

Article 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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Article 40 (3)

“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 ...”

OVERVIEW OF THE **2007** **version of the** **Child Justice Bill**

It was with welcome relief that the Child Justice Bill was reintroduced to parliament in late 2007. However, despite the excitement felt by child justice activists at the Bill’s re-emergence, dismay followed due to the range of provisions that it contains that are cause for concern. Many of the issues that follow were the focus of the submissions made by the Child Justice Alliance and other civil society organisations in early 2008.

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

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EDITORIAL

After many editorials that expressed disappointment and frustration regarding the delays around the finalisation of the Child Justice Bill in past editions of Article 40, it was a welcome surprise when late last year Cabinet approved a new version of the Child Justice Bill and the Portfolio Committee on Justice and Constitutional Development called for written submissions on the Bill. The elation at the re-emergence of the Bill was somewhat short-lived, however, when the substance of the Bill became apparent. While the ethos of the original 2002 Bill remained, in that the original procedures and processes were still retained in the 2007 version, there are serious concerns about the manner in which the Bill deals with children charged with serious offences and especially children aged 16 and 17 years. The effect of the changes evidenced in the 2007 version is that only certain children will benefit from, for example, assessment, consideration for diversion and attendance at the preliminary inquiry. The new version of the Child Justice Bill represents a serious inroad into the constitutional protection for children in conflict with the law and a generalised, 'tough-on-crime' approach to certain children – in stark contrast to the individualised approach fashioned in the 2002 version that sought to determine the best outcome for each child offender and thereby promote the prevention of reoffending in the interests of public safety.

Despite the concerns with the 2007 version of the Bill, the fact that a legislative framework for child offenders is back on the table is encouraging. What followed the re-introduction of the Bill to parliament was a consolidated effort by a range of organisations working in child justice to make submissions on the Bill and influence the final draft. This edition of Article 40 is therefore dedicated to a selection of submissions made on various issues contained in the Bill. All the submissions represent a wealth of information on child justice issues in South Africa, as well as the work of organisations, academics and individuals who are concerned with child justice and in certain cases have years of experience in the field. These include: National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO); Civil Society Prison Reform Institute (CSPRI); Resources Aimed at the

Prevention of Child Abuse and Neglect (RAPCAN); Centre for Child Law at the University of Pretoria; Department of Social Development at the University of Cape Town; Restorative Justice Centre (RJC); Campus Law Clinic at the University of KZN; Community Law Centre at the University of the Western Cape; Professor Terblanche from UNISA; Professor Sloth-Nielsen from the University of the Western Cape; Childline; South African Society for the Prevention of Child Abuse and Neglect (SASPCAN), GSL Solutions; Heidi Sauls; CSIR Crime Prevention Research Group; Catholic Institute of Education; Southern African Catholic Bishops Conference Parliamentary Liaison Office; South African Human Rights Commission and the Child Justice Alliance.

The process of the deliberations by the Portfolio Committee on Justice and Constitutional Development has also been very participative and allowed for rigorous debate. The Chairperson of the Committee has encouraged civil society participation and in certain respects we believe his approach should be considered a good practice of parliamentary participation by civil society. In South Africa, our Constitution contains a number of provisions that facilitate the participation of civil society in interaction with government in order to achieve both accountability and transparency. These provisions provide a formal legislative framework that civil society can harness in any attempts to lobby or monitor government and can be of particular use in moving for the reform of laws. In particular, section 59 of the Constitution states that the National Assembly must facilitate public involvement in its legislative and other processes as well as those of its committees. The insistence of the Chairperson of the Justice Portfolio Committee that representatives of civil society be present at all deliberations, and the concurrent opportunity afforded to them to present a summary of the submissions to the Committee during the clause-by-clause reading of the Bill is just one example of how he has given life to the Constitutional requirements around participation in parliament. For this we must commend him.

Article 40 will continue to monitor developments around the Bill in parliament and ensure that information regarding these are passed on to you, our readers.



