CENTRE FOR CHILD LAW

CENTRE FOR CHILD LAW SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE CRIMINAL PROCEDURE AMENDMENT BILL [B2-2017]

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Structure of written submissions:

1. Submissions on Criminal Procedure Amendment Bill [B2-2017]]

2. Oral submissions

SUBMISSIONS ON THE CRIMINAL PROCEDURE AMENDMENT BILL [B2-2017]

1. BACKGROUND

The Criminal Procedure Amendment Bill B2-2017 (the Bill) amends the Criminal Procedure Act 51 of 1977 (CPA). The amendments emanate from, *inter alia*, the judgment of the Constitutional Court *in De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21; 2015 (2) SACR 217 (CC); 2015 (9) BCLR 1026 (CC) (*De Vos* judgment).

The amendments arising from the *De Vos* judgment aim to, *inter alia*, provide courts with a wider range of options in respect of orders to be issued in cases of findings that a person accused of committing an offence is not capable of understanding criminal proceedings so as to make a proper defence by reason of mental illness or intellectual disability.

2. THE AMENDMENT BILL

The amendments to section 77(6)(a) give courts the discretion to, in section 77(6)(a)(i), direct that an accused be detained in a psychiatric hospital or temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where beds become available. This is done if the court is of the view that the accused poses a serious danger or threat to themselves or members of the public or property. This order is applicable to accused who have been charged with murder or culpable homicide or rape or compelled rape or a charged with an offence involving serious violence or if the court finds that the accused has committed the act in question or another offence involving serious violence and it is in the public interest to make such order. It also gives the court the discretion to direct that the accused be admitted to and detained in a designated health establishment as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002.

Section 77(6)(ii) has been amended to ensure that the court has the discretion to direct that a person who has committed an offence other than the ones mentioned in subsection (i) or has not committed an offence, be admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary

mental health care user as contemplated in section 37 of the Mental Health Care Act. The court can also order that the accused be released subject to conditions or unconditionally.

3. CENTRE FOR CHILD LAW SUBMISSIONS ON PROPOSED AMENDMENTS

The amendments, though partially complying with the Constitutional Court judgment, are lacking in providing child centred options to presiding officers on how they can ensure that detention is used as a last resort for children. Section 77(6) is noticeably silent on other options available to presiding officers if they are of the view that a child should not be detained a psychiatric hospital designated health establishment. This may create the situation of presiding officers not independently investigating different avenues available to them to ensure that children receive necessary intervention.

The amended provisions need to fully embody the requirement in section 28(1)(g) of the Constitution that provides that every child has the right not to be detained except as a measure of last resort. In this regard the Constitutional Court noted the following of the subsections in section 76(6) of the CPA:

> "…if a child should find himself in a section 77(6)(a)(i) process, then the prescripts of the provision apply. The presiding officer will have no discretion to deal with the child appropriately. Once engaged in a section 77(6)(a) process, the 'trial of the facts' may reveal that the child did nothing at all or may reveal other important information that the presiding officer, under the current circumstances, would be unable to into account. I, therefore, cannot conclude that detention – which must follow – is being used as a last resort as required by section 28(1)(g) of the Constitution. Section 77(6)(a)(i) deprives courts of a discretion to deal appropriately with children who fall within the ambit of the impugned section. Thus, to the extent that section 77(6)(a)(i) applies to children, it is unconstitutional."

> "To the extent that section 77(6)(ii) prescribes that *all* accused persons must be institutionalised, regardless of whether they are likely to inflict harm to themselves, or others and do not require, treatment and rehabilitation in an institution, it is inconsistent with the Constitution and stands to be invalidated."

The amendments need to clearly provide alternatives available to presiding officers on ways in which detention could only be used as a last resort, this includes making use of care and protection system. The Centre submits that the amendments could note, for both subsections, that section 50 of the Child Justice Act 75 of 2008 provides that a magistrate presiding over a preliminary enquiry of a child can refer a matter to a children's court if the magistrate believes that that child concerned is in need of care and protection; the child does not live at his or her family home or in appropriate alternative care; or the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth.

Once a child is referred to a children's court then the Children's Act 38 of 2005 comes into play. Section 150(1) of the Children's Act provides that a child can be found to be in need of care and protection by a children's court if they are found to be in the following circumstances, the child, inter alia—

a. displays behaviour which cannot be controlled by the parent or care-giver;
b. is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
c. lives or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
d. is in a state of physical or mental neglect.

If a child is found to be in need of care and protection an order can be made by a children's court to meet their particular needs, including, inter alia, placement in a child and youth care centre that runs programmes necessary to meet the particular needs of the child; provision of appropriate treatment or attendance if the child is found to be in need of medical, psychological or other treatment or attendance.[1]

If however a social worker investigating the child's circumstances or a children's court finds that a child is not in need of care and protection other measures to assist the child can be taken which include prevention and early intervention services. Section 144 of the Children's Act provides that prevention and early intervention programmes must focus on, inter alia, providing psychological, rehabilitation and therapeutic programmes for children; preventing the neglect, exploitation, abuse or inadequate

[1] Section 156(1) of the Children's Act 38 of 2005.

supervision of children and preventing other failures on the family environment to meet children's needs; preventing the recurrence of problems in the family environment that may harm the child or adversely affect their development; and diverting children away from the child and youth care system and the criminal justice system.

This opens the way for children that come into the ambit of section 77(6) of the CPA to be exposed to an array of services that are aimed at meeting their individual needs and diverting them away from detention unless necessary as a last resort.

ORAL SUBMISSIONS

The Centre will not be making a request to make oral submissions. The Centre is however available to provide more information if necessary.