

- Child a danger to self or others
- No suitable adult is available
- Exceptional circumstances exist

Duties of police if child released

- A written notice giving alleged offence, conditions of release, time and date of preliminary inquiry etc
- Warn parent/caretaker of date and place of court appearance
- Warn child of date and place of court appearance
- Child can be released on own recognisances where appropriate

In considering release the magistrate must consider

- (a) the best interests of the child;
- (b) whether the child has previous convictions;
- (c) - the age of a child - for example where the child is at least 10 but under 14 years of age and presumed to lack criminal capacity; and
- (d) the interests and safety of the community in which the child resides.

The magistrate may impose conditions

For example - the child

- (a) must appear at a specified place and time;
- (b) must report periodically to a specified person or place;
- (c) must attend a particular school;
- (d) must reside at a particular address;
- (e) must be placed under the supervision of a specified person;
- (f) may not to interfere with any witness, tamper with any evidence or associate with any person or group of specified people; or
- (g) comply with any other condition that the presiding officer deems fit in the circumstances

Custodial Placement of children prior to conviction

- Various custodial options are provided for - eg places of safety and detention
- Prisons and police custody last resort placements as it is recognised that these placements often damage children and reinforce anti-social behaviour
- Conditions and time limits apply to children detained in police custody and prison prior to conviction
- Police custody - not longer than 48 hours

Children in police custody

A child who is in detention in police custody must be—

- (a) detained separately from adults, and boys must be held separately from girls;
- (b) detained in conditions which will reduce the risk of harm to that child, including the risk of harm caused by other children;
- (c) permitted visits by parents, appropriate adults, legal representatives, registered social workers, probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit; and
- (d) cared for in a manner consistent with the protection afforded to children in terms of section 28 of the Constitution.

Before detaining a child in prison the magistrate must consider

- (a) the best interests of the child;
- (b) the child's state of health;
- (c) previous convictions or charges pending against the child;
- (d) the risk that the child may be a danger to himself, herself or to any other person or child in a placement facility;
- (e) any danger that the child may pose to the safety of members of the public;
- (f) the risk of the child absconding from a placement facility;
- (g) the probable period of detention until the conclusion of the matter;
- (h) any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child;
- (i) the seriousness of the offence in question; or
- (j) any other relevant factor.

Magistrates must consider the ff if detention is continued for a longer period

- (a) determine whether or not the detention remains necessary;

- (b) if ordering further detention of the child, record the reasons for the detention;
- (c) consider a reduction of the amount of bail, if applicable;
- (d) inquire whether or not the child is being properly treated and kept under suitable conditions;
- (e) if not satisfied that the child is being properly treated and kept under suitable conditions, inspect and investigate the treatment and conditions and may make an appropriate remedial order; and
- (f) enter the reasons for any decision made in this regard on the record of the proceedings.

Provision is made for assessment

- Purpose of assessment
- (a) assess whether a child may be in need of care (b) estimate the age of the child if the age is uncertain;
- (c) establish the prospects for diversion
- (d) formulate recommendations regarding the release or detention and placement of the child;
- (e) gather information relating to previous convictions, pending charges and any previous diversion in respect of the child
- (f) in the case of children below the age of 10 years, establish what measures need to be taken

Assessment

- Is confidential
- Done by probation officer
- Certain persons have to be present or may be requested to be present - the child, parent/caretaker, investigating police officer
- Child must be seen in private and encouraged to participate

The probation officer submits a report in which

- Certain basic information is presented
- The probation officer may make recommendations as to
 - the care of the child,
 - detention,

- Diversion
- Further assessment
- Referral for other services

Diversion

- means diversion of a child away from the formal court procedures to the informal procedures established by the Bill
- May occur before or during the preliminary inquiry, and at other stages of the criminal justice process
- Diversion may occur before the preliminary inquiry in the case of minor offences, where the child acknowledges the offence. However the child and, if possible his/her parent, must appear before the court to have the diversion option made an order of court

The Preliminary Inquiry

- Is an informal pre-trial procedure to be attended by the prosecutor, magistrate, child, and ideally by the parent(s), probation officer and legal representative if appointed.
- Identity of child to remain confidential
- Parents and the child may be summonsed to appear and arrested if they fail to do so.
- Informal
- Inquiry magistrate must keep a record of proceedings

The preliminary Inquiry

The Inquiry magistrate must

- Inform the child as to nature of inquiry, alleged offence, child's rights, the procedure to be followed
- Ask if the child acknowledges the offence
- Consider the probation officer's assessment
- Request further information to establish the truth
- Encourage the child's participation

Diversion

- If the inquiry magistrate is satisfied that -
- (a) the child acknowledges responsibility for the offence;
- (b) the child has not been unduly influenced to acknowledge responsibility;

- (c) there is a *prima facie* case against the child;
 - (d) the child and his or her parent, or an appropriate adult, consent to diversion;
- and
- The prosecutor indicates the child can be diverted
- Then a diversion order may be given

The Magistrate may also refer to the Children's Court at this stage if the child appears in need of care.

