RAPCAN
protecting children's rights

# Additional Submission on the Child Justice Bill

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**Cheryl Frank**
Executive Director, RAPCAN

## 1. Introduction

We would like to congratulate the Portfolio Committee on the current version of the Child Justice Bill, and for its engagement with both government departments and civil society in developing the Bill to this stage. We would also like to thank the Portfolio Committee for this opportunity to provide further comments on the Bill.

This submission addresses itself to provisions in the revised version of the Child Justice Bill (dated 12 June 2008) in relation to:

- Preliminary Inquiry
- Diversion

It should be noted that all recommended changes to the text of the Bill are indicated in **bold, red text.**

## 2. Preliminary Inquiry

Clause 44 of the Bill requires that diversion service providers to be present at the Preliminary Inquiry. This provision is not practical and we concerned that the Preliminary Inquiry process will be rendered inefficient before it is properly instituted into the system, due to this requirement.

We submit that the only value that can be added by the attendance of diversion service providers at the Preliminary Inquiry is to confirm that the child who is being considered for diversion is indeed suitable for the diversion programme contemplated. We submit that it is not necessary for the diversion service provider to be present at the Preliminary Inquiry for this fact to be established, and that this can be done by Probation Officer, who would have had prior consultation with the diversion service provider.

We believe that there are very practical issues that will affect the ability of diversion service providers to attend Preliminary Inquiries, and provide some detail about these below:

- The organisations that provide diversion programmes are of a wide range with only two of these (Nicro and Khulisa) being large organisations with the staff and infrastructure to offer programmes across the country. Most of the organisations that will offer these programmes are likely to be locally based, with relatively small staff

components. Under these circumstances, requiring organisations to allocate staff time (and depending on the numbers dealt with, possibly entire posts) to this administrative process is not practical and will divert limited time and expertise away from the core functions of these organisations which are to provide effective diversion programmes and follow-up services to children.

- It is only in very unusual circumstances where diversion service providers would find it practicable to attend Preliminary Inquiries, i.e. in cases where they are lucky enough to be located at the court buildings. This situation currently only exists in few cases (such as One-Stop Centres), but is by no means the norm. It should be noted that due to the range of support services that need to be provided to the public (e.g. victim support, maintenance advice, etc.), there is an enormous demand for the limited space at the courts and very few organisations are successful in obtaining the permission of the Department of Justice to locate their services at the court. In the Western Cape, for example, only two organisations have concluded formal agreements with the Department of Justice to run their services from the courts and both these provide services to victims and are not diversion providers.

The above notwithstanding, we do believe that, where it is practical, diversion service providers should be included in the Preliminary Inquiry.

**Recommendation:**

It is recommended that clause 44 (2) be amended to replace the word 'should' with 'may', and that the words 'where practicable' be added to the end of the sentence, as follows:

**Persons to attend preliminary inquiry**

**[45]** 44. (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; and
*(c)* the probation officer.**[; and]**
**[*(d)* any diversion service provider identified by a probation officer at the assessment.]**
(2) If a diversion order is likely to be made, a diversion service provider identified by the probation officer ~~should~~ **may** be present at the assessment, **where practicable**.

## 2. Diversion

**Clause 53** sets out the maximum lengths of diversion programmes, as this relates to level 1 and level 2 diversion programmes. The comments below seek to limit the lengths of diversion programmes as well as ensure that the quality of programmes is enhanced as far as possible.

We submit that it is not only the length of the diversion programme that should be of concern here, but the broader issue of programme quality. There are several issues that speak to programme quality, including programme content, length, follow-up and monitoring. We submit that the issue of ensuring the quality of diversion programmes has

been dealt to a great degree in clauses 56 and 57, and that clause 53 should also seek to enhance provisions relating to programme quality, by also making provision for follow-up and monitoring of programmes.

We are extremely concerned that in practice, the maximum lengths of programmes stated will be interpreted as the actual lengths of the programmes that should be prescribed for children being diverted from the system. Recent research on sentencing in South Africa illustrates the tendency of magistrates to apply higher sentencing tariffs where these are enabled by amendments in legislation[1] and there is nothing to suggest at this stage a different approach would be taken by magistrates and prosecutors in relation to child offenders that are being diverted. Diversion is understood by most in the system in much the same way as sentencing i.e. a form of punishment for offending behaviour. This is severely problematic if it results in children staying longer in programmes than is actually necessary. The principle that diversion is based on is the limiting of the child's contact with the criminal justice system as far as possible. This applies equally to diversion programmes which are an extension of the criminal justice system.

There are several problematic implications for keeping children in programmes for longer than is necessary. These include: the wastage of resources that could be applied to other more needy children; the stigmatisation of children due to long periods in programmes (which become akin to 'sentences'); and the utilisation of diversion for the purposes of punishment only, rather than the range of functions it is intended to serve, as described in this Bill.

**Recommendation:**

We recommend that follow-up and monitoring of children in the context of diversion programmes be included within the maximum periods stated, in order to ensure that these services are provided. This will strengthen the quality of programmes that are provided for in this Bill.

**[(4)]**(5) *(a)* Where a diversion option from level one as referred to in subsection (3) is selected in respect of a child –

(i) **[below]** under the age of 14 years, the order may not exceed **[twelve]** 12 months in duration, **inclusive of monitoring and follow-up services**, if a time period is applicable;

(ii) who is 14 years or older, the order may, subject to paragraph *(b)*, not exceed twenty four months in duration **inclusive of monitoring and follow-up services**, if a time period is applicable.

**[*(b)* Where a diversion option referred to in subsection (3) is selected in respect of a child who is 14 years or older, the order may not exceed twenty four months in duration if a time period is applicable.]**

**[*(c)*]***(b)*** An order exceeding the time period referred to in paragraph**[s]** *(a)* **[and *(b)*]** may be given, in which case the reasons for exceeding the time period must be entered on the record of the proceedings.

(6) *(a)* Where a diversion option from level two as referred to in subsection **[(5)]**(4) is selected in respect of a child –

[1] Giffard, C and L Muntingh. 2006. The Effect of Sentencing on the Size of the South African Prison Population. Cape Town: Open Society Foundation for South Africa.

(i) **[below]** under the age of 14 years, the order may not exceed **[two years]** 24 months in duration **inclusive of monitoring and follow-up services**, if a time period is applicable;**[, except in the case of a matter which is diverted in terms of section 57, in which case the order may not exceed five years]**

(ii) who is 14 years or older, the order may, subject to paragraph *(b)*, not exceed 48 months in duration **inclusive of monitoring and follow-up services**, if a time period is applicable.

**[*(b)* Where a diversion option referred to in subsection (5) is selected in respect of a child who is 14 years or older, the order may not exceed four years in duration inclusive of monitoring and follow-up services if a time period is applicable.]**

**[*(c)*]***(b)*** An order exceeding the time period referred to in paragraph**[s]** *(a)* **[and *(b)*]** may be given, in which case the reasons for exceeding the time period must be entered on the record of the proceedings.