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Simplification

The Child Justice 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.

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 2007 version of the Bill now excludes certain children based on their age or offence category from these processes, which have discernable outcomes benefiting not only the children but society as well.

Already in the summary of the Bill reference is 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.

Civil society organisations made extensive submissions 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. The changes effected by the 2007 version of the Bill constitute 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. The argument was made to the Portfolio Committee on Justice and Constitutional Development during the hearings that the exclusion of certain children from these processes and procedures places them in a more prejudicial position not only with regards to other children but also with regard to certain adults who appear in criminal courts.

Specific issues

In addition, a range of other concerns were addressed by the submissions and at the hearings. These included:

How to establish the criminal capacity of a child

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, unlike the 2002 version of the Bill which provided that such an

“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’.”

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evaluation be done at state expense. The concerns in relation to this clause stem from the fact that the assessment of a child within the first 48 hours of arrest is not the appropriate mechanism to determine criminal capacity and that a probation officer is not suitably trained to make a determination of a child's criminal capacity.

Mandatory placement in prison of children prior to their first appearance in court

Clause 27 of the Bill provides for the mandatory placement in prison of children charged with offences in Part 1 and Part 2 of Schedule 3 who haven't been released before their first appearance. This is an example of a restrictive approach being adopted, which is not in compliance with section 28(1)(g) of the Constitution. The illogical nature of this provision is evidenced by the fact that, 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 the Correctional Services Act 1998, which in fact does not allow for any accused person, child or adult, to be detained in prison prior to a first appearance in court.

Assessment

It has been noted that, although section 50(5) of the Criminal Procedure Act 51 of 1977 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. The purpose of notification and what the probation officer is supposed to do thereafter is also not stated.

Accordingly, a chapter dedicated to assessment, setting out the responsibilities and powers of probation officers, is welcome. The inclusion of this process as a necessary (albeit not compulsory) procedure is a necessary improvement of the present criminal procedure pertaining to children. Assessment has already been assimilated into South African law through the Probation Services Amendment Act 35 of 2002. 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 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).

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 the child and the nature of the offence with which the child is charged or is alleged to have committed.

Civil society 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. To totally exclude a child from any of these processes, for example, assessment, does not allow for an individualised approach to be adopted and criminal justice officials are precluded from properly engaging in the circumstances of the commission of the offence as well as with the child. This can impede the decision-making process from achieving the most desirable outcome for the child and for society.

The 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. 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'.¹

¹ 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.

“This approach recognised the value of these services in determining the best possible outcome for all children in changing their offending behaviour ...”

It is of great concern that the 2007 Cabinet version of the Bill in clause 44 precludes certain children from attending a preliminary inquiry. It is clear that this is linked to the fact that these children are also excluded from the possibility of diversion. Civil society is generally of the view 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 a number of submissions have focused on calling for all children charged with an offence to attend a preliminary inquiry except those that are diverted by a prosecutor at the outset of proceedings.

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 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. 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.

However, the 2007 version of the Bill excludes certain children from the possibility of being considered for diversion based on age and certain offence categories. Civil society strongly objected to this. The objection was 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.

In addition the point was made that, should the legislature insist on following the approach to exclude 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 with which they have been charged, but certain children will be totally precluded *ab initio* from an equal opportunity to be considered for diversion.

Legal representation

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

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 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 2007 version of 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, civil society argues that the Child Justice Bill tries to give its own interpretation of section 35(2)(c) for children accused of crimes and completely excludes from this interpretation ALL children who face the possibility of imprisonment as a sentence as well as children aged 16 or 17 years who are in detention in prison. 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.

Conclusion

These are some of the main issues that are cause for concern in the 2007 version of the Bill. Vociferous submissions were made calling for the provisions to be amended and the 2002 approach adopted once again. It must be stressed that the provisions are only in draft legislative form and are not final, as it is precisely these issues that the Portfolio Committee on Justice and Constitutional Development are debating in their deliberations on the Bill. It is hoped that the submissions made by civil society will sway the members of the Committee to discarding the approach adopted in the 2007 version of the Bill.



