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SUBMISSION ON THE CHILD JUSTICE BILL

TO: THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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PLEASE NOTE THAT THE CHILD JUSTICE ALLIANCE WISHES TO MAKE AN ORAL SUBMISSION AND ADDRESS THE PORTFOLIO COMMITTEE AT ANY PUBLIC HEARINGS THAT MAY OCCUR ON 5 FEBRUARY 2008 OR ANY OTHER TIME SPECIFIED, AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO.

This submission is structured as follows: it deals with each chapter and part of the Bill in two ways – first a general comment on the chapter and then specific, technical comments on the drafting and content of that chapter or part of the Bill, with recommendations on particular clauses contained in the Bill.

[1] The Child Justice Alliance is a voluntary organisation of over 460 members and friends who consist of organisations, NGOs, CBOs and individuals.

A. Introduction

The South African Constitution,[2] in section 28, provides specific rights for children in addition to the range of general rights that they enjoy under the provisions of the Bill of Rights.

In particular section 28(2) provides that, "A child's best interests are of paramount importance in every matter concerning the child." This provision naturally includes children who come into conflict with the law. It indicates that the interests of the individual child are of overarching importance in any decision made, and therefore this should be one of the chief, if not the, guiding principle in dealing with children who are accused of or who have committed offences.

In addition, section 28(1)(g) deals specifically with children accused of committing an offence and, apart from confirming the application of sections 12 and 35 of the Constitution, the section lays down the principle that children should only be detained as a measure of last resort and for the shortest appropriate period of time. Furthermore, the section also ensures that children who are detained, must be held separately from persons over the age of 18 years and must be treated in a manner and kept in conditions that take account of the child's age.

Therefore the Constitution clearly intends to afford special protections for children who come into contact with the criminal justice system.

In addition to the applicable Constitutional provisions, South Africa has ratified both the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. Both documents have specific articles dealing with child justice – articles 37 and 40 of the CRC and article 17 of the Charter. The latter provision is, however, not as extensive as the provisions found in the CRC. South Africa has, therefore, assumed an obligation to ensure that its domestic laws are compliant with the provisions contained in the international and regional treaties.

These are the three main sources that have informed the process around ensuring that South Africa develops a separate child justice system. There are other international documents that have particular relevance such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Riyadh Rules)[3] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[4]. The advent of the Child Justice Bill goes a long way to provide for a criminal justice process specific to the needs and situation of children who are in conflict with the law so as to avoid their being treated and dealt with inappropriate to their age.

B. Child Justice in South Africa

It has been contended that the child justice movement in South Africa emerged in the early 1990s and was focused on a number of issues, with the detention of children and the need for law reform

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[2] Act 108 of 1996

[3] General Assembly Resolution 45/113 of 14 December 1990

[4] U.N. Doc. A/40/53

being the two most prominent and inter-linked.[5] Key child rights academics have observed that the law reform process was initiated by non-governmental organisations in the early 1990's through their launching advocacy campaigns to focus attention on children who were being detained for allegedly committing ordinary criminal offences (rather than for offences that were political in nature and linked to the struggle against apartheid, as was previously the case). [6] Most of the attention had been previously concentrated on children who were political detainees, possibly at the expense of children, who were arrested, detained and dealt with in the adult criminal justice system on account of being charged with offences such as theft. Nevertheless, the demise of apartheid ushered in heightened awareness for the plight of all child detainees.

Apart from the law reform process to be discussed shortly, the child justice movement has also created a platform, in the absence of a legally separate criminal justice system for children, for a range of child justice related issues to emerge and develop within the field of criminal justice.

This was initiated in part by certain developments that were occurring in South Africa on a policy level, in particular the establishment of the Inter-Ministerial Committee on Youth at Risk (IMC), which was established in 1995 to deal with the situation of children in custody in prison but which set itself the goal of the development of proposals for the transformation of the entire child and youth care system for 'at risk' children.[7]

Preceding the appointment of the IMC a crisis had ensued in the child justice system. In 1994 an amendment to section 29 of the Correctional Services Act 8 of 1959 had put a blanket ban on pre-trial detention in prison of any person under 18 years. Apart from a few limited concessions, this first amendment was intended to prohibit pre-trial detention in prison of all children under the age of eighteen years, irrespective of the offence with which the child had been charged or prior criminal history. More humane welfare institutions such as places of safety were therefore envisaged for children who required secure care whilst awaiting trial. After the amendment was promulgated in 1995, subsequent chaos ensued due to the sudden promulgation of this amendment coupled with lack of planning and provisioning. Approximately 800 children were released into the society for a lack of adequate places of safety and other alternatives and because of the unpreparedness of staff at welfare institutions. A few children who had committed serious and violent crimes took advantage of this chaotic situation and there ensued a cycle of arrests (second and further arrests) and release without the completion of the resulting criminal proceedings. The government was forced to backtrack in light of these developments against a fervent public backlash. This led to a second amendment to the Correctional Services Act in 1996, which remains applicable to this day (having been left untouched by the new Correctional Services Act (1998)). This second amendment provided for limited circumstances when children over 14 years of age, but under 18

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[5] Sloth-Nielsen, J, 'The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day?' *Quinnipiac Law Review,* Vol. 18, No. 3, 1999, p 470.

[6] These campaigns included the 'Release a Child for Christmas Campaign' and the' No Child Should Be Caged' campaign as well as the efforts of the Community Law Centre, which contracted university students to intervene informally in the criminal courts and provide assistance to arrested children, in the form of trying to secure their release from custody awaiting trial. See generally Sloth-Nielsen, p 470-471, note 1 above, and Skelton A, 'The South African Child Justice Bill: Transition as Opportunity', in Jensen E and Jepson J (eds), *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems*, Hart Publishing: Oxford, 2006 p 65 – 82.

[7] See generally, Sloth-Nielsen J, *The Role of International law in Juvenile Justice Reform in South Africa*, unpublished LLD dissertation, University of the Western Cape, 2001, p174 and 189.

years can be detained in prisons while awaiting trial. It also resulted in the IMC being established to investigate the situation of children in detention. The second amendment resulted in the gradual diminishing of numbers of children awaiting trial detained in places of safety in South Africa and a considerable increase, between 19996 and 2001, in the number of these children detained in prisons. However it appears that the trend was reversed as in 2006, it was shown that the number of children awaiting trial in prison had decreased by more than half from 2 764 to 1238 on 31 December 2005.[8]

The work of the IMC was a significant factor in the development of law reform to deal with children in trouble with the law in that it measurably and substantially contributed to the incorporation of assessment, diversion, secure care and probation in the theory, practice, policy and fiscal planning of child justice.[9] Sloth-Nielsen describes the work of the IMC resulting in child justice practice being deeply enriched through a more multi-modal and diverse range of service delivery interventions.[10]

Recognising these international obligations and constitutional obligations, as well as following on developments such as the appointment and ensuing work of the IMC on youth at risk, in 1996 the then Minister of Justice, Dullah Omar, appointed a project committee of the South African Law Reform Commission (SALRC) to investigate juvenile justice.

C. Background to the Child Justice Bill

The Report on Juvenile Justice and the draft Child Justice Bill, released by the South African Law Reform Commission on 8 August 2000, heralded a significant and definitive moment in the process of reforming laws that apply to children who have come into conflict with the law. The date on which the Report and draft Bill were made publicly available, also marks the end of a structured process of consultation that took place over the period 1996 - 2000. The reform process undertaken by the South African Law Reform Commission commenced with the appointment by the Minister of Justice, in 1996, of a project committee on juvenile justice. The project committee on juvenile justice was tasked with investigating proposals for law reform relating to this subject.

At the time of the appointment of the project committee and still today, there exists NO dedicated legislation addressing children that come into conflict with the law. The various departments, policies, and laws that currently guide the way in which child offenders are handled is problematic and incoherent, and often causes serious violations of the basic children's rights.

The law reform process commenced with the preparation and publication of an Issue Paper, which was released by the South Africa Law Commission in May 1997. The Issue Paper contained very broadly framed questions in regard to which respondents were invited to provide comment.

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[8] Dissel A, 'Children in detention pending trial and sentence', in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 113 – 121.

[9] Sloth-Nielsen J, '"A short history of time": Charting the contribution of social development delivery to enhance child justice 1996 – 2006', in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 17 – 27.

[10] Sloth Nielsen, p 27, note 5 above.

Following upon the release of the Issue Paper, the Commission embarked on an intensive process of consultation. A video was commissioned and used as the basis for introducing the issues relevant to juvenile justice reform. Not only were 13 workshops and briefings convened, but the project committee also prepared a simplified questionnaire that was widely distributed. The aim was to canvass a wide range of views. In November 1997, the Commission hosted what has been described as a 'well attended and vibrant' international drafting conference to debate in detail the content of the Issue Paper prior to the formulation of a Discussion Paper.

The proposals contained and developed in the Discussion Paper incorporated the responses obtained and issues raised in the consultative process of the Issue Paper, as well as the recommendations of the international drafting conference. The Discussion Paper provided concrete proposals in the form of draft legislation, which included thorough motivation for the policy options that were selected, and was submitted for further public debate. The Discussion Paper was a far more extensive document, not only reviewing in detail the existing law, the available literature, and comparative law, but also providing comprehensive motivation for the content of the draft Child Justice Bill.

The Discussion Paper on Juvenile Justice was released by the Commission in December 1998, and thereafter subjected to intensive public consultation. In contrast to the first phase of consultation that followed the release of the Issue Paper, the second phase was characterised by specific focus group workshops, rather than general regional workshops. Thus, State Departments that would bear responsibility for the implementation of new legislation were consulted, a briefing was held with representatives of non-governmental organisations, with persons concerned with the provision of legal aid, and with members of various Parliamentary Portfolio Committees. The Report recorded that 12 workshops in all were held. Further, a dedicated two-day conference to examine social, political and anthropological factors influencing the setting of a minimum age of criminal capacity was co-hosted by the Centre for Child Law at the University of Pretoria and the project committee. A consultation process with children (mainly children who had had some contact with the criminal justice system) was commissioned to elicit children's views on the proposals contained in the Discussion Paper. Finally, a large number of written comments on the Discussion Paper were received from various academics, practitioners and institutions.

The responses and views expressed at workshops and in written comments were then taken into account in the preparation of the final Report, which provided detailed arguments concerning the content of the law reform proposals, and also contained the fully developed Child Justice Bill. The Commission's handing over of the Report to the Minister of Justice marked the end of the Commission's formal involvement in the law reform process. The three-stage process described above spanned a period of nearly four years from the date of appointment of the project committee.

Another important and unique aspect of the drafting process was a study undertaken to analyse the financial feasibility of the proposed legislation. The Applied Fiscal Research Centre (AFReC) of the University of Cape Town published a research monograph detailing the costing implications of the implementation of the draft Child Justice Bill. This research has played an important role in ensuring that the legislative proposals are workable within the existing resource allocation. The draft Child Justice Bill of the South African Law Reform Commission was thus the end-product of an extensive process of consultation, research and development, involving a broad cross section of South African interest groups, role-players, and stakeholders.

After spending two years with the Department of Justice, during which time intensive work was done in preparing for implementation of the Bill, and a second costing undertaken, in 2002 the Child Justice Bill was introduced into Parliament as Bill 49 of 2002.

The Child Justice Bill, while retaining most features of our present criminal justice process, introduces a number of new concepts and procedures, some of which are used presently in practice but are not provided for in legislation. On account of the fact that practice in the child justice system at present is not mirrored by legislation, uncertainty and inconsistency are constant dangers that need to be addressed by clear legislative norms.

In 2002/2003 the Child Justice Alliance made written and oral submissions on the Child Justice Bill 49 of 2002 as introduced to Parliament in 2002. This submission, whilst also addressing Bill 49 of 2002, will make specific reference to the 2007 Cabinet version of the Child Justice Bill as it differs significantly from the original 2002 version. Therefore this submission will refer to both the 2002 version of the Child Justice Bill and the 2007 Cabinet version of the Child Justice Bill (as the circumstances determine).

D. Overarching concerns

There are two main concerns regarding the 2007 version of the Child Justice Bill. The first relates to the manner in which the Bill is drafted, and the Alliance submits that the Bill is in dire need of simplification. The second relates to the issue of bifurcation and how the services and interventions contained in the Bill are now not accessible for all children, only certain children.

1.Simplification

At the outset, it is submitted that this Bill affects a range of stakeholders that are not necessarily legally trained and it is important that the Bill be clear and understandable to persons not used to reading formally written legislation. As it stands the 2007 version of the Bill is extremely difficult to read. It is cumbersome, confusing and too legalistic. If the spirit of the legislation is such that it is intended to be inter-disciplinary and accessible to parents and children alike, the drafting fails in this intention.

