

# A long and winding road

## The Child Justice Bill, civil society and advocacy

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*This article charts the journey of civil society's engagement with the Child Justice Bill. The story begins with activism in the early 1980s, and tracks the reform efforts through various phases. The Bill was rewritten in Parliament in 2003, and it then fell off the parliamentary agenda. When it re-surfaced at Parliament in 2008 civil society lobbied hard for changes that would bring the Bill closer to the original intentions. An account is given of the gains and losses, and, all in all, the picture looks positive. A brief description of important features of the Bill is included in the article.*

The Child Justice Bill was missing in action for a while. Although it was first introduced into Parliament in 2002, and debated by the Justice Portfolio Committee in 2003, it thereafter disappeared (for reasons that are still not clear). At the end of 2007 the Bill suddenly appeared back on the parliamentary agenda. In the civil society child justice sector, all hands were needed back on deck to try to undo the damage that the Bill had suffered during its first round of deliberations in 2003. Intense activity on the part of civil society and of the politicians on the Justice Portfolio Committee in the first half of 2008 has paid dividends. The Bill was passed by the National Assembly, and as it now makes its way to the President, child justice advocates are taking stock of the gains and losses. All in all, the picture looks positive.

South African civil society has an illustrious past of advocacy and lobbying in the context of the struggle against apartheid. This activity continued

in the transition to a democratic government and is still prominent in various forms today. One of the areas in which the advocacy efforts of civil society has made a tremendous impact, and still has much scope for further action, is in the field of children's rights. Bayes (2000:10) argues that the importance of NGOs in assisting and exerting pressure on government lies in the fact that NGOs have particular knowledge of a child's situation, can consult with children and are able to identify effective means of intervention and protection. One very valuable function of NGOs and civil society in general is the role that they can play in ensuring that the law reform process is not only initiated, where needed, but also seen through to completion. In the child justice sector civil society and NGOs have assumed a valuable role in affecting change both in law and practice.

The child justice movement in South Africa emerged in the early 1990s and was focused on a number of issues, although interlinked issues of

detention of children and the need for law reform were the two most prominent. (Sloth-Nielsen 1999:470).

Key child rights academics have observed that the law reform process was initiated by non-governmental organisations in the early 1990s through advocacy campaigns that focused 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), and through publishing legislative proposals (Juvenile Justice Drafting Consultancy 1994). The demise of apartheid ushered in heightened awareness for the plight of all children in trouble with the law.

In the absence of a separate criminal justice system for children, the child justice movement has also created a platform, for a range of child justice related issues to emerge and develop within the field of criminal justice. One example of a particularly innovative initiative was the establishment of diversion programmes by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) (Skelton 2005: 368). These programmes offered an opportunity, in appropriate cases, to refer children away from the criminal justice system, thereby promoting their chances for re-integration into the community. The result of this initiative is that, at present, diversion services are widely available throughout the country through a variety of different service providers in and outside of government, and the concept of diversion is a central feature of the Child Justice Bill.

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. This was in recognition of South Africa's international obligations under the UNCRC and the constitutional imperatives for children contained in section 28 of the Constitution. It also followed developments such as the appointment and ensuing work of the Inter-Ministerial Committee on Youth at Risk (IMC). A previous article in South African Crime Quarterly

17 addressed the South African Law Reform Commission process relating to the drafting of the Bill, as well as the initial debates in Parliament during 2003 (Gallinetti 2006).

## THE MANY FORMS OF THE CJB

The Child Justice Bill that was developed by the South African Law Reform Commission, while retaining most features of our present criminal justice process, introduced a number of new concepts and procedures, some of which are presently used in practice but are not provided for in legislation. These included:

- Raising the minimum age of criminal capacity from seven to ten years
- Providing a legislative framework for the assessment of all children in criminal procedure
- Introducing a preliminary inquiry process
- A legislative framework for diversion
- Guidelines established in law to ensure that the detention of children happens as a last resort by requiring that courts first consider an alternative to detention before placing a child in a facility or prison

The procedures contained in this version of the Bill resulted in a separate system of criminal justice for children that balanced due process rights with the rights of children to be protected, while at the same time providing for the interests of the community.