Child Justice Bill

BRIEF OVERVIEW

First reading of the Child Justice Bill

At the end of April 2008 the Portfolio Committee finished the first clause-by-clause reading of the Child Justice Bill.

This article gives a brief summary of some of the decisions made, but readers are urged to bear in mind that none of the decisions are final as the Committee will revisit the Bill during a second reading later in 2008.

Child Justice Bill

Policy decisions

At the outset, the Portfolio Committee on Justice and Constitutional Development identified certain policy decisions that they needed to make. These policy decisions stemmed from a clear disjuncture between the 2002 version of the Bill and the 2007 version, as well as almost unanimous calls from civil society to revert to most of the provisions in the 2002 version of the Child Justice Bill.

The following represents tentative, preliminary decisions by the Committee, which they would take to their respective political party caucuses for decisions on these policy aspects to the Bill:

Assessment

It seems the Committee is leaning towards assessment for all children providing the Department of Social Development is able to show to the Committee's satisfaction that they can deliver on assessing all children (which they have said they can).

Preliminary enquiry

Again, the Committee seems to be leaning towards allowing all children to attend the preliminary inquiry, but again dependent on whether the Department of Justice and the National Prosecuting Authority (NPA) have capacity to accommodate this.

Diversion

The Committee seems to have accepted the argument that certain children can't be excluded from the possibility of diversion based on the type of offence committed, whilst still allowing the possibility of all adults to be diverted irrespective of the offence they have committed. This is still a controversial issue and the Committee appears to be somewhat divided as to how to approach this. On the one hand they realise the problems of totally excluding children from the possibility of diversion while on the other hand they feel that the Committee, in 2003, must have had good reasons for making the decision to exclude them. So two trains of thought have

emerged. Firstly, to allow all children the possibility of being diverted and then include, in clause 95, a provision requiring the NPA to formulate guidelines on when children can and should be diverted, which they must table in parliament for approval. Secondly, to exclude certain children from diversion in certain instances, but then include a clause which allows for 'application' to be made to the NPA for diversion of these children in exceptional circumstances. However, no decision has been made as to which route will be followed.

Detaining children awaiting trial

This has proved to be quite a contentious issue. However, the Committee seems to be leaning towards not allowing children under 14 years to be detained in prison awaiting trial based on current law – the thinking is that unless there is good reason to depart from the present position they will keep the prohibition on the detention of children under 14 years in prison awaiting trial. Yet no final decision has been made.

Other issues

- It appears as if the Committee will retain the provisions in the 2007 version of the Bill that allow for probation officers to express their views on age and criminal capacity. Despite vigorous arguments that they are not trained to do this and the Department of Social Development themselves confirming this, the Committee appears to be of the opinion that this clause will do no harm and there is still the provision that experts can assess age and criminal capacity if applied for by the legal representative or prosecutor.
- The time period for probation officers to prepare pre-sentence reports has been increased to six weeks;
- The clauses dealing with family group conferences and victim-offender mediations must provide that victims must consent to these processes;
- The provision relating to separation and joinder of trials is retained, which means a trial with two or more accused, especially where one is a child and the other an adult, will proceed against all the accused unless an application for separation of trials is made. The Committee noted the concerns regarding children who are used by adults to commit crime and are considering including guidelines in clause 95 regarding automatic separation of trials in situations where children have been used by an adult to commit a crime;
- The Portfolio Committee seems to have accepted the submissions regarding legal representation at state expense and all children will be entitled to state-funded legal representation if substantial injustice would otherwise occur.

A range of other issues have been dealt with by the Committee, however, this is just intended to provide a brief overview of some of their deliberations so far. Again, these are all tentative and not the final decisions or views of the Committee, as the Bill will return for a second reading later in the year.

The Minimum Age of Criminal Responsibility: 10 or 12 years?