The Child Justice Alliance submits that the Bill needs a complete redraft in order to ensure that it is easy to read and clear. Complicated legislation leads to bad interpretation and wrong application of the law. Legal certainty is a goal which should be striven for with all legislation, but particularly legislation that should be accessible to children.

We wish to highlight some particular examples of how convoluted the Bill is at present:

63.	(1)	*(a)*	Any child –
(i)	who is charged with an offence referred to in Part I of Schedule 3 or an offence referred to in items 2, 5 or 6 of Part II of Schedule 3; or		

(ii)	whose matter has not been diverted in terms of Chapter 6 and 7, and who has been dealt with in terms of section 50(3)*(b)* or *(c)*,
must appear before a court with the requisite jurisdiction for plea and trial.	
68	(1) (v) the offence in question is not an offence referred to in item 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13*(a)*, 13*(b)*, but excluding possession of only a firearm, or 14 of Part I of Schedule 3, or an offence referred to in item 2, 5 or 6 of Part II of Schedule 3, or any conspiracy, incitement or attempt to commit any of these offences listed here.

It would be much easier just to state what is meant in those sections instead of complicated cross-referencing.

We would ask the Portfolio Committee to read these two sub-sections in context and see if it is clear what is meant – we submit it is not. These are not the only examples and we urge the Committee to require a complete overhaul of the Bill to make it more understandable.

2. Bifurcation

The 2007 Child Justice Bill now displays a division or split approach to children. Originally, the South African Law Reform Commission version and the 2002 version of Bill 49 of 2002 applied to all children equally giving them access to all the services and procedures contained in the Bill, particularly assessment, the preliminary inquiry and the possibility of diversion. This approach recognised the value of these services in determining the best possible outcome for all children in changing their offending behaviour, allowing them to lead a crime free life in future and enhancing public safety.

However, the Bill now excludes certain children based on their age or offence category from these processes which have discernable outcomes not only benefiting the children but society as well.

Already in the summary of the Bill there is reference made to diverting children who commit “less serious offences”; the diversion of “certain children” from formal criminal court processes and the assessment of “certain children”. This is repeated in the Preamble to the Bill when the purpose of the Bill is outlined.

The Child Justice Alliance submits that it was never the intention of the South African Law Commission nor the South African government, when the Bill was originally introduced into Parliament, to exclude certain children based on age and offence from the application of the processes and procedures of the Bill. These addition are now contained in the 2007 Cabinet version of the Bill and we submit that this marks a significant change in policy - away from ensuring that ALL children are afforded procedural protections in the criminal justice system, to a situation when only a select few are entitled to a different procedural regime. In fact, we would argue that the exclusion of certain children from these processes and procedures places them in a more prejudicial position not only to other children but also to certain adults who appear in criminal courts, for example in relation to legal representation (16 and 17 year olds are excluded from legal representation at state expense whereas adults are not) and sentencing (a maximum tariff of 25

years imprisonment has been set for certain children whereas this appears nowhere else in our law and is not applicable for adults).

It is our submission that not only will this bifurcation not achieve the aims and objectives of the Bill but is in fact discriminatory based on age and in certain respects unconstitutional. We will refer to specific examples during the course of submission.

D. The Child Justice Bill 49 of 2002 (2007 version)

The submission will now proceed to comment on certain aspects of the Child Justice Bill (2007 Cabinet version) in general:

1. Definition section

"an appropriate adult" – the 2007 Cabinet version is very limited in scope and possibly excludes a worker at a street children's shelter or drop in facility from appearing for the child with the words "and has a prior relationship of responsibility towards the child", which in itself in a very vague phrase. We propose that the definition deletes reference to the phrase "and has a prior relationship of responsibility towards the child".

"assessment" – it is submitted that an assessment should not just be conducted by a probation officer as broadening the scope of persons who could undertake the assessment will alleviate the pressure on the Department of Social Development to make sufficient probation officers available to undertake assessments. We therefore submit the definition should also include 'other suitably qualified persons as prescribed'. These could include retired educators, persons with psychology (honours) qualifications etc. In addition the definition should provide some insight into the assessment process. Therefore we propose the definition reads as follows: "assessment" means a process of evaluation, by a probation officer or a suitably qualified person, of a child; the child's development and competencies; the child's home or family circumstances; the nature and circumstances surrounding the alleged commission of an offence by the child and its impact upon the victim; the intention of the child to acknowledge responsibility for the alleged offence, and any other relevant circumstance or factors.

"children's court" – the reference to the Child Care Act 74 of 1983 fails to take cognisance of the fact that the Children's Act 38 of 2005 provides a new definition (although not promulgated yet).

"detention" – The Children's Act 2005 no longer makes reference to a place of safety or secure care facility, but rather a child and youth care centre, which is defined in section 191 (1) of the Children's Amendment Bill 19F of 2006 (which has been passed by parliament) as 'a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the children in the facility but excludes (a) a partial care facility; (b) a drop-in centre; (c) a boarding school; (d) a school hostel or other residential facility attached to a school; (e) a prison; or (f) any other establishment which is maintained mainly for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training.'

"place of safety" – in terms of section 196 (1)(b) of the Children's Amendment Bill 19F of 2006 a place of safety is now a child and youth care centre.

"placement facility" - we submit the definition of child and youth care centre is now the most appropriate and that this definition should be removed.

"residential facility" – this definition seems to have been superceded by the definition of child and youth care centre as set out in section 191 (1) and 196(1) of the Children's Amendment Bill 19F of 2006.

"restorative justice" - the Alliance refers to the submission made by the Restorative Justice Centre and submits that the following definition be included in the Bill to define the concept of restorative justice. "Restorative justice is an approach to justice that seeks to involve, to the extent possible, those who have an interest in a specific offence (particularly victims, communities, the child offender and such child's family members) and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible. This involves encouraging the acceptance of responsibility, making restitution, taking steps to prevent a recurrence of the incident and promoting reconciliation."

"secure care facility" – in terms of section 196 (1) (c) of the Children's Amendment Bill 19F of 2006 a secure care facility is now a child and youth care centre.

2. Chapter 1: Objects of Act and general principles

2.1 Objectives

It is submitted that the objectives set out herein serve an important function in that they provide the context in which the Bill as a whole must be read and interpreted. A balance is created between protecting the accused child's rights as a child and an individual on one hand, and ensuring that the human rights and fundamental freedoms of the community are respected by children in trouble with the law on the other. It must be borne in mind that the Bill does not merely confer rights on accused and convicted children, but it also aims to hold them accountable for their actions to the victims, the families of the child and victims and the community as a whole. Consequently, the concept of restorative justice is explicitly included as an objective. The Child Justice Alliance supports these objectives in accordance with which the Bill must interpreted.

Of particular importance is the reference to co-operation between all government departments and other organisations and agencies. The present Criminal Procedure Act 1977 does not promote co-operation and the trend has been for the various role-players to perform their tasks and functions in isolation and also without much interaction with outside organisations and agencies. It is necessary that a holistic approach be fostered and inter-departmental co-operation will ensure such an approach.

2.2 General Principles

The general principles of the Bill include the important concepts of participation and proportionality and that children should be treated in a manner appropriate to their age and intellectual development. In addition, the principles also recognise the need for children's cases to be conducted as speedily as possible.

Clause 3

However, the 2007 Cabinet version of the Bill is significantly different from the 2002 version in various aspects and these differences detract from its overall objective to protect the rights of children as stated in clause 2 (a).

The main differences which raise concern are as follows:

- Clause 3 of the 2002 version made it mandatory for courts to apply the general principles listed while clause 3 of the 2007 Cabinet version make it discretionary to apply the principles. It is argued that general principles as contained in legislation guide the application of the legislation and create the overall framework and 'vision' of the legislation. To make these principles discretionary means that the 'core' principles of the Bill can be dispensed with or disregarded and it is submitted that this would not be the intention of the legislature in drafting such legislation.
- The 2007 Cabinet version has omitted to include clause 3(1)(e) of the 2002 version which deals with the child's right to remain in contact with his or her family and have access to social services. Section 28(1)(c) of the Constitution guarantees social services for children. This law should not do less.
- The 2007 Cabinet version has omitted certain aspects of clause 3(1)(g) of the 2002 version of the Bill, in dealing with the issue of proportionality in clause 3(1)(a). More specifically, it fails to provide that (in addition to the principle of proportionality) the interests of society, the circumstances of the child and the principle that a child should not be treated more severely than an adult in the same circumstances must apply. It is submitted these are key considerations in addressing the consequences arising from the commission of the offence.
- The 2007 Cabinet version of the Bill failed to include clause 3(2) of the 2002 version as a general principle. Although the 2007 version deals with clause 3(2)(a) of the 2002 version in clause 21 (a) (i) and (ii) and clause 24; and clause 3(2)(b) of the 2002 version in clause 21(b) , it is submitted that these be contained in the general principle section in a comprehensive manner as opposed to the ad hoc and disparate manner in which it is now done. Clause 3(2) of the 2002 version sets out overarching principles which at the very outset indicate the approach of the legislation to detention of children. Although the different sections of the Bill deal with detention, because it is such a restriction on a child's liberty, it should guide the whole application of the legislation.

THEREFORE THE CHILD JUSTICE ALLIANCE SUBMITS THAT CLAUSE 3 SHOULD READ AS FOLLOWS:[11]

[11] The changes proposed to clause 3 appear in bold.

3. In the application of this Act, the following guiding principles must be considered:

(a) All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances.

(b) Every child must, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal proceedings contemplated in this Act where decisions affecting him or her might be taken.

(c) Every child must be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.

(d) Every child must be treated in a manner which takes into account his or her cultural values and beliefs.

(e) All procedures in terms of this Act must be conducted and completed as speedily as possible.

(f) Parents and appropriate adults must be able to assist children in proceedings contemplated in this Act and, wherever possible, to participate in decisions affecting them.

(g) As far as is practicable and possible, all children, notwithstanding their background, must be subject to the same processes, procedures and mechanisms and have access to the same services or options contemplated in this Act when having committed similar offences.

(h) Every child has the right to maintain contact with his or her family, and to have access to social services.

(2) Any police official, Director of Public Prosecutions, prosecutor designated thereto by the Director, inquiry magistrate or officer presiding in a child justice court must consider the following principles when making any decision regarding the release of a child from detention:

(a) Preference must be given to the release of a child into the care of his or her parent or an appropriate adult, with or without the imposition of any conditions;

(b) if the release of the child into the care of his or her parent or an appropriate adult is not feasible, the release of the child on bail must be considered;

(c) if the child must be detained as a measure of last resort, the least restrictive form of detention appropriate to the child and the offence must be selected.

3. Chapter 2: Application, criminal capacity and matters related to age

3.1 Part 1: Application

The application of the Bill in clause 4(1) to persons accused of committing crimes under the age of 18 years is consistent with our present criminal justice system, the Constitution, the CRC and the Charter.

Clause 5

Clause 5 requires that the manner in which a child should be dealt with is determined according to the seriousness of the offence according to the schedules of offences attached to the Bill. We submit that this is the incorrect approach as the manner in which a child should be treated should be determined by more than just having regard to the offence allegedly committed, but should have regard to the individual circumstances of the child as well as the nature of the offence allegedly committed. The present formulation of the clause does not take the best interest of the child principle into account as contained in section 28 (2) of the Constitution nor does it take the requirement that the individuality of the child be taken into account as required by Article 40 (1) of the CRC[12] and Article 17(1) of the ACRWC.[13]

WE THEREFORE PROPOSE THAT CLAUSE 5 SHOULD BE REMOVED.

3.2 Part 2: Children below 10 years of age

Clause 6

Clause 6(2) has a typographical error. It should read as follows:

> (2) The common law pertaining to the criminal capacity of children below 10 years is hereby amended to the extent set out in this section.

Clause 7

Clause 7(2), (3), (4), (6) and (7) refers to assessment by a probation officer, we submit this should read as as including "a probation officer or any other suitably qualified person".

3.3 Part 3: Children aged 10 years or older but below 14 years

Clause 9(1)(a)

Clause 9(1)(a) of the Bill raises the age of criminal capacity to 10 years of age and therefore repeals the common law age of 7 years. The difficulty in setting a minimum age of criminal capacity is that neither the CRC nor the Beijing Rules specify a particular minimum age of criminal capacity. However, the UN Committee on the Rights of the Child has constantly criticized countries that have fixed their minimum age of criminal capacity at less than 10 years of age[14] and has recently released a General Comment that recommends that the minimum age of criminal capacity be set

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[12] "States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

[13] "Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others".