The version of the Child Justice Bill that was introduced into Parliament as Bill 49 of 2002 was very similar to the SALRC version. However, the debates that took place in the Portfolio Committee on Justice and Constitutional Development during 2003 resulted in many proposed changes to the Bill. Although aspects of the Bill remained the same in that the processes of assessment, diversion and the preliminary inquiry were retained in the Bill, the Portfolio Committee adopted an approach that saw certain children being excluded from the application of these procedures.

The deliberations focused on trying to fashion a

far more punitive approach to children charged with serious scheduled offences than the Child Justice Bill in its original form intended. In particular, the Portfolio Committee strongly resisted the idea that all children could be considered for diversion, irrespective of the offence alleged to have been committed. Their view was that diversion should only apply to children charged with less serious crimes. Likewise, children charged with serious offences would not be assessed by a probation officer and would 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.

However, after the debates in 2003 and before the Bill could be finalised, Parliament recessed for the elections in 2004 and the Bill was not placed back on the Portfolio Committee agenda in that year, nor was there any further progress on it in 2005 or 2006, sparking many debates as to what had happened to it.

## FROM DESPAIR TO SATISFACTION

In October 2007, a new version of the Child Justice Bill was released by the Department of Justice and approved by Cabinet. The concerns regarding the approach to the Bill adopted by the Portfolio Committee on Justice and Constitutional Development during 2003 became very real. This 2007 version of the Bill differed dramatically from the 2002 version of the Bill. While it still retained the essential features of the Bill such as assessment, the preliminary inquiry, diversion and alternative sentences, it excluded certain children from the benefit of the processes and procedures, based on their age and category of offence with which they were charged.

In essence, children who were over 14 years and charged with serious offences would not benefit from the new child justice system. In addition, in certain respects the new version of the Bill was more retrogressive than our current law. At present children under 14 years are not allowed to be detained in prison awaiting trial, but the 2007

version of the Bill allowed for certain children under 14 years charged with serious offences to be held in prison awaiting trial. One of the puzzling aspects of the new Bill was that, although it contained all the proposed changes made by the Portfolio Committee in 2003, it was in fact the Department of Justice that had re-submitted the Bill, signalling a dramatic policy shift from its approach when first introducing the Bill in 2002.

In early 2008 the Portfolio Committee on Justice and Constitutional Development, with a new chairperson, held public hearings on the Bill and proceeded to deliberate on its contents. In yet another dramatic turn of events, the Committee indicated that they were prepared to revert to the original approach adopted by the Department of Justice in 2002 and provide that the processes and procedures contained in the Child Justice Bill be accessible to all children, irrespective of age or offence.

The Committee noted that many of the changes to the Bill which had resulted in the 2007 version had arisen out of a concern that the 2002 version would experience difficulties with implementation, but that five years on the problems that the former Committee were concerned with had to a large extent dissipated. This, combined with an acknowledgement by the present Portfolio Committee that there was unanimous support for the provisions of the 2002 version of the Bill from civil society, was one of the main influencing factors that led to the Committee ultimately passing a Bill, not that dissimilar to the 2002 version, but somewhat more tightly regulated.

The Child Justice Bill was passed by the National Assembly on 25 June 2008, and the National Council of Provinces on 5 September. This Bill ensures that all children will be assessed (see the article by Thulane Gxabane in this edition of the SACQ for a discussion about the practical difficulties relating to assessment); all will appear before a preliminary inquiry for certain decisions (such as whether the child should be released or detained awaiting trial); and that all children can be considered for diversion, although children

charged with more serious offences will only be diverted in exceptional circumstances.

