WHAT HAPPENED TO THE CHILD JUSTICE BILL?

The process of law reform relating to child offenders

Jacqui Gallinetti
Community Law Centre, University of the Western Cape
jgallinetti@uwc.ac.za

Children who are accused of crimes in South Africa are governed by the same legislation as adults. The urgent need to develop a separate child justice system culminated in the release of the draft Child Justice Bill in 2000 by the South African Law Reform Commission (SALRC). A product of thorough research and consultation, the revised Bill was introduced to parliament in August 2002. The changes made after public hearings and debates in parliament in 2003 saw the whittling away of the overall child rights nature of the Bill. To add insult to injury, the legislation has, since that year, not been debated again before the portfolio committee and the legislature has provided no explanation for this state of affairs.

Children who are accused of crimes in South Africa are governed by the same legislation as adults who enter the criminal justice system. The Criminal Procedure Act 51 of 1977 sets out the procedural system that governs the prosecution of all persons who come into conflict with the law. There are only minimal provisions that take the status of being a child into account. These include:

- requiring court proceedings to be held in camera when a person under 18 years of age appears in court;
- allowing children to be assisted by their parents or guardians in court proceedings;
- provision for children to be placed under the supervision of a probation officer; and
- the possibility of being sentenced to a reform school (now known as youth centres) upon conviction.

In 1995, South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC), thereby binding itself to realise the rights contained therein for the children of South Africa. Included in the UNCRC are extensive provisions relating to children who come into conflict with the law, essentially requiring ratifying States Parties to create a separate child justice system for children.

In 1996, South Africa adopted its final Constitution, which in section 28 sets out certain principles applicable to children in trouble with the law. For instance, section 28(2) requires that the best interests of the child be of paramount importance in every decision taken in relation to a child and section 28(1)(g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and for the shortest appropriate period of time.

In addition, South Africa has ratified the African Charter on the Rights and Welfare of the Child and Article 17 thereof requires ratifying states to take measures to protect children in the criminal justice system. These are the three main sources that have informed the development of a separate child justice system for South Africa. 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)[1] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).[2] 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 in a manner inappropriate to their age.

The 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 present practice in the child justice system is not mirrored by legislation, uncertainty and inconsistency are constant dangers that need to be addressed by clear legislative norms.

The law reform process

The Report on Juvenile Justice and the draft Child Justice Bill, released by the South African Law Reform Commission (SALRC) on 8 August 2000,[3] heralded a significant and definitive moment in the process of reforming laws that apply to children who have come into conflict with the law. This date also marked the end of a structured process of consultation that took place over the period 1996–2000.

The consultation process started with an Issue Paper released by the SALRC in May 1997 to which respondents were invited to make comment. This was followed by workshops, briefings, a video and a questionnaire.

The Discussion Paper on Juvenile Justice was released by the Commission in December 1998, and thereafter subjected to intensive public consultation in the form of specific focus group workshops with state departments, NGOs, legal aid providers and members of various parliamentary portfolio committees.[4] A conference examining social, political and anthropological factors influencing the setting of a minimum age of criminal capacity was also held.[5]

Importantly, 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.[6] Finally, a large number of written comments on the Discussion Paper was received from various academics, practitioners and institutions.[7]

All these responses and views were taken into account in the preparation of the final report, which provides detailed argument concerning the content of the law reform proposals, and also contains the fully developed Child Justice Bill. The Commission's handing over of the report to the Minister of Justice marked the end of its formal involvement in the law reform process.

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 cost 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.

It can therefore be argued that the draft Child Justice Bill released by the SALRC in 2000 was well researched, extensively consulted on, and focused on implementation as well as ensuring that South Africa's international and constitutional obligations were met.

The SALRC version of the Child Justice Bill

Objectives of the Bill

The stated objectives of the Bill 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 as an individual on the

one hand, and, on the other, ensuring that the human rights and fundamental freedoms of the community are respected by children who are in trouble with the law.

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.

Of particular importance is the reference to co-operation between all government departments and other organisations and agencies. It is submitted that, until now, there has been little inter-departmental co-operation around issues of child justice. The various role-players perform their tasks and functions in isolation and also without much interaction with outside organisations and agencies. It is necessary that a holistic approach is fostered and that officials from the various departments and outside organisations start to regard all participants in the child justice process as colleagues, and not just those in their own field or sphere of operation.

Provisions of the Bill

The general principles of the Bill include the important concepts of non-discrimination, participation and proportionality. In addition, the constitutional guarantees contained in section 28(1)(g) are given prominence and are concretised into guidelines to ensure that children are only detained as a measure of last resort – the first step is to see if the child can be released. If not, bail must be considered, and if the child is to be detained it has to be as a measure of last resort and in the least restrictive form of detention appropriate to the child and the nature of the offence.