[14] Sloth-Nielsen, J. *The Role of International Law in Juvenile Justice in South Africa*, unpublished doctoral thesis, UWC, 2001, p. 122

at 12 years.[15] The Law Commission's proposals[16] that the age be raised to 10 was based on a number of motivating factors, which included the respondents to the consultative process agreeing to the change[17] as well as the recognition that scientific evidence on child development advocated the age being raised.[18] The Child Justice Alliance supports that the age of criminal capacity be raised to 10 years.

The Bill also retains the common law presumption, by making it a statutory provision, relating to criminal capacity for children aged between 10 and 14, namely that such a child is rebuttably presumed not to have had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation. This ensures there is flexibility and protection for children aged between 10 and 13 on account of the fact that children differ according to maturity and emotional and intellectual understanding during those developmental years.

Clause 9(1)(b)

Firstly, this section does not actually deal with criminal capacity of a child but rather the prosecutor's decision to prosecute or divert. Therefore it is somewhat misleading to have in a section dealing with criminal capacity. We propose that clause 9(1)(b) be sepearated from clause 9 (1) (a) and placed inder a heading which reads: Decision to divert or prosecute a child aged 10 or older but under the age of 14 years.

Clause 10

We submit that there have been longstanding problems with the application of the common law presumption to establish criminal capacity (which is retained in clause 9 and 10),[19] such as only the first part of the test[20] being applied and the practical application of the test in court. For example, a study of the attitudes and perceptions of magistrates in 8 of the Western Cape Peninsula magisterial areas was undertaken during 1995 to 1999 and the question of criminal capacity was addressed.[21] The study found that where an accused is below the age of 14 years a great effort is made to try arrange diversion and where there was any doubt as to the child's criminal capacity, the magistrates saw this as an opportunity for charges to be withdrawn.[22] However, where criminal capacity was an issue, it again became apparent that the test for criminal capacity was being incorrectly applied, as the establishment of knowledge of the difference between right and wrong seemed to suffice for capacity to be proven, without any inquiry being made into whether the child could act in accordance with his or her appreciation of the wrongfulness of his or her actions.[23]

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[15] United Nations Committee on the Rights of the Child General Comment No. 10 (2007) Children's Rights in Juvenile Justice.
[16] Project 106, July 2000
[17] Report par 3.16
[18] Report par 3.29-30
[19] Sloth-Nielsen, op cit, p. 131 - 134
[20] The test has two parts: (i) whether the child understands the difference between right and wrong and (ii) whether the child was able to act in accordance with that knowledge at the time and in the circumstances of the offence.
[21] Sloth-Nielsen, J. and Mayer, V. *Children and criminal accountability: An analysis of judicial perceptions* 1999
[22] ibid, p. 13
[23] ibid, p. 14

Therefore it is of the utmost importance that the establishment of criminal capacity be undertaken carefully and comprehensively by appropriate professionals.

We therefore have serious concerns regarding the content of clause 10 (2). The South African Law Reform Commission proposals as well as clause 56 of the 2002 version of Bill 49 of 2002 provided that the prosecution or the child's legal representative can request that a child be evaluated by a suitably qualified person, at State expense, to determine the question of criminal capacity. The Child Justice Alliance supports this idea in that it is submitted that these are important provisions as they ensure that the prosecution properly applies its mind to the prosecution of children between 10 and 13 years and thereby avoids indiscriminate prosecution as well as ensuring that the question of criminal capacity can be determined with appropriate evaluation of the child where necessary.

However, clause 10 now provides that the evaluation of criminal capacity must be based on the assessment report of the probation officer and that the child justice court may order an evaluation of the child by a suitably qualified person on application but NO reference is made to this being done at state expense.

Firstly we submit that the assessment of a child within the first 48 hours of arrest is NOT the appropriate mechanism to determine criminal capacity. Secondly we submit that a probation officer is NOT suitably trained to make a determination of a child's criminal capacity. The Child Justice Alliance objects to the age and criminal capacity of a child being determined based on the recommendations of a probation officer flowing from the assessment of a child during the first 48 hours after arrest.

We are of the opinion that an evaluation of criminal capacity must be undertaken by a appropriately qualified professional and that it should be at state expense on application by the prosecutor or legal representative of the child.

Therefore we propose that clause 10(2) – (5) be removed and replaced with clause 56 (2) – (5) of the 2002 version which reads as follows:

(2) The prosecutor or the child's legal representative may request the child justice court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.
(3) If an order has been made by the child justice court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice court with a written report of the evaluation within 30 days of the date of the order.
(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.
(5) The person who conducts the evaluation may be called to attend the child justice court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 191 of the Criminal Procedure Act.

In light of the above, it is submitted that the time is ripe for the common law relating to criminal capacity of children to be revised and that more stringent controls be introduced in order to ensure

that the legal theory, that is so important especially when dealing with children in this instance, is applied correctly and fairly. The Child Justice Alliance is therefore in support of this idea.

3.4 Part 4: Referral of matters

Clause 11

Clause 11 is a wholly new insertion into the Child Justice Bill. The effect is to manage children who come into conflict with the law based on their age and type of offence committed. So for example, in terms of clause 11 (c), if a child charged with a Schedule 1 offence (and not diverted in terms of Chapter 6) or a schedule 2 offence, the child must appear in a preliminary inquiry. However, in terms of clause 11 (e) if a child is charged with a Part 1 Schedule 3 offence, he or she must be brought before a child justice court for trial– therefore effectively excluding the child from the preliminary inquiry based ONLY on age or offence committed.

What is even more concerning is that in terms of clause 11(c) and (e) a child under 14 years who commits murder (Part 1 Schedule 3) is excluded from the preliminary inquiry and must go straight to the child justice court – BUT is nevertheless assessed in terms of clause 35(d). The purpose of the preliminary inquiry is to make decisions regarding the management of the child in the criminal justice system based on the assessment. BUT in respect of this child there is now no forum at which the probation officer's recommendations can be dealt with. This does not mean we suggest the assessment for this child should be done away with. To the contrary we believe the assessment is crucial to support accurate and effective decision making and that this decision making should occur at the preliminary inquiry. We therefore submit that this child should not be excluded from the preliminary inquiry as clause 11 and clause 44 effectively do.

The preliminary inquiry will be dealt with later in this submission however, the purpose of the inquiry is to make a range of decisions about the child which include an assessment of the child's age; whether the child is a child in need of care; the possible release or placement of a child awaiting trial and the potential diversion of the matter. These are crucial decisions regarding the management of the child and merely because a child is charged with a particular offence (which does not mean he is guilty or that he has been charged with the correct offence) should not exclude him from the decision making process envisaged by the preliminary inquiry.

We take this opportunity to refer the Committee to the submission of the Centre for Child Law at the University of Pretoria which specifically deals with this issue in greater detail.

The Child Justice Alliance submits that clause 11 should be removed from the Child Justice Bill and that all processes and procedures in the Bill are applicable to ALL children who fall within the scope of the legislation (i.e. 10 years of age or older) irrespective of age or offence category with which they are charged.

3.5 Part 5: Age estimation, determination and error

Clause 13

Clause 13(2)(a) makes reference to the Child Care Act 74 of 1983 and the Alliance would draw the Committee's attention to the fact that this Act will be replaced by the Children's Act 38 of 2005 once promulgated, probably in the first half of this year.

Clause 16

A reading of clause 16 indicates the complexity and illogical consequences that flow from treating children in a particular manner based on their age and offence committed. The consequences of excluding children from diversion and the preliminary inquiry are clearly evident, for example, from clause 16 (2)(a)(ii). A child who has been found suitable for a diversion programme and who may be complying with and benefiting from such order could now be subject to that order being vacated and having to stand trial in court purely because he is 14 years and not 13 years of age.

Again if one has regard to section 16(3)(c) – a reading of this section seems to indicate that if a child's age has been incorrectly set as over 14 years and he is found to be older than 10 years or younger than 14 years he must proceed to trial! This does not allow for the diversion of the child which is central to the Bill and clearly allowed in terms of Chapter 7. The Alliance submits that Clause 16 is a prime example of how complex and unnecessarily over-restrictive this Bill has become and a s a result a myriad of drafting errors have occurred which actually makes it quite difficult to fathom what the legislature is intending with respect to all the different types of children who come into conflict with the law.

A typographical error exists in clause 16(2)(a)(ii) – it should read:

"(ii) the diversion order in terms of section 57 relates to the offence of rape or compelled rape as contemplated in item 4*(b)* of Part I of Schedule 3 and the child is found to have been 14 years or older, but below the age of 18 years at the time of the commission of the alleged offence, in which case the presiding officer must refer the matter to the child justice court to proceed with trial in terms of Chapter 8;"

Another error exist in clause 16(4)(c) as the reference should be to children 14 years or older but below 18 years (children older than 10 years but younger than 14 years were dealt with in clause 16(4)(b)).

In Clause 16 (6) another typographical error occurs and it should read:

"(6) A person who estimates or determines the age of a child or who acts on the strength of such estimation or determination in terms of this Act is not liable for any prejudice suffered by such child as a result of such estimation, determination or act performed or omitted in good faith".

The Alliance submits that the lengthy and complicated provisions of clause 16 can be avoided by allowing all children access to the processes and procedures contained in the Bill and not excluding them on the basis of age and offence committed. Certain provisions on error as to age may need to be retained, but the clause could be much simpler.

4. Chapter 3: Arrest, summons and warning of a child

Clause 18

The Alliance submits that clause 18(1)(b) should be removed as it is superfluous and clause 18(1)(a) should suffice – where an offence is in the process of being committed, it is argued that this would constitute compelling reasons justifying an arrest.

The Alliance also submits that Clause 18(3)(d) as it is currently drafted waters down the responsibility of the police. The phrase "where circumstances permit" is too vague and will allow police to shirk responsibility to ensure that parents or guardians are notified of a child's arrest – something that is of vital importance. We submit the clause should read:

(d) notify the child's parent or an appropriate adult of the arrest.

5 Chapter 4: Release or detention and placement of child prior to sentence

This Chapter also illustrates the overarching problem of excluding certain children (based on offence alleged to have been committed) from mandatory assessment and attendance at the preliminary inquiry as set out in clause 35 and 44 respectively. We use the following example:

> A 15 year old child charged with murder in terms of Part 1 of Schedule 3 is arrested by the police and detained by them. He is not assessed in terms of clause 35 and does not appear before a preliminary inquiry in terms of clause 44, because these clauses do not require these procedures to be applied to such a child. He goes straight to an appearance in a child justice court after the expiration of 48 hours following his arrest. The child justice court must then make a decision to release or detain him further. As he is charged with a Part 1 of Schedule 3 offence he is excluded from being held in a placement facility (even though at present such children can be detained in such facilities!) therefore the only options are release or detention in a prison. The Constitution requires that detention is a matter of last resort and for the shortest period of time and therefore the presiding officer must ensure that such detention in a prison is absolutely necessary. BUT he has no information before him on which to base his decision because the child has not been assessed because the Bill did not make provision for it! Clause 30(3) helpfully lists the factors that the court must take into account before making the decision, BUT the court will have no information on which to assess those factors because there was no assessment report (despite clause 30(3) referring to a probation officer's assessment, which is wrong because under the present construction of the Bill there will not be one for such a child)!

The Child Justice Alliance therefore submits that this is another example of why it is necessary for all children to be assessed and to appear at the preliminary inquiry. These two procedures have great value to assist the court in making accurate and informed decisions on a range of matters including release, detention and placement; age assessment and not just diversion.

5.1 Part 1: Release or detention

Clause 25 (1)

There is a typographical error and the clause should read:

(1) An application for the release of a child, referred to in section 21*(b)*, on bail, must be considered in two stages as set out in subsection (2) and, where necessary, subsection (3).

5.2 Part 2: Placement

At the outset, The Child Justice Alliance wishes to strongly object to three particular provisions in this Part of Chapter 4.

Firstly, clause 27 (b) provides for the mandatory placement of any child charged with an offence listed in Part I or Part II of Schedule 3 (including a child 10 years or older but younger than 14 years) in prison before a first appearance. Clause 30(2), while not mandatory, then allows for children aged below 14 years charged with certain offences to be held in prison awaiting trial. This is a retrogressive step as our present law in section 29 of the Correctional Services Act of 1959 forbids all children aged below 14 years to be held in prison awaiting trial, and this law was passed by the post 1994 democratic government. A placement in prison is the most restrictive placement that can be effected. In addition, the Alliance submits that prison is not suitable for children below 14 years of age and in particular mandatory placement in a prison before a first appearance is particularly inappropriate. It is also highly impractical to place any person in prison prior to his or her appearance in court. It is never done, to our knowledge, with regard to adult offenders who are held in police cells prior to their first appearance in court, and only transferred to prison thereafter.