However, there are still certain aspects of the Bill that are of concern. Firstly, the Bill still allows for minimum sentences to be applicable to children aged 16 and 17 years. This is despite the fact that the Constitution states that children should be detained only as a last resort and for the shortest appropriate period of time, whereas minimum sentences, by their nature, are a first resort. Secondly, while the sentencing provisions create a system of sentencing that seeks to ensure that children to whom minimum sentences are not applicable are imprisoned as a last resort, the Bill specifically allows for a court to impose a sentence of imprisonment of up to 25 years on a child, even for less serious offences (provided substantial compelling reasons exist). This, coupled with the fact that minimum sentences still include life imprisonment, means that children of 14 years and older may be sentenced to 25 years, whilst 16 and 17 year-olds can be jailed for life. In terms of international practice, 25 years imprisonment is considered to be a very long sentence for a child offender, and the UN Committee on the Rights of the Child has called for life imprisonment of child offenders to be abolished.

A further concern relates to the over-formalisation of diversion. Although the Bill provides that all children can be considered for diversion, the system of diversion itself is extremely tightly regulated. While there is a need for checks and balances to ensure that the system of diversion is credible and a viable alternative to the formal criminal justice system, the level of regulation that is now contained in the Bill was not originally envisaged. This level of regulation detracts from one of the major advantages of diversion, which is that it provides an informal way to deal with less serious crimes, and simultaneously takes pressure off the criminal justice system.

Nonetheless, the overall outcome means that South Africa has finally established a child justice system that will potentially reduce crime; promotes the accountability of children with a view to breaking the cycle of violence; treats

children in a manner appropriate to their ages whilst holding them accountable for their actions; balances the needs of the child, the victim and society; and creates a safer society for all.

## CIVIL SOCIETY ADVOCACY

Van Zyl Smit (1999:202) recorded almost a decade ago that during the period of transition there was a conscious effort by criminologists and human rights activists to build a coalition of progressive forces that united around new ideas for dealing with children in the criminal justice system. Van Zyl Smit was of the view that during this period 'juvenile justice probably attracted more debate and development resources than any other criminal justice issue and therefore the ideas of how society should ideally be organised in the future were articulated most fully in this context'.

Civil society played a specific role in the law reform process. In the early days NGOs formed loose coalitions to run their campaigns and raise awareness. The sector became more organised around the year 2000. In November 2000, shortly after the South African Law Reform Commission handed the draft Child Justice Bill to the Department of Justice and Constitutional Development, a meeting was held that brought civil society organisations, NGOs and government officials together. As a result of this meeting, a campaign aimed at promoting and lobbying for the passing of the Child Justice Bill was initiated, and the Child Justice Alliance was formed to co-ordinate it. The Alliance is a collaboration of NGOs, CBOs, academics and individuals across South Africa committed to seeing change in the field of child justice. Early on, the Alliance established nine basic principles around which to arrange the campaign, and these proved valuable to the end of the process.

However, civil society was working against a moving background. The tough-on-crime talk of zero tolerance was in ascendance in 2003 when the Child Justice Bill was first debated in Parliament, and the Child Justice Alliance had to cope with difficult debates in an era when fear of

crime created a charged atmosphere. The Alliance proved to be very resilient; it learned the art of compromise and adjusted its expectations, whilst remaining firm to its principles.

Van Zyl Smit and Van der Spuy (2004) summed up their view of the situation as follows:

Thus far a spirit of political pragmatism has allowed the child justice lobby to recognise, rather than dismiss, concerns about desert and retribution. In some instances there have been concessions. Yet many aspects of diversion and conferencing remain intact - sufficient for the reformers to claim that communitarian justice is far from dead ... Pragmatism among the moral entrepreneurs may not, however, be enough to keep the communitarian ideas afloat. As elsewhere in the criminal justice system, the gap between theory and practice, between social policy and bureaucratic implementation may loom large. This may be the case despite the fact that the bill was placed before Parliament together with an implementation strategy and detailed costing. Notwithstanding such initiatives, the political will to sustain this model of child justice may prove to be fickle in the face of contradictory pressures to 'tough justice' elsewhere in the criminal justice system.