The Law Commission's proposals regarding the minimum age of criminal responsibility date back to 2000. Since then medical science has advanced and international law on this issue has also developed. As a result, a number of submissions were made by civil society organisations advocating for a higher minimum age of criminal responsibility.

These submissions included:

- Raising the minimum age of criminal capacity to 12 years (Professor Julia Sloth-Nielsen and NICRO)
- Raising the minimum age to 12 years and retaining the rebuttable presumption of no criminal capacity for children 12 years and above but who are younger than 14 years (Childline)
- Raising the minimum age to 12 years and retaining the rebuttable presumption for children 12 years and above but younger than 16 years (SASPCAN)
- Raising the minimum age of criminal capacity to 14 years (Professor Stefan Terblanche)

Developments in international law

Professor Sloth-Nielsen pointed out that, based on Concluding Observations and consideration of country reports over a much more extended period than was the case when the South African Law Commission Project Committee was conducting its research, the UN Convention on the Rights of the Child Committee issued General Comment No. 10 in February 2007 ('Children's Rights in Juvenile Justice'), to elaborate the nature of the states' obligations in relation to a range of matters including the minimum age of criminal responsibility. In this particular regard, the obligation is clearly stated and based on universal wisdom: the minimum age should be

Both the 2002 version of the Child Justice Bill and the 2007 version raise the minimum age of criminal responsibility to 10 years. This move was based on the South African Law Reform Commission's proposals¹ that the age be raised to 10 years. This was founded on a number of motivating factors, which included the respondents to the consultative process agreeing to the change² as well as the recognition that scientific evidence on child development advocated the minimum age of 7 years in terms of the common law being raised.³

set at 12 years and progressively raised from there where possible. According to the General Comment any age below 12 years is unacceptably low and in contravention of the Children's Rights Convention. Further, a 'split' age such as is occasioned by the retention of the rebuttable presumption for certain categories of children is discriminatory (in contravention of Article 2 of the Convention on the Rights of the Child), as it leads to children being treated differently according not just to their age and maturity, but also according to the nature and quality of the rebuttal evidence adduced by the prosecution.

Likewise, Childline and SASPCAN referred to the General Comment when making their submissions.

Advances in medical science

NICRO made some very interesting arguments in their submission calling for the minimum age of criminal responsibility to be raised to 12 years. They referred to the basics of the human brain and what follows is a direct quotation from their submission:

'The human brain has been called the most complex mass in the known universe. This is a well deserved reputation, for this organ contains billions of connections among its parts and governs countless actions, involuntary and voluntary, physical, mental and emotional. The largest part of the brain is the frontal lobe. A small area of the frontal lobe located behind the forehead, called the prefrontal cortex, controls the brain's most advanced functions. This part, often referred to as the "CEO" of the body, provides humans with advanced cognition. It allows us to prioritise thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses. Along with everything else in the body, the brain changes significantly during adolescence. In the last five years, scientists, using new technologies, have discovered that adolescent brains are far less developed than previously believed.

'Neuro scientist Jay Giedd (National Institute of Mental Health) and neurologist Paul Thompson (University of California) found one of the most significant changes to be in the frontal lobes or prefrontal cortex. It is these areas, among other things, which control impulses, calm emotions, provide an understanding of the consequences of behavior and allow reasoned, logical and rational decision-making processes. These "executive functions" do not fully develop until the early twenties.

'In conjunction with the development of the prefrontal cortex during adolescence, other studies show that throughout this period adolescents use an alternative part of the brain in their thought processing: the amygdala. This area of the brain is associated with emotional and instinctual responses. Studies by Dr Deborah Yurgelun-Todd and colleagues at Harvard Medical School using MRI scans show that adolescents, when interpreting emotional information, use this part of the brain rather than the rational decision-making region: the prefrontal cortex. Conversely, adults in the same experiment relied more heavily on the frontal cortex. In assessing the results of the tasks set to the two groups, Dr. Yurgelun-Todd found that all of the adult participants interpreted the emotional information correctly in comparison to under half of the adolescents. "These results suggest that adolescents are more prone to react with 'gut instinct' when they process emotions but as they mature into early adulthood, they are able to temper their instinctive 'gut reaction' response with rational, reasoned responses" ... "Adult brains use the frontal lobe to rationalise or apply brakes to emotional responses. Adolescent brains are just beginning to develop that ability."