In fact, the Department of Correctional Services itself is of the opinion that children under the age of 14 years should not be held in prison. In its *White Paper* (2005) the Department of Correctional Services contends that "children under the age of 14 have no place in correctional centres. Diversion, alternative sentences, and alternative detention centres run by the Department of Social Development and the Department of Education should be utilised for the correction of such children".[24]

While detention in prison has been shown to be completely inappropriate for children given shockingly inhumane conditions, it must also be noted that such children are awaiting trial, not proven guilty, presumed innocent and therefore the constitutional principle that detention should be a last resort is being flouted and detention in prison is becoming a first resort for children aged 10, 11, 12 and 13 years of age when they have not even been found guilty of an offence yet and may even lack criminal capacity.

Secondly, the Alliance wishes to object to the exclusion of children charged with Part 1 of Schedule 3 from the possibility of being held in a residential facility other than a prison awaiting trial as contained in clause 31 (1). This too is a retrogressive step from our present law which allows for the detention of children charged with all offences in places of safety or secure care facilities. Again, prison is the most restrictive detention option and to exclude children who could be detained

[24]Department of Correctional Services (March 2005) *White Paper on Correctional Services* Para 11.2.3.

in other facilities from this option is a generalising approach and an attempt to legislate in a manner that does not allow for exceptional circumstances to be treated differently. It would be far better to allow courts to have the discretion to place a child in a residential facility other than a prison if it is in his best interests and does not threaten public safety. To exclude this possibility implies that the legislature has no confidence in the decision making abilities of presiding officers and is in fact a contravention of section 28(1)(g) and 28(2) of the Constitution.

Thirdly the Alliance wishes to object to the mandatory placement of children charged with Part 1 and Part 2 of Schedule 3 who haven't been released in prison before their first appearance in terms of clause 27(b). This again the most restrictive approach being adopted and not complying with section 28(1)(g) of the Constitution. Specifically, children charged with these offences are likely to spend the longest period awaiting trial, if one looks at trends regarding delays in finalising cases, and on account of prisons not offering educational services to children awaiting trial – this indicates one important aspect of how a child could be prejudiced by not being allowed to be detained in a facility that does allow for educational services, such as a residential facility other than a prison.

Furthermore, whereas a child charged with a Part 2 Schedule 3 offence may be placed in a residential facility after the first appearance (in terms of clause 31(1)(b)) he does not have that benefit after arrest and must go straight to prison. In any event, the 2002 version of the Bill did not allow for children to be held in prison prior to the first appearance and neither does our present law under section 29 of the Correctional Services Act 1959.

Finally, in the 2002 version of the Bill, the clauses on the least restrictive placement options came before the most restrictive – in other words the structure of the Bill was such that the least restrictive placement option escalated to the most restrictive and made for logical reading and reinforced the principle. The 2007 version reverses this and therefore makes the reading of the Bill overly complicated and illogical.

THEREFORE THE ALLIANCE SUBMITS AS FOLLOWS:

- No child under the age of 14 years may be held in prison awaiting trial
- All children should have the option of being held awaiting trial in a residential facility other than a prison irrespective of the offence committed
- There should be no mandatory placement of children in prison prior to the first appearance in court
- The content of clause 31 should be placed before the content of clause 30 in the structure of the Bill (with the necessary amendments).

Clause 26

Clause 26(1) (b) is rather unclear as it does not qualify the fact that placement in a police cell should only be prior to a child's first appearance in court. Therefore we submit the clause should read as follows:

(b) placement in a police cell until the first appearance in court by the child; or

Clause 27

As stated above, the mandatory or other placement of children in prison prior to their first appearance in court is wholly inappropriate and a retrogressive step from our present law. Therefore we propose the clause reads as follows:

27. If, at any stage before a child's first appearance at a preliminary inquiry or a child justice court, such child has not been released from detention in police custody the relevant police official must give consideration to the detention of such child in a suitable placement facility, if such facility is available within a reasonable distance from the place where the child has to appear for a preliminary inquiry and there is a vacancy, or if such facility or vacancy is not available, in a police cell or lock-up.

Clause 28

In order to ensure further protections for children placed in police custody we propose that clause 28 be amended to read as follows:

28. (1) 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 counselors and any other person who, in terms of any law, is entitled to visit; and
(d) cared for in a manner consistent with the special needs of children, including the provision of immediate and appropriate healthcare in the event any illness and has the right to adequate food and water; access to reading materials; adequate clothing and sufficient blankets and bedding; and adequate exercise.

(2) *(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 sustained by such child or if a police official observes that a child has been injured, 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 treatment if the station commissioner is satisfied that any of the following circumstances exist:
(i) Where there is evidence of physical injury;
(ii) where the child appears to be in pain as a result of an injury;
(iii) where there is an allegation of sexual abuse of any nature; or
(iv) any other circumstances which warrant medical treatment.

Clause 30

As stated above, the Child Justice Alliance submits that no child under 14 years of age may be detained in prison awaiting trial. Therefore we submit that clause 30 (2) should be removed from the Bill and clause 30 (1) be redrafted to read as follows:

30. (1) Subject to section 31(5), a presiding officer may only order the detention of a child referred to in section 29 in a specified prison, if—
(a) an application for bail has been postponed or refused or bail has been granted but one or more conditions relating thereto have not been complied with;
(b) such child is accused of having committed an offence referred to in Part I or II of Schedule 3;
(c) such detention is necessary in the interests of the administration of justice or the safety or protection of the public or such child or another child in detention;
(d) there is a likelihood that the child, upon conviction, could be sentenced to imprisonment; and
(e) the child is 14 years or older.

Clause 31

As stated above the Child Justice Alliance submits that children charged with offences in Part 1 of Schedule 3 should not be excluded from being placed in a residential facility other than a prison. Therefore the Alliance submits that clause 31(1) should be amended to read as follows:

31. (1) A presiding officer may order the detention of a child referred to in section 29 in a specified child and youth care centre.

This formulation of clause 31(1) also ensures that prison, as a most restrictive option of placement, is not seen as a first resort of placement over other residential facilities, as the present formulation of Clause 31(1)(a) of the 2007 Cabinet version seems to suggest.

Another problem in Clause 31 is the requirement in clause 31(3) that a sworn statement is required regarding the availability of residential facilities or space in the facility. Firstly, there will not be an assessment report for children over 14 years charged with offences in terms of Part 1 or 2 of Schedule 3. Secondly, a sworn statement is impractical and might lead to delays and blockages in the child justice system. The head of the residential facility, would be spending an inordinate amount of time drafting and attesting to affidavits of individual children in various magisterial districts. We submit that instead of a sworn statement the assessment report (which we submit should be available for all children) should, if recommending placement in a residential facility other than a prison contain information regarding the availability of space at a residential facility on the day the recommendation is made.

Therefore the Alliance submits that clause 31(3) and (4) should be amended to read as follows:

(3) Whenever a presiding officer is required to make a decision in terms of subsection (1), such presiding officer must consider the information regarding availability of accommodation at a child and youth care centre for the child in question and any other relevent information regarding level of security, amenities and services of the facility, which forms part of the

assessment report contemplated in section 41(2). The probation officer or other suitably qualified person must ensure that this information was obtained on the same date as the recommendations made in the assessment report.

(4) Where the information in subsection (3) is, for any reason, not available, called into question or no longer current the presiding officer may request any functionary responsible for the management of a child and youth care centre within a reasonable distance from the court to furnish information in respect of –

(a) the availability or otherwise of accommodation for the child in question; and

(b) all other available information relating to the level of security, amenities and features of the centre.

Given the Alliance's submission regarding clause 30 (1) and the fact that children under the age of 14 years should not be placed in prison awaiting trial, we submit that clause 31(5)(a) be amended to read as follows:

(5) *(a)* If a presiding officer finds substantial and compelling reasons, including a relevant previous conviction or relevant previous diversion or a relevant pending charge against the child, for not placing a child referred to in subsection (1)*(b)* in a child and youth care centre, then the presiding officer may order the placement of such child in a specified prison, subject to clause 30(1) [as amended in this submission].

Clause 32

The Alliance submits reference to "cell" should rather be "police cell" for the sake of clarity and consistency. Therefore we submit clause 32 should be amended as follows:

32. Where a child is placed in a police cell, child and youth care centre or a prison and it comes to the attention of the person admitting the child to such police cell, facility or prison or any other person at such police cell, facility or prison that the child has been erroneously referred to such police cell, facility or prison, as the case may be, such person must act in accordance with the order of the court committing the child to such facility and receive such child into the facility and must, as soon as practicable, but not later than the next court day, refer the child back to the relevant child justice court for the matter to be reconsidered and the error to be corrected.

5.3 Part 3: Factors to be taken into account by presiding officer regarding further detention and placement and conditions of detention at preliminary inquiry or child justice court

Clause 34

There are numerous constitutional and international obligations that require minimum standards regarding the detention of children (and all accused persons). The Alliance is of the opinion that the content of clause 34 is not sufficiently protective of the rights of children to be detained in a humane manner and in conditions that do not expose them to harm. Therefore we submit that clause 34 (2) be amended to read as follows:

(2) *(a)* A child held in a police cell while awaiting appearance at a preliminary inquiry or child justice court must be kept separate from adults and be treated in a manner and kept in conditions, according to standards as prescribed.

(b) A girl must be kept separate from boys and must be under the care of an adult woman official.

(c) Where a child is transported to or from a preliminary inquiry or child justice court the child must, be transported separate from adults. [the words if reasonably possible have been deleted]

6. Chapter 5: Assessment

It has been noted that although section 50(5) of the Criminal Procedure Act[25] requires an arresting officer to inform a probation officer after the arrest of a person under 18 years, this has not consistently occurred in practice and the purpose of notification and then what the probation officer is supposed to do is also not stated.[26]

Accordingly, a chapter dedicated to assessment, setting out the responsibilities and powers of probation officers is welcome and necessary and the inclusion of this process as a necessary (albeit not compulsory) procedure is supported by the Child Justice Alliance. Assessment has been assimilated into South African law through the Probation Services Amendment Act 35 of 2002,[27] which defines it as 'a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact upon the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor'.[28] In addition, section 4(1) of the principal Act was amended to ensure that the duty of performing assessments and the related issue of reception of accused persons and their referral form part of the core mandate of probation services.[29]

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[25] Act 51 of 1977

[26] Sloth-Nielsen, op cit, p. 218

[27] This amended the principal Act, namely the Probation Services Act 116 of 1991.

[28] Section 1.

[29] Kassan explains that probation officers are generally social workers appointed specifically to render probation services and in fulfilling their duties they take on various roles including investigators, supervisors, crime 'preventers' and planners and implementers of programmes as well as conveners and mediators in restorative justice initiatives, Kassan D, 'Probation Officers as Roleplayers', in Sloth-Nielsen J and Gallinetti J (eds), *Child Justice in Africa: A Guide to Good Practice*, Community Centre, 2004, p 130-131. See also Martin G, *Juvenile Justice: Process and Systems*, Sage Publications: Thousand Oaks, London, New Dehli, 2005, p 263 for a brief discussion of the origins of probation.

However, the department responsible for the implementation of this law is the Department of Social Development and hence, the Act is considered a social development sectoral law as opposed to a criminal justice law. It is not binding on courts and criminal justice role-players, besides probation officers, are not enjoined to implement its provisions. Therefore, until assessment is identified as a core component of criminal justice practice through a legislative framework that requires criminal justice role-players, such as magistrates and prosecutors, to consider and apply it, it remains arguably on the fringe of the child justice legal system (although entrenched in practice). In addition, the Probation Services Amendment Act is also not child-centred; on the face of it, it applies equally to adults and children and therefore the assessment of children still needs a 'home' in South African criminal justice legislation.

Therefore, although probation services and assessment are, in practice, already a part of the child justice system at present, it is of the utmost importance that structured legislation be enacted to ensure that there is consistency of practice and that the responsibilities and powers of probation officers in the assessment process are evident to all role-players in the system.

In terms of the 2002 version of the Child Justice Bill all children would be assessed. However, the 2007 version of the Bill excludes certain children from being assessed, namely children 14 years and older charged with offences contained in Part 1 of Schedule 3 and items 2, 5 and 6 of Part 2 of Schedule 3. Thus the effect of clause 35 of the 2007 Cabinet version is to exclude the application of certain procedures and processes of the Bill to certain children based on the age of child and the nature of the offence with which the child is charged or is alleged to have committed.