Generally, the proposed legislation contained in the SALRC version deals with issues such as police powers and duties, and arrest and court procedures. It also creates a child justice court, which is a court at district court level that will deal with all matters pertaining to children in conflict with the law. No longer will children appear in courts ordinarily designated for adults; instead they will have a court staffed by a magistrate and prosecutor trained in child justice. This was seen as not involving more resources, but rather the reallocation of staff and premises.

Furthermore the Bill regulates the detention and release of children, providing definite guidelines for the exercise of judicial discretion in detaining children in prison while awaiting trial.

More importantly, there are a number of provisions in the SALRC version of the Child Justice Bill that will significantly change the present state of our child justice law. These relate to, *inter alia*, the minimum age of criminal capacity, the proposed preliminary inquiry, assessment, diversion and sentencing.

The age of criminal capacity is presently regulated by our common law. A child below the age of seven years is irrefutably presumed to be *doli incapax*, a child between the ages of seven and 14 years is refutably presumed to be *doli incapax* and a child older than 14 years is regarded as having full criminal capacity.

In terms of the Child Justice Bill, a child who is below the age of ten years at the time of the alleged commission of the offence cannot be prosecuted. The Bill also stipulates that a child between the ages of ten and 14 years at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at that time. Children older than 14 years continue to have full criminal capacity.

Essentially, this means that the *doli capax/doli incapax* presumptions are retained while just the minimum age has changed. The rationale for this can be found in the Report on the Child Justice Bill by the SALRC (par. 3.10-3.11), where it is reasoned that the presumptions create a 'protective mantle' to immediately cover children of specified ages, as each child's level of maturity and development differs.

Preliminary inquiry

The Child Justice Bill also creates a wholly new procedure to facilitate the management of children

in conflict with the law, namely, the preliminary inquiry, which uses current resources and personnel. This inquiry has a number of objectives, which include 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 in future the Children's Act 38 of 2005).

The Bill also requires that any child who is to appear at a preliminary inquiry must be assessed prior to that appearance, although an assessment can be dispensed with in certain circumstances. An assessment is conducted by a probation officer and it is intended to serve a number of purposes: estimating the age of a child, establishing the prospects for diversion, establishing whether a child is in need of care, making recommendations relating to the release or detention of a child, and determining steps to be taken in relation to children below ten years of age. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate, pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity.

At present there is no legal requirement for the assessment of children who are arrested, although assessments are usually done by probation officers. However, assessments in the present system are not uniformly applied or regulated and delays often occur.

Diversion

As is the case with assessment, diversion does not feature in our criminal justice legislation at present. Despite this, diversion practices have been implemented in some of our courts since the early 1990s. Diversion involves the referral of children away from the criminal courts where appropriate, in order to serve a number of purposes. These include encouraging the child to accept responsibility for his or her actions; allowing the victim to express his or her views on the harm caused; promoting reconciliation between the offender and the victim(s) and community; avoiding stigmatising the child; and preventing him or her having a criminal record.

The Child Justice Bill proposes various forms of diversion. These options range from receiving a formal caution, or compulsory school attendance order, to the attendance of a specified programme, or referral to a programme with a residential element. As diversion will be used as a means of referring children away from the formal criminal justice system it is of great importance that diversion is properly regulated. Consequently, the Bill sets out certain criteria and minimum standards applicable to diversion programmes to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well as ensuring that the child understands the impact of his or her behaviour on others.

Rethinking sentencing options

While the Criminal Procedure Act contains a wide range of sentencing options to be used in matters pertaining to children, the South African Law Reform Commission decided, for a number of reasons, to re-appraise the sentencing of child offenders. This includes the impact of the concept of restorative justice on the criminal justice system; the effect of our Constitution on the traditional aims of punishment; and the shift in the international approach to sentencing from rehabilitation to reintegration into society. Therefore the Child Justice Bill was constructed in such a way as to encourage the use of alternative sentences and allow for the imprisonment of children only as a last resort and for the shortest period of time.

The above brief summary illustrates the innovative and child-centred approach that the SALRC took, adhering to South Africa's international and constitutional imperatives to create a procedural system within which children could be appropriately dealt with.

Developments after the release of the SALRC version of the Child Justice Bill

The tabled version of the Bill

The Child Justice Bill was introduced to Parliament in August 2002 as Bill 49 of 2002. However, it is

important to note that the Bill was no longer in the form that was originally released by the South African Law Reform Commission – although the substance essentially remained the same.

While the Department of Justice had effected various amendments, the core elements of the Bill remained: assessment, diversion, the preliminary enquiry, and alternative sentences. Unfortunately, the contents of the chapter on monitoring were removed, and the Bill now stated that monitoring would be included in the regulations to the Bill, once passed.

Ultimately, the changes to the Bill made the reading thereof somewhat difficult and laborious, while some of the definitions and explanations that the SALRC had included in the original Bill had been removed or altered. Even though most of the changes were cosmetic and not substantive, it is still unsettling that the Bill as a whole is now possibly more difficult to read.