It is clear therefore, that the normal adolescent brain is far from mature or operating at full adult capacity. The physiological structure of the adolescent brain is similar therefore to the manifestation of mental disability within an adult brain.

'These are not however the sole developments within the adolescent brain. It has further been found that the cable of nerves (the corpus callosum) that connects the two sides of the brain appears to grow and change significantly through adolescence. This cable of nerves is involved in creativity and problem solving. The lack of a properly formed prefrontal cortex and corpus callosum indicates an impairment of the rational decision and thought-making process, instead placing heavy reliance upon the emotional and instinctual response area (amygdala). The ability to regulate emotions is therefore impaired and this can result in quite severe acts with little regard for the consequences.

'The problems associated with adolescent brain development are further exacerbated by trauma and shocking experiences. It has been accepted for some time that psychological consequences arise from exposure to violence, abuse, neglect, abandonment and other childhood trauma. However now it has been found that these experiences may cause physical changes in the brain.'

The issues raised by NICRO seemed to impact on the Committee's thinking with regard to the issue of criminal capacity and may influence the ultimate outcome of the deliberations on this point.

Conclusion

It appears that these developments have overtaken the thinking that motivated the original proposals to raise the minimum age of criminal capacity to 10 years. This issue, however, essentially represents a policy matter. The Committee has not reached a final decision on minimum age of criminal responsibility and much will depend on what their political party caucuses decide in relation to this particular policy issue.

1 Report on the Child Justice Bill, Project 106, July 2000

2 Report on the Child Justice Bill, par 3.16

3 Report on the Child Justice Bill, par 3.29-30

Young sex offenders & the Child Justice Bill



The 2002 version of the Child Justice Bill did not discriminate between categories of offences in relation to diversion. It allowed for all children to be considered for diversion, irrespective of the seriousness of the offence committed. However, the 2007 version excludes certain children from diversion based on their offence category. One of those categories includes sexual offences.

While it is acknowledged that diversion for sexual offences is a controversial issue, especially amongst some victims' lobby groups, the potential benefits of intervening in young sex offenders' behaviour patterns are recognised and widely researched. As a result, two child victims' advocacy and service organisations made substantive submissions in relation to young sex offenders, calling for the Portfolio Committee on Justice and Constitutional Development not to exclude certain children from the possibility of consideration for diversion.

Childline

Childline indicated to the Committee that the organisation has 20 years' experience providing rehabilitation programmes to child sex offenders. They noted that both child and adult offenders are referred to these programmes through the criminal justice system, other NGOs working in the field of child abuse, state departments, and sometimes by families and offenders themselves. They pointed out that Childline's experience with young sex offenders indicates that the vast majority of these children have been exposed to adverse circumstances through their childhood and to various forms of abuse and violence. Their experience further indicates that these children have little understanding of their sexual behaviour and its

impact on others and have distorted beliefs about sex and sexuality. Therefore, on this basis, Childline submitted that all children should be allowed to be considered for diversion, including young sex offenders.

In addition, Childline's submission does not suggest that there should be no demand for accountability and the assumption of responsibility for the commission of an offence, and even negative consequences for these crimes, but rather that the provisions for dealing with the child through diversion, restorative justice options and rehabilitation prior to trial can potentially be applied to all children regardless of the crime and age of the child.

RAPCAN

One of RAPCAN's primary activities is working with child victims of sexual offences. They therefore expressed concern that current responses to young sex offenders do not take a

long-term preventive approach. They argued that South Africa's current responses to sexual offending, which are to a great extent perpetuated by the provisions of the 2007 version of the Bill, are hugely inadequate and have the effect of removing sexual offenders from society for a limited period, after which many return and are likely to continue to offend. This approach perpetuates cycles of violence and victimisation rather than intervening to interrupt these. It is important to note also that many young offenders enter the system and are themselves victimised sexually and otherwise. They pointed to recent research which indicates that prevention efforts that target young sexual offenders have a significant impact on breaking the cycle of offending.