The Child Justice Alliance is strongly opposed to this type of bifurcation. The Child Justice Bill is a carefully constructed piece of legislation aimed at ensuring that ALL children who come into conflict with the law are appropriately managed within the criminal justice system, based on an individual approach that takes the best interests of the child into account as well as the circumstances of the offence and public safety. This approach is aimed at ensuring that an individual child receives the most suitable intervention whether it be diversion or a custodial sentence. Each of the procedures and processes contained in the Bill are formulated to work in conjunction with each other to achieve these aims. To totally exclude a child from any of these processes, for example, assessment, does not allow for an individualised approach to be adopted and the criminal justice officials are precluded from properly engaging in the circumstances of the commission of the offence as well as the child, and this can impede the decision making process from achieving the most desirable outcome for the child and society.

THEREFORE THE CHILD JUSTICE ALLIANCE SUBMITS THAT ALL CHILDREN WHO ARE ARRESTED, SUMMONSED OR WARNED BY POLICE SHOULD BE ASSESSED, IRRESPECTIVE OF AGE OR OFFENCE.

We wish to bring the attention of the Committee to the fact that a more detailed submission on assessment has been made by Thulane Gxubane of UCT, Department Social Work and Mike Batley of the Restorative Justice Centre.

We also wish to bring the Committee's attention to our submission that an assessment should be conducted by a probation officer or any other suitable person as prescribed. This will ensure that there are sufficient persons available to provide these services given the concern regarding the

capacity of the Department of Social Development. Therefore we submit that all references in this chapter to probation officer should be replaced with the phrase "probation officer or any suitably qualified person as prescribed".

Clause 35

35. A child who is alleged to have committed an offence must be assessed by a probation officer or a suitably qualified person.

Clause 36

At the outset, we wish to draw the Committee's attention to the fact that there are various purposes for the assessment and therefore it is integral to the decision making process regarding any accused person, and even more important when dealing with a child who has been accused of committing a serious offence. The decision making ability of a presiding officer can be greatly enhanced by an assessment report on all the factors listed in clause 36 (with the exception of criminal capacity as will be discussed hereunder and under the submission on clause 10).

However as submitted in relation to clause 10, the Child Justice Alliance is of the opinion that the assessment process as intended here is not appropriate for the evaluation of criminal capacity, nor are probation officers suitably trained to determine criminal capacity. Therefore we submit that clause 36(g) be removed from the Bill and clause 36 be amended to read as follows:

36. The purpose of an assessment is to –

(a) establish whether a child may be in need of care for purposes of referring the child to a children's court in terms of section 51 or 64;

(b) estimate the age of the child if the age is uncertain;

(c) gather information relating to a previous conviction, any previous diversion or any pending charge in respect of the child;

(d) formulate recommendations regarding the release or detention and placement of the child;

(e) where appropriate, establish the prospects for diversion of the matter;

(f) in the case of a child below the age of 10 years or a child referred to in section 9(1)*(c)*(ii), establish what measures need to be taken in terms of section 7; or

(g) provide any other relevant information regarding the child which the probation officer may regard in the best interests of the child or which may further any objective which this Act intends to promote or achieve.

Clause 37

There is a typographical error in clause 37 (b) and it should read as follows:

(b) is inadmissible as evidence during any criminal trial in which the assessed child appears, except for purposes of sentencing if the child is to be dealt with in terms of section 50(4)(b).

Clause 39

We propose that rather than listing the persons who may attend the assessment, provide the probation officer or suitably qualified person with the authority to permit any other appropriate person whose presence is necessary or desirable for the assessment to attend. Therefore we propose that clause 39(3) be amended to read as follows:

(3) Any other appropriate person whose presence is necessary and desirable may be authorised by the probation officer or other suitably qualified person to attend the assessment.

This will require an amendment to the content of clause 39(7) accordingly, as appears below.

Furthermore, the Child Justice Alliance is of the opinion that the views of the child are of paramount importance and so the structure of this section should reflect this. We therefore submit that clause 39(6) follow clause 39(3) and become clause 39(4) with the remaining clauses being numbered accordingly.

Therefore we submit that clause 39 should be amended to read as follows:

39. (1) The child must be present at his or her assessment in terms of this Act.
(2) Subject to subsection (9), a child's parent or an appropriate adult must attend the assessment of the child.
(3) Any other appropriate person whose presence is necessary and desirable may be authorised by the probation officer or other suitably qualified person to attend the assessment.
(4) The probation officer or other suitably qualified person should, where appropriate, elicit the views of the child in private regarding the presence of any person attending the assessment.
(5) The probation officer or other suitably qualified person may exclude any person referred to in subsection (2) or (3), from attending an assessment if the presence of such person is disrupting, undermining or obstructing the completion of the assessment.
(6) A probation officer or other suitably qualified person may, if there is any risk that the child may escape or may endanger the safety of the probation officer or any other person, request a police official to be present at an assessment.
(7) A probation officer or other suitably qualified person may, at any time before the assessment of a child –
(a) issue a notice in the prescribed manner to a parent of the child or an appropriate adult to appear at the assessment or, where the interests of justice so require, the probation officer or other suitably qualified person may orally request the parent or appropriate adult to appear at the assessment; and
(b) inform a person referred to in subsection(3) of the time and venue of the assessment. [Reference to prosecutor and police has been deleted.]

(8) A notice contemplated in subsection (7)*(a)* must be delivered by a police official upon the request of the probation officer or other suitably qualified person in the prescribed manner.

(9) A person who has been notified in terms of subsection (7)*(a)* may apply to the probation officer or suitably qualified person not to attend the assessment, and if the probation officer or suitably qualified person exempts the person from attending, the exemption must be in writing.

(10) *(a)* A probation officer or suitably qualified person must make every effort to locate a parent or an appropriate adult for purposes of concluding the assessment of a child and may request a police official to assist in the location of such person.
(b) A probation officer or suitably qualified person may conclude the assessment of a child in the absence of a parent or appropriate adult if all reasonable efforts to locate such person have failed or if such person has been notified of the assessment and has failed to attend.

Clause 41

As submitted in clause 10 and clause 36, the Child Justice Alliance is of the opinion that the assessment is not a suitable process to evaluate criminal capacity, nor is a probation officer the appropriate professional to undertake such evaluation. Therefore we submit that clause 41(f) should be removed from the Bill.

Furthermore, as submitted in clause 31, we are of the opinion that requiring a sworn statement regarding the availability of accommodation in residential facilities is impractical and will unduly burden the criminal justice process. We therefore refer the Committee back to our submission under clause 31 and propose that clause 41 (2) be amended to read as follows:

(2) A recommendation referred to in subsection (1)*(d)* relating to placement of the child in a placement facility must be supported by information obtained by the probation officer or suitably qualified person from the functionary responsible for the management of such facility on the same date as the recommendation made in terms of subsection 1(d) containing current information regarding –

(a) the availability or otherwise of accommodation for the child in question; and

(b) all other available information relating to the level of security, amenities and features of the facility.

Clause 41(3) incorrectly refers to clause 41(1)(f) and should refer to the contents of clause 41(1)(g). However, if the Committee accepts our submission to remove the present clause 41(1)(f) as appears above, then there is no need to correct this as clause 41(1)(g) will be renumbered as Clause 41(1)(f).

7. Chapter 6: Diversion by prosecutor in respect of minor offences

Clause 42

The Child Justice Alliance submits clause 42(2) be amended to ensure that a prosecutor properly applies his or her mind to the need to dispense with assessment. Therefore we propose the clause be amended as follows:

> (2) If the child has not yet been assessed, the prosecutor may, in accordance with the directives of the National Director, dispense with such assessment if it is in the best interests of the child to do so and the reasons for the dispensing with the assessment must be recorded by the presiding officer at the preliminary inquiry.

Furthermore the Alliance submits that the purpose of clause 42(3) should be more clearly apparent and therefore submits that it should be amended to read as follows:

> (3) In order to formulate the most suitable response for the child, including the consideration of further or alternative diversion programmes, the prosecutor must have access to the register of children in respect of whom a diversion order has been made contemplated in section 54(5).

Clause 43

There is a typographical error in clause 43(1) and it should be amended to read as follows:

> 43. (1) If a matter is diverted in terms of section 42, the child in question and, where possible, his or her parent or appropriate adult must appear before a magistrate in chambers, for purposes of having the diversion option that has been selected by the prosecutor made an order of court.

8. Chapter 7: Preliminary inquiry and diversion

8.1 Part 1: Preliminary inquiry

The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry.[30] It is innovative and complies with the obligation set by the CRC in Article 40(3) which states:
" States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.."

[30] See the Discussion Paper, p 165-192, note 62 and Juvenile Justice Report, p 108-129, note 62. For a detailed discussion of the procedure see Sloth-Nielsen, p 429-435, note 88 and Sloth-Nielsen, p 304-318, note 39.

Originally, in terms of the 2002 version of the Child Justice Bill, clause 25(3) set out a number of objectives, which included establishing whether a child can be diverted and, if so, identifying a suitable diversion option; determining the release or detention of a child and establishing whether the child should be referred to the Children's Court to be dealt with in terms of the Child Care Act 74 of 1983 (or the Children's Act 38 of 2005 once fully promulgated). The proposed preliminary inquiry has been described as 'a proposal of a mandatory pre-trial inquisitorial investigation, assessment and discussion of the child, the case and the circumstances to see whether diversion was possible and, if so, which specific diversion option the child should undertake; whether release was possible and whether the accused was under 18 years of age'.[31]

Clause 44

It is great concern that the 2007 Cabinet version of the Bill precludes certain children from attending a preliminary inquiry in clause 44. It is clear that this is linked to the fact that these children are also excluded from the possibility of diversion. The Child Justice Alliance submits that the purpose of the preliminary inquiry is much broader than a mere determination of the possibility of diversion, so even if a child was not going to be diverted certain key decisions such as placement or release; age determination or an assessment of whether the child is a child in need of care should be made at the preliminary inquiry. This is irrespective of the age of the child or offence with which he or she has been charged. Therefore the Child Justice Alliance submits that all children charged with an offence should attend a preliminary inquiry except those that are diverted by a prosecutor.

It is also concerning that the purposes of the preliminary inquiry are no longer contained in the 2007 version of the Bill. This, it is submitted, will lead to confusion and the possible incorrect application of the preliminary inquiry.

Therefore the Child Justice Alliance submits that the content of clause 25(3) be reinstated into clause 44 of the 2007 Bill (and the exclusions relating to offence category removed) to read as follows:

44. (1) *(a)* A preliminary inquiry must be held in respect of every child prior to plea unless they are diverted by a prosecutor.

(b) The objectives of a preliminary inquiry are to –
(i) establish whether the matter can be diverted before plea;
(ii) identify a suitable diversion option, where applicable;
(iii) establish whether the matter should be transferred to a children's court in terms of the Children's Act No. 38 of 2005;
(iv) provide an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial;

[31] Sloth-Nielsen J, 'Paperweight or powertool: a critical appraisal of the potential of the proposed preliminary inquiry procedure', *Article 40*, Vol. 6, No. 2, 2004 p 3-5.

(v) ensure that all available information relevant to the child, his or her circumstances and the offence is considered in order to make a decision on diversion and placement of the child;
(vi) ensure that the views of all persons present are considered before a decision is taken;
(vii)encourage the participation of the child and his or her parent or an appropriate adult in decisions concerning the child; and
(viii) determine the release or placement of the child pending conclusion of the preliminary inquiry; appearance of the child in a court; or transfer of the matter to the children's court.

(c) A preliminary inquiry referred to in paragraph *(a)* must be held –

(i) within 48 hours of arrest as contemplated in section 18(5) if a child is arrested and remains in detention; or

(ii) within such specified time periods as may be required in terms of a summons in terms of section 19, a written warning in terms of section 20 or a written notice in terms of section 23.

(d) A child's appearance at a preliminary inquiry must be regarded as his or her first appearance before a lower court as contemplated in section 50 of the Criminal Procedure Act.

(2) A preliminary inquiry is an informal pre-trial procedure which is inquisitorial in nature, may be held in a court or any other suitable place.

Clause 45

It is submitted that the requirement that a diversion service provider attend the preliminary inquiry is too burdensome and will firstly, place a strain on organisations straining to provide services and secondly, cause undue delays. However, clause 45(5) refers to the magistrate subpoenaing any person whose presence is necessary at the preliminary inquiry and clause 45(1) should make provision for this. Therefore, the Child Justice Alliance submits that the present clause 45 (1) (d) of the Bill be removed and amended so clause 45 reads as follows:

45. (1) The following persons must, in addition to the inquiry magistrate and prosecutor, attend the preliminary inquiry, subject to subsections (2) and (3):

(a) The child;
(b) the child's parent or an appropriate adult;
(c) the probation officer; and
(d) any person contemplated in section 45(5).