The original draft Bill of the SALRC was user friendly and allowed for a clear understanding of the proposed new system. The Commission recognised that the legislation had to be readily accessible to criminal justice practitioners who are not legally trained, and accordingly attempted to make the Bill as straightforward as possible. An example of the removal of an explanation made by the SALRC can be found in the definition of detention. The SALRC's draft defined detention as follows:

> ...means the deprivation of liberty of a child including confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility.

The tabled version removed the explanation regarding deprivation of liberty and defined detention as follows:

> …includes confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility.

Other changes include:

- The principles relating to the detention of children that were listed in the chapter headed "Detention of Children and Release from Detention" are now listed under Chapter One – general principles, section 3(2).
- The remaining provisions relating to age assessment and age estimation that the Law Commission had included in the chapter dealing with age and criminal capacity, have now been placed in section 56 in the chapter dealing with child justice courts and section 82 in the chapter dealing with general provisions. It is arguable that these issues would be better placed in their position in the original draft, as they would have to be determined early on in criminal proceedings against a child.
- Section 38 of the Law Commission's draft dealing with assessment clearly set out the purposes of the assessment procedure. These have been removed from the new version and are to be implied from recommendations that a probation officer must make in the chapter dealing with the preliminary inquiry.

So while the essence of the original Bill remained, the tabled version became far more legalistic. The consequences for those who lack legal training will be that the Bill becomes more difficult to navigate and possibly apply.

It must be stressed that viewing the 2002 Bill as being 'soft on crime', is misplaced. Combating crime is an obvious necessity in South Africa today, but it must be directed and co-ordinated in such a way that, especially in the case of children, the rights of the accused are protected. The state must manage offenders in a way that will impact on, and change behaviour patterns to prevent reoffending. It is argued that an overall punitive approach, especially towards child offenders, is not desirable, except when absolutely necessary, and that restorative justice and the systems that will facilitate this should be prioritised.

The parliamentary debates

In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and was briefed by government departments and civil society on Bill 49 of 2002. During these debates the Bill appeared to undergo certain changes. Although the ethos of the Bill remained the same in that the processes of assessment,

diversion, the preliminary inquiry and alternative sentencing remained intact, the overall child rights nature of the Bill that focused on the individual child offender, was whittled away by the portfolio committee.

The result was that at the end of 2003, the Bill was not yet finalised, but was far more punitive in nature and did not allow for many of its provisions to apply to children charged with serious scheduled offences. One example of the new nature of the Bill is that it would appear that the benefits of diversion, which were potentially available to all children charged with any crime under Bill 49 of 2002, are now only available to children charged with less serious and petty crimes. Likewise, children charged with serious offences will not be assessed by a probation officer and will not appear before a preliminary inquiry – processes that were put in place in order to manage a range of issues from age determination to placement of the child, in order to ensure the child is detained as a matter of last resort and for the shortest possible period of time.[8]

In addition, allowing children under the age of 14 to be held in prison awaiting trial if charged with serious scheduled offences, as per changes to the Bill, can be seen as retrogressive and punitive. Section 29 of the Correctional Services Act (1959) provides that only children above the age of 14 years may be kept in prison awaiting trial, irrespective of the offence for which they are charged.

Should the portfolio committee persist in its proposed amendments, the Bill will bring our new and emerging child justice system perilously close to treating serious child offenders in the same manner as adults. However, it must be stressed that the above discussion reflects the parliamentary debates and that no final decision has been made on the content of the Bill. There is, therefore, still the opportunity for advocacy efforts to lobby for the tabled version of the Bill to remain.

However, it is a matter of concern that, after the debates in 2003, parliament recessed for the elections in 2004 and since that time, the Bill has not been debated again before the portfolio committee. Its 'non-appearance' has been the subject of many debates and theories, but there have been no answers forthcoming from the legislature as to where it is and why the portfolio committee has not proceeded with it.

Conclusion

The Bill has sought to address the problems encountered in the field of child justice within the framework of current legislation. If the Bill is adopted as legislation it will revolutionise the criminal justice system in South Africa, particularly in relation to children in conflict with the law. While ensuring that a child's sense of dignity and self-worth are recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others.

In this respect, the formal introduction of diversion and the underlying principles of restorative justice into our child justice system will be very exciting. It encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of recognising their actions, making amends for them and reducing the possibility of re-offending.

Endnotes

1 General Assembly Resolution 45/113 of 14 December 1990.
2 U.N. Doc. A/40/53
3 The Report proposed that the new legislation refer to 'child justice' rather than 'juvenile justice', as the term 'juvenile' can be pejorative and stigmatising, and the reference to a child is more congruent with a children's rights approach.
4 Report par 1.5.
5 Report par 1.5.
6 Subsequently published in book form as *What The Children Said*…, Community Law Centre (1999).
7 A list of respondents is provided in Annexure B to the Report.
8 While no new official version of the Bill exists, the author was present at all of the Portfolio Committee debates and kept personal notes of the changes to the Bill.