Research on young sex offenders

RAPCAN provided some useful information in their submission on recent research in this area. They noted that research clearly indicates that the majority of young sex offenders do not become adult sex offenders.¹ Literature on young offenders in general shows that young people who commit crimes are less likely to continue to do so as they get older.² Recidivism rates for young sex offenders are even lower when compared with non-sexual offences of both a violent and non-violent nature. This is important as it implies that there is likely to be a significant subgroup of young sex offenders who do not continue to commit sexual offences as adults.³

They pointed out that a meta-analytical study in 2006 analysed the findings of 33 studies on recidivism rates for young sex offenders. It found that the overall recidivism rate for young sex offenders was 11,8%.⁴ The study shows that recidivism rates for young sexual offenders are significantly lower than the rates for young offenders who commit non-sexual crimes, whether violent or not. Recidivism rates in these other categories ranged from 22,5% for violent non-sexual offences to 29% for non-violent and non-sexual offences. These studies indicate that a child convicted of a sexual offence is about half as likely to reoffend as a child convicted of violent non-sexual offences.

It is widely accepted that the current criminal justice and correctional systems increase the risk of young offenders (sexual or not) being exposed to sexual offences in police and holding cells, places of safety and prison. This is of serious concern given that research indicates that a high incidence of sexual victimisation in childhood is a risk factor for continued sexual offending in adulthood. Research indicates that exposing lower-risk youth to more delinquent youth within residential and institutional settings can result in negative outcomes for that child.⁵ The current provisions of the Bill in relation to young sex offenders can thus potentially exacerbate the situation of sexual offending in the country in the long term.

It was on this basis, inter alia, that RAPCAN strongly advocated for the Bill not to exclude certain children from the possibility of diversion based on their age or the offence with which they were charged.

“[RAPCAN] pointed to recent research which indicates that prevention efforts that target young sexual offenders have a significant impact on breaking the cycle of offending.”

1 Carter M & Morris L. 2007 *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners*, Center for Sex Offender Management, US Department of Justice, p6. This research cites three significant studies between 2004 and 2006.

2 Tolan & Gorman-Smith. 1998, cited in Righthand S & Welch C. 2001, *Juveniles who have sexually offended: A Review of the Professional Literature*, Office of Juvenile Justice and Delinquency Prevention, p15.

3 Weinrott, 1996 and Knight & Prentky, 1993, in Righthand S & Welch C. 2001, p13.

4 Reitzel L & Carbonell J. 2006. *The effectiveness of sex offender treatment for juveniles as measured by recidivism: A meta-analysis*. *Sexual Abuse: A Journal of Research and Treatment*, Volume 18, Number 4, pp401–421.

5 Dodge, Dishion & Lansford, 2006, cited in Bumby K. 2007. *The Importance of Assessment in Sex Offender Management: An Overview of Key Principles and Practices* Centre for Sex Offender Management; Office of Justice Programs, US Department of Justice.

NOTICE-BOARD



UPCOMING CONFERENCE

XVIIth ISPCAN International Congress on Child Abuse and Neglect

This event takes place from 7-10 September 2008 in Hong Kong SAR, China. It is entitled 'Towards a Caring and Non-Violent Community: A Child's Perspective'. ISPCAN congresses provide a unique opportunity for professionals all over the world to meet, discuss their concerns, learn from each other and support each other. Apart from stopping and preventing abuse and neglect, the theme of the XVIIth ISPCAN Congress hopes to stimulate participants to move the world "Towards a caring and non-violent community" emphasizing "a child's perspective" along the way.

KEY DATES:

10 June 2008: Early Registration Deadline

1 July 2008: Speaker Registration Deadline

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