Clause 46

Although clause 46 provides the protection regarding publishing the child's identity, but no provision regarding the preliminary inquiry being held *in camera*. Therefore we submit that the

contents of section 153(4) should apply to the preliminary inquiry. We therefore submit that the following clause be added to clause 46.

46(2) No person, other than the child accused, his or her legal representative, the probation officer and parent or a person in *loco parentis* or an appropriate adult, shall be present at the preliminary inquiry, unless such person's presence is necessary in connection with such proceedings or is authorised by the inquiry magistrate.

Clause 49(4)

The Child Justice Alliance has already expressed its concerns regarding probations officers and the assessment report being seen as the appropriate professionals and mechanism to determine criminal capacity in respect of clause 41(f) and recommended its removal. In addition, the 2002 version of the Bill did not limit the request for a detailed assessment to the probation officer but also allowed for any other person (e.g. the child's legal representative) to request such an assessment. In addition, the grounds for such a postponement appear more clearly from the 2002 version and are not as vague as the present formulation of "exceptional circumstances warranting a further assessment". Therefore we submit that clause 49(4) be amended to read as follows:

49(4) (a) A probation officer may recommended in terms of section 41(1)*(f)* that a further and more detailed assessment of the child is required, or a probation officer may make such a recommendation during the course of the preliminary inquiry, or any person may request the inquiry magistrate to postpone the proceedings of a preliminary inquiry for the purposes of obtaining a detailed assessment of a child,

(b) The inquiry magistrate may postpone the proceedings of the preliminary inquiry a preliminary inquiry for the purposes of obtaining a detailed assessment of a child for a period not exceeding 14 days if there are exceptional circumstances warranting a further assessment of the child and if such circumstances relate to-

(i) the possibility that the child may be a danger to others or to himself or herself;
(ii)the fact that the child has a history of repeatedly committing offences or
(iii) the social welfare history of the child;
(iv) the possible admission of the child to a sexual offenders' programme,
(v) the possibility that the child may be a victim of sexual or other abuse.

(c) Any detailed assessment must be conducted in the home of the child, unless assessment in the home is not in the best interests of the child or impossible, in which case assessment may be conducted at any residential facility.

Clause 50

At the outset, the Child Justice Alliance reiterates its concern and strong objection to excluding diversion for some children based on the offence with which the child has been charged. The limitation on the prosecutor's discretion to divert a child who is appropriate for diversion runs contrary to the objectives of the Bill, namely, to reinforce the child's respect for human rights and the fundamental freedoms of others; support reconciliation by means of a restorative justice response and involve parents, families, victims where appropriate and the community to encourage the reintegration of children.

Therefore the Child Justice Alliance submits that the reference to section 11 (c) be removed from clause 50(1) and the clause be amended to read as follows:

50. (1) If the inquiry magistrate is satisfied that the matter can be diverted as and it is not a matter contemplated in section 51, and 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; and
(d) the child and, if available, his or her parent, or an appropriate adult, consent to diversion,
and after consideration of all relevant information presented at the preliminary inquiry, the inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted.

Clause 51

Referral to a children's court inquiry is a valuable mechanism in a child justice system. It exists in terms of section 254of the Criminal Procedure Act 51 of 1977 and essentially allows a magistrate to refer a child to the children's court if such child is a child considered to be in need of care as set out in section 14(4) of the Child Care Act (74 of 1983). This conversion to a children's court inquiry recognises the fact that some children who come into conflict with the law have got themselves into trouble possibly due to having no parental supervision, being abandoned, being neglected or exposed to certain difficult circumstances or may be experiencing certain behavioural problems and thus is in need of interventions that are not specifically aimed at criminal justice issues. It therefore allows for such child to be dealt with as a child in need of care who will receive the necessary attention and services as may be required. The Children's Act 38 of 2005, in section 150, has extended the grounds under which a child may be considered a child to be in need of care. Therefore, the Alliance submits that clause 51 be redrafted to refer to the relevant provisions of the Children's Act 38 of 2005 as this Act repeals the Child Care Act 74 of 1983.

However, it should be noted that section 254 of the Criminal Procedure Act does not limit conversions to a children's court inquiry to specific offences – instead conversions to a children's court inquiry are permitted irrespective of the nature of the offence allegedly committed by the child provided the child is considered to be a child in need of care. The Alliance thus submits that clause 51 be redrafted by omitting any references to the alleged commission of minor offences or offences aimed at meeting the child's need for basic food and warmth.

The Alliance proposes that clause 51 of the 2007 version of the Bill be redrafted as follows:

> 51. If it appears to the inquiry magistrate during the course of a preliminary inquiry that a child is a child referred to in section 150 of the Children's Act 38 of 2005, and it is desirable to deal with the child in terms of sections 155 and 156 of the Children's Act 38 of 2005, the inquiry magistrate may stop the proceedings and order that the child be brought before a children's court referred to in Chapter 4 of that Act and that the child be dealt with under the said sections 155 and 156.

8.2 Part 2: Diversion

Diversion is closely linked to the concept of restorative justice, which involves offenders taking charge of making amends for what they have done and initiating a healing process for themselves, their families, the victims and the community at large. The goal of restorative justice is that offenders will rejoin the law-abiding community and thereby prevent re-offending. Diversion involves giving communities a bigger stake in justice and the guidance of families and communities, supported by professionals and specific interventions, can sufficiently make children understand the impact of their crimes on others and ensure that they put the wrong right.[32] Diversion is not a soft option, but usually, in more serious matters, involves an appropriate intervention in order to bring about a change in the behaviour of the child.

The practice of diversion – referral of a child away from formal court procedures- has been developing in South Africa over the past decade. It is now a feature of our child justice system, but as with assessment there is no legislative framework in place to regulate it. This lack of a framework has led to certain problems, for instance, as was evidenced in *M v The Senior Public Prosecutor, Randburg*[33]. In this case, two girls were charged with theft in the same matter. The one pleaded guilty and was convicted and the other was diverted. The case challenged the exercise of prosecutorial discretion in deciding to prosecute the one accused. The court inferred, in the absence of evidence to the contrary, that the prosecutor did not consider diversion and this implied an improper exercise of discretion and that the prosecutor did not apply himself properly and fully to the content of what was before him.

Therefore to ensure good governance, consistency, certainty and just administrative action, it is imperative that provisions relating to diversion, such as are included in the Bill, are enacted. This will ensure that there is guidance on the range of diversion practices that can be used, which diversion programmes are suitable for certain types of offences, minimum standards applicable to diversion of children and diversion programmes themselves and what should happen if there is non compliance with a diversion order. The Child Justice Alliance supports the idea of diversion and welcomes the inclusion of diversion in the Bill so that it can operate within a legislative framework.

However, as stated previously, the Child Justice Alliance strongly objects to the exclusion of certain children from the possibility of diversion based on their age or the offence with which they are charged.

Our objection is based on the fact that diversion would only be allowed in appropriate circumstances and is not an automatic or foregone conclusion. It depends on a range of factors before a child is considered suitable for diversion. Because of this and because of the fact that prosecutors are *dominus litis* and have the power to decide to divert or not, there should be no reason to limit prosecutorial discretion in this instance. Section 179(2) of the Constitution and

[32] Skelton, A. " Setting Standards for Diversion", *Article 40*, Vol.3, No.1, March 2001, p.8
[33] Unreported decision, case no: 3284/00(W)

section 20(1) of the National Prosecuting Authority Act 32 of 1998 entrench the concept of prosecutorial discretion and do not limit it according to age or offence, as the Child Justice Bill is attempting to do. At present, diversion occurs in practice and is not limited save in terms of policy guidelines set by the National Prosecuting Authority which give guidance to prosecutors on whether matters should be diverted or not.

Section 179 (2) of the Constitution, states that:

> " The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

Section 179 has established a single prosecuting authority that is now regulated by the National Prosecuting Authority Act 32 of 1998. It has been stated that " it is the duty of the national director of public prosecutions to see to it that prosecutions are instituted without fear, favour or prejudice"[34]. This should be undertaken with just cause.

Section 20(1) of Act 32 of 1998 sets out the powers, duties and functions of the prosecuting authority and states:

> " The power as contemplated in section 179(2) and all other relevant sections of the Constitution, to-
> (a) institute and conduct criminal proceedings on behalf of the State;
> (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
> (c) discontinue criminal proceedings,
> vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

Therefore the National Prosecuting Authority has a clear discretion and power to direct criminal proceedings and this extends to the decision to either conduct criminal proceedings or discontinue them.

The discretion to prosecute was examined in *Gillingham v Attorney-General and others 1909 572* in the context of section 6 of Ordinance 1903. In this case the court held:

> " Now our system of the administration of justice in criminal cases is based upon this- that the duty and responsibility of prosecuting on behalf of the Crown is vested absolutely in the Attorney General. The responsibility is his, and he discharges the duty of prosecuting all offences on behalf of the Crown.."[35]
>
> and further:

[34] Du Toit, E., De Jager, F., Paizes, A., Skeen, A., Van Der Merwe, S. *Commentary on the Criminal Procedure Act*, Juta & Co, 2002, 1-4B.
[35] at 573-574.

> " ..the Attorney General has absolute control over the proceedings from the very commencement and can discontinue them at any time."[36]

It has been noted that the powers of the prosecuting authority are extensive and therefore have to be exercised with care and the highest degree of objectivity and it is only in exceptional cases that a court will interfere.[37] An example of this occurred in *S v F 1989 (1) SA 460 (ZH) A* where a 10 year old boy was charged with indecent assault of a 8 year old girl. The review court found that the element of wrongfulness had not been decided on by the Court and the State had failed to prove its case. In forming this decision, Greenland J held:

> " Though mindful of the Attorney-General's prerogative in regard to prosecutions, I am compelled to hold it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that such child will not understand or appreciate the proceedings."[38]

It is submitted that the discretion granted to the prosecuting authority by the Constitution envisages that the prosecution must act in the best interests of the State and this entails weighing up the circumstances of the crime, the victim and the accused in making a decision to prosecute. It is further submitted that the prosecution has the discretion to discontinue proceedings in appropriate matters. In light of this it is submitted that any victims rights could be reasonably and justifiably limited by a prosecutorial decision to divert in appropriate circumstances.[39]

In addition, it is submitted that there existed checks and balances in the 2002 version of the Child Justice Bill to ensure that only appropriate cases are diverted. It is further submitted that instead of excluding certain categories of offences from diversion, there can be further checks and balances introduced to ensure that victims rights are properly catered for and that decisions to divert are made with every parties' interests in mind. To this end the following is suggested that the NPA be directed to make policy guidelines for diversion in terms of clause 95 of the Bill.

Therefore, it is submitted that there is no constitutional bar to allowing all types of crimes to be diverted. If the Child Justice Bill contains enough conditions regulating the decision to divert both the interests of the victim of the crime and the child can be balanced and catered for.

Furthermore, should the legislature insist on following the approach to excluding certain children from diversion IN LAW, as opposed to policy guidelines, it will result in a disproportionate situation where all adults could be considered for possible diversion irrespective of the nature of the offence

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[36] at 575.
[37] Du Toit *et al*, p. 1-4M.
[38] at 462 A-B.
[39] It is also submitted that the best interests of the child principle enshrined in section 28(2) of the Constitution also supports the argument that diversion is constitutional as the prosecutor must have regard not only to the effect of the crime on the victim but the best interests of the child offender when making a decision to institute or discontinue proceedings.

with which they have been charged but certain children will be totally precluded ab initio from an equal opportunity to be considered for diversion.

Therefore the Child justice Alliance submits that the possibility for diversion be allowed for all children irrespective of age or offence and that clause 95 of the Child Justice Bill require the National Prosecuting Authority to set policy guidelines for prosecutors in the exercise of their discretion. In addition we submit that clause 44 of the 2002 version of the Child Justice Bill be reinstated in the Bill.

See also the submission of Ann Skelton from the Centre for Child Law at the University of Pretoria on this issue.

A further reason for not excluding certain children from diversion is the fact that it is an effective intervention that can lead to a child living a crime free life and protecting public safety. As far as the effectiveness of managing juvenile offenders is concerned, it has been said that a purely punitive approach discounts advances made in the area of treatment.[40] According to Lipsey, 'it is no longer constructive for researchers, practitioners, and policy makers to argue about whether delinquency treatment and rehabilitative approaches work. As a generality, treatment clearly works. We must get on with the business of developing and identifying the treatment models that will be most effective and providing them to the juveniles that will benefit'.[41]

Regarding the benefits of diversion and how it positively intervenes with the lives of children to change their offending behaviour and enhance public safety see also the submissions of RAPCAN, Childline, NICRO and the Restorative Justice Centre.