The Objectives of Diversion are to

- (a) deal with a child outside the formal criminal justice system in appropriate cases;
- (b) encourage the child to be accountable for the harm caused;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into the family and community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;

The Objectives of Diversion are to (Cont)

- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for recidivism; and
- (j) prevent the child from having a criminal record.

Diversion programmes

- Are to be registered
- Accreditation criteria and minimum standards are to be established
- NGO's are recognised diversion programme providers

- A confidential register of diverted children is to be kept

Minimum Standards of Diversion programmes

- (1) Diversion programmes
- (a) must be structured in such a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society;
- (b) must be aimed at minimising the potential for recidivism;
- (c) must promote the dignity and well-being of a child, and the development of his or her sense of self-worth and ability to contribute to society;
- (d) may not be exploitative, harmful or hazardous to a child's physical or mental health;
- (e) must be appropriate to the age and maturity of a child;
- (f) may not interfere with a child's schooling; and
- (g) may not be structured in a manner that excludes certain children due to a lack of resources, financial or otherwise.

Minimum standards for diversion

- Diversion programmes must—
- (a) impart useful skills;
- (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;
- (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;
- (d) be reasonably accessible to the child;_
- (e) be structured in such a way that they are suitable to be used in a variety of circumstances and for a variety of offences; and
- (f) be promoted and developed with the view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups.

Diversion options (other than programmes)

- (a) "a compulsory school attendance order" means an order issued in the prescribed manner requiring a child to attend school every day for a specified period of time, which attendance is to be monitored by a specified person;
- (b) "a family time order" means an order issued in the prescribed manner requiring a child to spend a specified number of hours with his or her family;

- (c) "a good behaviour order" means an order issued in the prescribed manner requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour;

Diversion options (other than programmes)

- (d) "a positive peer association order" means an order issued in the prescribed manner requiring a child to associate with persons who can contribute to the child's positive behaviour;
- (e) "a reporting order" means an order issued in the prescribed manner requiring a child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child's behaviour; and
- (f) "a supervision and guidance order" means an order issued in the prescribed manner placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child's behaviour.

Other diversion options

- Are listed in the Bill
- Are categorised according to the seriousness of the offence
- Under certain circumstances diversion may be considered for rape where the child is under 14year (16?)

Diversion

- Compliance must be monitored
- Non-compliance reported
- Consequences follow

Family Group Conferences

- Are provided for
- Facilitators are provided for
- Participants are to some extent prescribed
- Procedures are determined by the child and family and other participants

- May develop and agree on a plan of action to be followed by the child (and family)

Victim offender mediation

- Is provided for
- To be convened by a probation officer
- Mediated by a probation officer or Diversion service provider

Trial

- Must be in a child justice court (specialised court)
- In camera
- Best interests of the child must be upheld
- Parent or appropriate adult may assist
- Criminal capacity must be established before conviction if child between 10 and 14 years
- A Professional evaluation may be sought

Trial

- Postponements should be minimised
- The court may investigate delays
- Diversion may still occur at this stage of the CJ

Process

Sentencing

- Objectives of sentencing must be considered - accountability, appropriate, proportionate, promote reintegration of the child,
- Ensure any necessary treatment and services
- Follow restorative justice principles
- Prison the last resort
- The impact of the sentence on the victim must be considered
- Pre-sentence reports from probation officers must be requested.

Sentencing

- The compliance with the sentence must be monitored
- Fines are discouraged - have little meaning for the child, often it is a parental punishment!
- Correctional services and community service may be considered.
- Compulsory residence in a corrective facility may be ordered.
- Sentences may be suspended or postponed with conditions.

Imprisonment

- Last resort
- No life sentences for children

Legal representation

- Is provided for
- Must encourage the child's understanding of and participation in proceedings

Other provisions

- One stop Child Justice Centres are provided for
- All professionals involved in service delivery work from the same physical base.
- Various schedules of offences are attached to the Bill - these schedules relate to specific provisions - eg: less serious scheduled crimes (Schedule 1 or 2 crimes) may have the records of conviction expunged after certain periods

• **Thank you !**

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