Clause 52

We submit that clause 52 be amended to include the content of clause 44 of the 2002 version of the Bill referred to above. Therefore we submit that clause 52 read as follows:

52. (1) 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 by him or her;

(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;

(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;

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[40] Kempf-Leonard K and Tracy PE, 'The Gender Effect among Serious, Violent and Chronic Juvenile Offenders', in Muraskin R (ed), *It's a Crime*, Prentice Hall: New Jersey, 2000, p 472

[41] Lipsey M, 'Juvenile delinquency treatment: A meta-analytic inquiry in the variability of effects', in Cook TA, Cooper H, Cordray DS, Hartman H, Hedges LV, Light RJ, Louis TA and Mosleller F (eds), *Serious and Violent Juvenile Offenders*, Sage Publications: Thousand Oaks, 1992, p 85

(h) prevent stigmatising the child and prevent the 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.

(2) A child must be considered for diversion if-
(a) the child voluntarily acknowledges responsibility for the offence;
(b) the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility;
(c) there is sufficient evidence to prosecute; and
(d) the child and his or her parent, or an appropriate adult, consent to diversion and the diversion option.

Clause 53

Diversion is a process whereby a child is referred away from the criminal justice system and therefore the ordinary consequences of having been involved in the criminal justice system as a accused should not apply to diversions. Therefore in order to make the legal consequences regarding diversion more clear the Child Justice Alliance submits that clause 53 be amended to read as follows:

53. (1) If a matter has been diverted by a prosecutor in terms of Chapter 6 or at a preliminary inquiry in terms of Part 1 of this Chapter, the child in question may not be prosecuted on the facts relating to the offence in respect of which the diversion order was made, unless such child fails to comply with the conditions of the diversion order, in which case the provisions of section 60 apply.
(2) A private prosecution in terms of section 7 of the Criminal Procedure Act may not be instituted against a child in respect of whom the matter has been diverted in terms of this Act.
(3) A diversion shall not be considered as a previous conviction for the purposes of criminal records and shall not be regarded as an aggravating factor for purposes of sentencing.

Clause 54

The detail contained in clause 54 is crucial to ensure that service providers and diversion programmes are accredited as suitable for the delivery of diversion services. However, we submit that the detail contained in subsections (2) – (4) is more appropriately placed within the regulations to the Child Justice Bill. We also do wish to point out that the two month period for allowing diversion service providers to apply for accreditation is too short and it is also unfair that the Department of Social Development have 4 months to consider applications and civil society half that period to make the applications.

We therefore submit that clause 54 be amended to read as follows:

54 (1) Subject to section 96(1), a prosecutor, an inquiry magistrate or a child justice court may only refer a matter for diversion to a diversion programme or service provider that has been accredited as prescribed.

[Subsections (2) – (4) should be removed and contained in regulations with the change as submitted].

Clause 54 (5)(b) deals with the register of diversion. We submit that there is no need for police officials to access the register as provided in clause 54(5)(b) and that the reason for the access being granted to probation officers, prosecutors and presiding officers, namely to formulate a suitable diversion option, should be clearly stated. Therefore we submit that clause 54(5)(b) be amended to read as follows:

(b) The purpose of the register is to keep a record of particulars contemplated in paragraph *(a)* in respect of children who are diverted from the formal criminal justice system in terms of this Act –

(i) for purposes of access by probation officers when assessing a child in terms of Chapter 5, or when diversion is considered by a prosecutor in terms of Chapter 6, at a preliminary inquiry contemplated in Chapter 7, during proceedings at a child justice court contemplated in Chapter 8 and during sentencing proceedings contemplated in Chapter 9 in order to formulate a suitable response for the child and possible referral to an appropriate intervention; and

(ii) in order to facilitate research relating to the effectiveness of diversion and trends relating thereto.

Clause 55(1)

It is submitted that the requirement that diversion programmes be based on the principle of proportionality is already provided for in sub - clause (1)(a) and the inclusion of the phrase in clause 55(1) is superfluous and should be removed.

In addition we strongly object to the inclusion of a reference to section 57 be included in sub - clause (1)(a) as it is limiting and non-sensical. Clause 57 refers to sexual offences and to include it in a general principle section is calling inordinate attention to a specific group of child offenders.

55. (1) Diversion programmes, in keeping with the objectives of diversion -

(*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 completely excludes certain children due to a lack of resources, financial or otherwise.

Clause 57

As stated above, the Child Justice Alliance strongly objects to children being excluded from the possibility of diversion on the basis of age and offence category. We submit, that diversion should always be a POSSIBILITY, but obviously this does not mean that children will be automatically diverted. The prosecutor is dominus litis and should retain the discretion to divert in appropriate circumstances, or conversely proceed with prosecution in appropriate circumstances. At present the NPA has diversion guidelines and we submit that clause 95 must require the NPA to develop new diversion guidelines for prosecutors regarding the diversion of all children.

The Child Justice Alliance submits that clause 57 be removed from the Bill.

Clause 58

The concern with clause 58 is the increased time periods contained in clause 58(4), (5) and (6). These differ substantially from the time periods in the 2002 version. They have been set without regard to whether diversion service providers can offer services for these periods and in addition, these time periods were not costed in the original two costing of the Bill.

The Child Justice Alliance submits that the Bill should provide a minimum time for which a child must be on a diversion programme and leave it in the discretion of the court to extend that period if need be and appropriate based on information obtained in the assessment and preliminary inquiry.

See the submissions of NICRO, Childline and RAPCAN further in this regard and if necessary we urge the Committee to consult with the Department of Social development and service providers in setting the minimum period.

Clause 58 (5) refers to sentence of imprisonment. The Alliance submits that this should rather read:

(5) Level two diversion options apply to children where a court upon conviction of the child for the offence in question would consider a custodial sentence, and include—
(a) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group, identified by the probation officer;
(b) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose which may include a period or periods of temporary residence; and
(c) referral to counselling or therapeutic intervention, whether in combination with any of the options referred to in this subsection or not

Clause 58(6) reference is made to clause 57. According to our submission this clause should be removed from the Bill and therefore the reference should be removed from this section.

9. Chapter 8: Child Justice Court

Again, this chapter ensures compliance with the CRC's Article 40(3), which states:

> " States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law."

This merely means that a specific court in every magisterial district be designated a child justice court to protect the dignity and privacy of children.

Clause 63

As stated in the introduction to this submission under overarching concerns, Clause 63(1) represents a clause that is in desperate need of simplification as it does not make for accessible reading and understanding – particularly for persons who are not trained in law.

In addition, the use of the words 'plea and trial' is too limiting as this is not the only consequence of a referral to a child justice court. Children can still be diverted, matters can be withdrawn, prosecutions halted, or children referred to the children's court.

The Child Justice Alliance therefore proposes that clause 63(1) be amended as follows:

63. (1) (a) Any child whose matter has not been dispensed with at the preliminary inquiry and in respect of whom the preliminary inquiry has been closed, must appear before a court having jurisdiction over the matters.

(b) A court contemplated in subsection (a) must be regarded as a child justice court and must apply the provisions of this Act.

Clause 63(2) deals with adults and children charged together. Although it provides that the Bill must apply to children and the Criminal Procedure Act apply to adults, its silence on joinder or separation of trials means that the present system is still applicable namely, the co-accused are tried together unless application is made for their matters to be separated. Under clause 57 of the 2002 version of the Bill, the opposite was provided for – namely that where a child is co-accused with an adult, the trials will be heard separately unless application is made for them to be joined. This was an important protective measure that ensures children are not intimidated by adults, and not exposed to adult co-accused who may have in fact used them in the commission of the offence.

Therefore the Child Justice Alliance submits that clause 63(2) be amended as follows:

(2) (a) Where a child and an adult are charged together at the same

trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of –

(i) this Act in respect of the child;

(ii) the Criminal Procedure Act in respect of the person other than the child; and

(2) Where a child and a person other than a child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials and -

(a) An application for such joinder must be directed to the child justice court in which the child is to appear after notice to the child, such person and their legal representatives; and

(b) If the child justice court grants an application for joinder of trials, the matter must be transferred to the court in which such person is to appear.

For purposes of consistency between section 153(4) of the Criminal Procedure Act which deals with *in camera* hearings and clause 46(2) of the Bill (as per our submission) we submit that clause 63(5) read as follows:

63(5) No person, other than the child accused, his or her legal representative, the probation officer and parent or a person in *loco parentis* or an appropriate adult, shall be present at the child justice court, unless such person's presence is necessary in connection with such proceedings or is authorised by the presiding officer.

Again for purposes of consistency, we submit the contents of clause 46(1) as far as the child justice court is concerned be reproduced here, with the necessary changes. Therefore we submit the clause 63(6) be inserted to read as follows:

63(6) Section 154 of the Criminal Procedure Act relating to the publication of information that reveals or may reveal the identity of a child accused or a witness under the age of 18 years applies with the changes required by the context to proceedings at a child justice court.

Clause 64

As per our submission regarding referral to a children's court during preliminary inquiry proceedings, we submit that clause 64 be redrafted as follows to reflect consistency:

64. If it appears to the presiding officer during the course of proceedings in the child justice court that a child is a child referred to in section 150 of the Children's Act 38 of 2005, and it is desirable to deal with the child in terms of sections 155 and 156 of the Children's Act 38 of 2005, the presiding officer may stop the proceedings and order that the child be brought before a children's court referred to in Chapter 4 of that Act and that the child be dealt with under the said sections 155 and 156.

Clause 66

There are great concerns regarding delays in the criminal justice system, and particularly regarding children who are detained whilst awaiting trial. Clause 66 purports to ensure that there is sufficient oversight of children in detention awaiting trial. However, it also recognises that there needs to be sufficient time to allow the police to investigate the matter fully and prepare for trial. At present, 14 day remands are use, but this occasions delays because of dockets moving between court and the police stations. Therefore, it was originally proposed the remand periods be increased. However, the 2002 version of the Bill made provision for children in residential facilities to be brought before court at least every 60 days. This is missing from the Bill and needs to be reinserted. In addition, these limits on the periods of postponement of a child's matter should not be limited to proceedings up to the commencement of the trial (as contained in the 2007 version of the Bill), but should be applicable to his or her entire time in detention and the reference to 'prior to the commencement of a trial' should be removed..

Therefore The Child Justice Alliance submits that clause 66 (1) be amended as follows:

66. (1) If a child –

(a) has not been released into the care of his or her parent or an appropriate adult or on his or her own recognisance; or

(b) whose application for bail in terms of Chapter 9 of the Criminal Procedure Act –

(i) has been refused; or

(ii) has been granted but one or more conditions relating thereto has not been complied with,

and the child is in detention in prison, a child justice court may not postpone the proceedings for a period longer than 30 days at a time, unless exceptional circumstances exist and if the child is in detention in a child and youth care centre, a child justice court may not postpone proceedings for longer than 60 days at a time, unless exceptional circumstances exist.

Clause 67

As stated in the introduction to this submission under overarching issues, clause 67(2) is very complicated and does not facilitate easy access to the content of the Bill for persons who are not trained in law (or even those who are!). In addition, the 2002 version of the Bill is substantially different to the present version of this clause and we submit is not only simpler but more protective of children who find themselves languishing in detention pending the finalisation of a matter. Bear in mind that this restriction on the time spent in detention is only once the child has pleaded. Therefore if the trial starts expeditiously after plea, the child does not need to be released if concluded within 6 months. The intention is to put pressure on the police and prosecution to investigate and prepare the matter as thoroughly as possible for plea and trial so that it can be finalised as quickly as possible after plea.

Therefore the Child Justice Alliance submits that clause 58(3) of the 2002 version of the Bill be reinstated and clause 67(2) be amended to read as follows:

67(2) Where a child remains in detention in a child and youth care centre or prison and the trial of the child is not concluded within a period of 6 months from the date upon which

the child has pleaded to the charge, the child must be released from detention unless charged with murder, rape or armed robbery.

Clause 68

Its submitted that due process rights of the child are being severely prejudiced if the content of clause 68 (1)(c) is allowed to remain as and acknowledgment of guilt is not necessarily and admission of guilt and in any event, failure to comply with a diversion programme may not be due to any fault of the child. This clause is too prejudicial.

Therefore the Child Justice Alliance submits that clause 68(1)(c) be amended to read as follows:

(c) A child justice court that makes a diversion order must postpone proceedings pending the child's compliance with the diversion order in question.

10. Chapter 9: Sentencing

The sentencing chapter has important consequences for the management of convicted children, in addition, it emphasises the purposes of sentencing, namely, the creation of an individualised response to a particular child, instilling a sense of accountability in the child and promoting reintegration.

However, the effect of the provisions of the 2007 version of the Bill and the provisions of the Criminal Law (Sentencing) Amendment Act, 2007, in practice, do not achieve the objectives as stated in clause 70.

It is the submission of the Child Justice Alliance that the Criminal Law (Sentencing) Amendment Act of 2007 is unconstitutional and violates South Africa's international obligations.

Section 28(1)(g) of the Constitution states:

Every child has the right "not to be detained except as a measure 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…"

The imposition of a minimum sentence on a child as contemplated in the 2007 minimum sentences Act not only envisages the imposition of a minimum sentence as a measure of first resort but the very nature of minimum sentences also means that the detention will not be for the shortest appropriate period of time.

This was held in Brandt v S [2005] 2 All SA 1 (SCA), where the Court found minimum sentences were not applicable to 16 and 17 year olds relying on constitutional and international law obligations. The Court in this case stated as follows:

"If the notional starting point for the category of offender envisaged in subsection 3(b) is that the minimum prescribed sentence is applicable, as the majority in the court a quo and the full bench in Makwetsja (supra[42]) suggest, then imprisonment (the prescribed sentence) would be the first resort for children aged 16 and 17 years in respect of offences covered by the Act instead of the last resort….[n]evertheless, on the approach of the majority in the court a quo and of the Transvaal Provincial Division in Makwetsja, a sentencing court would be unable to depart from the statutorily prescribed minimum unless the child offender establishes the existence of substantial and compelling circumstances. To this extent the offender under 18 would be burdened in the same way as an offender over 18. This would infringe the principle that imprisonment as a sentencing option should be used for child offenders as a last resort and only for the shortest appropriate period of time."

The right of a child to be detained as a last resort and for the shortest appropriate period of time was also addressed in DPP KwaZulu Natal v P 2006(1) SACR 243 (SCA) where the court stated:

"*Having regard to s 28 (1) (g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'*."

It is submitted that to impose minimum sentences on children as has been done in the 2007 Act falls foul of section 28(1)(g) of the bill of rights as it removes the discretion of a court to apply the right contained in section 28(1)(g) unless substantial and compelling reasons exist to do so, a situation that does not observe the spirit, import and obligation of section 28(1)(g).

The Child Justice Alliance therefore urges the Portfolio Committee to amend the Criminal Law (Sentencing) Amendment Act of 2007 to exclude minimum sentences for children.

Clause 71

While it is acknowledged that the views of the victims are encouraged, and this point is found in various other aspects of the Bill, the use of victim impact statements in relation to child offenders only is highly inappropriate. They were proposed for inclusion in the Sexual Offences Act of 2007 but were rejected by this committee, and therefore it is inequitable that they should be allowed for children, when not allowed for adult sex offenders!

The Child Justice Alliance therefore submits that clause 71 should be removed from the Bill.

Clause 72

On the other hand a positive aspect of the sentencing chapter is the requirement regarding pre-sentence reports. Our courts have noted problems with the sentencing of children without probation officer reports and have consistently held that probation officer reports are necessary for

[42] Direkteur van Openbare Vervolgings, Transvaal v Makwetsja (2004 (2) SACR 1) (T).

sentencing purposes[43]. It is therefore noteworthy that the Bill emphasises the provision of pre-sentence reports and the Child Justice Alliance is in support of the idea that a pre-sentence report must be available before a sentence is imposed on a child.

However, the Child Justice Alliance submits that the time period stipulated in the 2007 Bill needs some adjustment. While the shortest possible period for completion of the report should be emphasised for detained children, more time should be allowed for the finalisation of the report for children not in custody. This will alleviate some pressure on the department of Social Development, as the standard time for obtaining reports now is 6 weeks, and there are often delays.

As stated earlier in this submission, probation officers and other suitably qualified persons should be allowed to perform functions under this legislation, and the sworn statement from a residential facility might cause undue delays.

Therefore the Alliance submits that clause 72 should be amended to read as follows:

72. (1) *(a)* A child justice court imposing a sentence must, subject to paragraph *(b),* request a pre-sentence report prepared by a probation officer or any other suitably qualified person prior to the imposition of sentence.

(b) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring such report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a residential facility or imprisonment unless a pre-sentence report has first been obtained.

(2) The probation officer or other suitably qualified person must complete the report as soon as possible but no later than 20 working days in respect of a child in detention or 30 working days in respect of a child who is not in detention following the date upon which such report was requested.

(3) Where a probation officer or suitably qualified person recommends that a child be sentenced to compulsory residence in a residential facility or prison, such recommendation must be supported by information obtained by the probation officer or suitably qualified person from the person in charge of such facility, regarding the availability or otherwise of accommodation for the child in question and services and educational programmes current to the date of submission of the report to the child justice court.

(4) A child justice court that imposes a sentence other than that recommended in the pre-sentence report must record the reasons for the imposition of a different sentence.

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[43] *S v S 2001 (2) SACR 321 TPD; S v Van Rooyen (unreported Cape High Court decision, 5413/01); R v B (unreported Cape High Court decision, 0982/02)*

See the submission of the Civil Society Prison Reform Initiative (CSPRI) for a comprehensive submission on sentencing which the Child Justice Alliance endorses.

11. Chapter 10: Legal representation

Legal representation in criminal matters is a due process right included in section 35 of the Constitution. It is essential in allowing an accused to properly defend the case against him or her. In addition it is

An important component of the right to legal representation is the right to legal representation at state expense in certain circumstances. Section 35 (2)(c) of the Constitution guarantees the right to legal representation at state expense for all accused persons 'if substantial injustice would otherwise result'. Case law has produced various factors to assist in interpreting this phrase, for example, courts must look to the severity of the sentence to be imposed if convicted; if the accused is ignorant or indigent or the complexity of the matter in determining if an accused has a right to legal representation at state expense.

The Child Justice Bill, shockingly requires a child justice court to refer a child to the Legal Aid Board for assistance if the child is below 14 years; the child is below 16 years and in prison and or if the child faces a sentence to a residential facility.

Therefore, we would argue that the Child Justice Bill tries to give its own interpretation of section 35(2)(c) for children accused of crimes. BUT completely excludes ALL children who face the possibility of imprisonment as a sentence as well as children children aged 16 or 17 years who are in detention in prison from this interpretation. This flies in the face and spirit of the Constitution, as ALL accused, - adult and children alike – in respect of whom 'substantial injustice would otherwise result' are entitled to legal representation at state expense. Therefore why exclude these children, who are the ones that 'substantial injustice' would almost certainly apply to, from a provision that would assist them in securing this legal representation? This provision invokes a deep feeling of indignation and disappointment in the new version of the Bill as it is prejudicing children in a manner that does not even apply to adults.
Therefore we submit that the contents of clause 75 of the previous 2002 version of the Bill be reinstated and clause 83 be amended to read as follows:

83. (1) Subject to the Legal Aid Act, 1969 (Act No. *22* of 1969), a child must be provided with legal representation at State expense at the conclusion of the preliminary inquiry if no legal representative was appointed by the parent or appropriate adult and if-
(a) the child is in detention pending plea and trial in a child justice court;
(b) the proceedings are postponed for plea and trial in a child justice court and it is likely that a sentence involving a residential requirement maybe imposed if the child is convicted of the offence in question; or
(c) the child is under the age of 14 years
(2) The prosecutor must indicate to the child justice court whether he or she is of the opinion that the matter is a matter contemplated in subsection (1)(a) before the child is asked to plead and if so, no plea may be taken until a legal representative has been appointed.

(3) If a child qualifies for legal representation at State expense a request for legal representation must be made to the Legal Aid Officer concerned in the prescribed manner as soon as is reasonably possible.

See the submission of CSPRI and Campus Law Clinic KZN

12. Chapter 11: Appeal and Review

Again the bifurcation issue raises its head. Imprisonment of children should be a last resort and for the shortest appropriate period of time. Given this constitutional imperative –ALL children should be protected when sentenced to a residential sentence. This chapter again excluded certain children from protections and it is these children that require the protections the most!!!

Clause 85

There should be no distinction between children below 16 years and children above 16 years. They are ALL CHILDREN! Also note that the Criminal Procedure Act has been amended and this clause needs to reflect such amendments.

In addition, we submit children who are sentenced to long periods of imprisonment when represented by a legal representative should also be protected in terms of this clause.

Therefore clause 85(1) should be amended as follows:

85. (1) An appeal by a child against a conviction, sentence or order as contemplated in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the offence -

(a) below the age of 14 years; or

(b) at least 14 years or older and was not assisted by a legal representative at the time of conviction in a regional court or high court, and has been sentenced to any form of a custodial sentence that was not wholly suspended, or

(c) at least 14 years or older and was assisted by a legal representative at the time of conviction, and has been sentenced to a custodial sentence of 5 years or more that was not wholly suspended

he or she may note such an appeal without having to apply for leave in terms of section 309B in the case of an appeal from a lower court and in terms of section 316 in the case of an appeal from a High Court: Provided further that the provisions of section 302(1)*(b)* shall apply in respect of a child who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)*(a)*.

Clause 86

Applying the same argument set out above, (as well as including protections for children represented by a legal representative) we submit clause 86(1) should be amended to read as follows:

86. (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the offence,-

(a) below the age of 14 years; or

(b) at least 14 years of age or older and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a residential facility, for longer than 3 months duration

such sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction.

In addition there should be a clause requiring the court to consider releasing the child on bail pending the outcome of a review.

13. Chapter 13: General provisions

Clause 90

One central feature of the chapter is the provisions for the establishment of one-stop-child-justice centres. These centres will facilitate the whole process from arrest to the formal court process and will ensure a much child-friendlier approach to children in trouble with the law and their families. The idea of one-stop-child-justice centres is supported by the Child Justice Alliance as this would mean that parents and children can have access to the necessary personnel and services at one place without having to travel to many different locations and venues. It also promotes specialisation within the criminal justice system; enhances inter-departmental co-operation and will ensure that children can access a range of services aimed at intervening positively in their lives.

Clause 94

The use of children by adults to commit crime is an under-researched phenomenon internationally as well as in South Africa. Recent research undertaken by the International Labour Organisation though has confirmed that use of children by adults is a significant problem in South Africa, and highlighted the need for mechanisms, such as the Child Justice Bill, to assist such children.

The children who are used by adults, commit crimes that range from shoplifting, to narcotic offences, to housebreaking or murder. These are children who are victims of exploitation and in need of interventions to assist them in being able to prevent such use again. Therefore to exclude certain children based on age of offence category from essential services such as assessment, preliminary inquiry and diversion will prejudice not only all children in conflict with the law but those who are not only offenders but victims as well.

The Children's Amendment Bill 19F of 2006 has created an offence for a person to use a child to commit crime.

But apart from criminalizing such action, it is of the utmost importance to ensure systems are in place to assist the victims of such action.

Therefore the Child Justice Alliance once again re-iterates its submission that no child should be excluded from processes contained in the Bill, such as assessment, the preliminary inquiry or diversion based on age or offence category.

Clause 95

As submitted earlier, the Child Justice Alliance objects to the exclusion of certain children based on age and offence category from the possibility of diversion. The National prosecuting Authority has been diverting persons (adults and children) from the criminal justice system in practice and according to their own guidelines. To legislate for certain exclusions based on age for children will lead to the inequitable situation where certain children can be diverted for minor offences, certain children excluded totally from diversion and adults potentially being diverted for anything. The effect is to punish children for being children instead of to intervene in their lives.

Therefore, as submitted previously we propose to allow all children the possibility of being diverted but that the National Prosecuting Authority issue guidelines regarding the exercise of the prosecutorial discretion to divert and clause 95 be amended to read as follows:

(5) *(a)* The National Director of Public Prosecutions must, in consultation with the Cabinet member responsible for the administration of justice, issue guidelines regarding –

(i) the manner in which prosecutorial discretion is applied to a decision to divert a child

(ii) all matters which are reasonably necessary or expedient to be provided for in order to achieve the objectives of diversion, the minimum standards applicable thereto and the factors to be considered when selecting a diversion option, and in particular the following:

(aa) the diversion of matters in the case of accused persons who, at the time of the commission of an offence or at the institution of criminal proceedings, were 18 years or older but below the age of 21 years, as contemplated in section 4(2)*(b)*; and

(bb) the diversion of matters by a prosecutor in respect of minor offences before a preliminary inquiry in terms of Chapter 6; and

(iii) the manner in which matters must be dealt with where an error as to age has been discovered subsequent to the matter being diverted as referred to in section 16(2).