Another fairly predictable battle was the one about resources. With so many demands on the public purse, could South Africa afford a new child justice system, and would there be enough infrastructure on the ground to cope with the new demands? This curved ball was met with a deft hand. Civil society closely followed the process of the costing of the Child Justice Bill. Part of the strategy that developed during this time was to focus on practical issues, trying to convince the portfolio committee that the infrastructure was available (Sloth-Nielsen 2003). Thus NGOs made presentations demonstrating that diversion programmes were already operating on the ground, and pledging to provide civil society support to government in implementation of the proposed law. The strategy of focusing on 'delivery' appears to have served a dual purpose: 'It was firstly to fend off arguments that systemic transformation resulting in a separate child justice

system was an unachievable endeavour, and secondly, to deflect "popular punitiveness" by shifting the debate to "new pragmatism" (Skelton 2005:490).

Aside from making its own written and oral submissions on the Bill, the Child Justice Alliance also co-ordinated submissions from other civil society organisations, NGOs and academics. This ensured a large show of support for the provisions and principles of the Bill. In addition, the parliamentary deliberations were monitored in order to gauge the progress of the Bill during the deliberations, and supplementary submissions were made resulting from some of the proposals made by the Committee at the time. Civil society had a strong presence at the hearings and continued to have an influence through lobbying and discussion with parliamentarians.

After the Bill fell off the parliamentary agenda, the Child Justice Alliance continued to agitate for its reappearance. The Alliance used the media, the internet and *Article 40*, a lay publication dedicated to child justice issues, to keep enthusiasm for the Bill alive. Targeted advocacy was also undertaken with politicians and key officials in the Department of Justice and Constitutional Development, and in 2005 the Alliance started to serve on the Intersectoral Committee on Child Justice, a national committee comprising of senior officials from all the relevant government departments in the child justice field.

Although advocacy efforts continued, the Alliance also re-directed its work and started undertaking research. The research component of the Alliance's work focused on collecting baseline data in the current criminal justice system pertaining to children, against which the implementation of the Child Justice Bill, once enacted, could be measured. The reason for undertaking this research was that there were no accurate data on children in the criminal justice system. There were ad hoc pockets of data, but nothing comprehensive. As a result, two studies were undertaken at three magistrates' courts over a period of four months to collect and analyse information on various aspects of the criminal

justice system based on a set of developed indicators. This research was completed in 2007, published, and placed on the Alliance's website. While the intention was to use the data once the Bill was enacted to measure certain key areas of implementation, the research also proved useful in the 2008 parliamentary hearings. Using the information, the Alliance was able to show how the system was working on the ground, what the problems were, and how they could be addressed.

Once the Child Justice Bill was again approved by Cabinet in 2007, the Alliance co-ordinated advocacy efforts aimed at ensuring that the Portfolio Committee would consider reverting to the approach contained in the 2002 version of the Bill. The strategy concentrated on liaising with the media, and submissions to parliament on the Bill. At the public hearings civil society organisations made extensive submissions to the effect that it was never the intention to exclude certain children, based on age and offence, from the application of the processes and procedures of the Bill.

In addition, civil society was clear that the changes effected by the 2007 version of the Bill constituted a significant change in policy – away from ensuring that all children are afforded procedural protections in the criminal justice system, to a situation in which only a select few are entitled to a different procedural regime, a flaw which the Child Justice Alliance described as creating a 'bifurcated system'. 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 would place them in a more prejudicial position not only to other children but also to certain adults who appear in criminal courts.

Civil society also addressed new issues during the hearings. Numerous NGOs and academics argued that recent developments in scientific neurological research and in child justice jurisprudence internationally have resulted in the original SALRC proposal to raise the minimum

age of criminal capacity to ten years of age becoming outdated. There were various calls for the minimum age to be raised to at least 12 years of age, with some calling for a higher minimum age. The Portfolio Committee engaged actively in the debate, and although the minimum age was ultimately set at ten years, the Committee decided to include a clause requiring Parliament to review this decision in five years after commencement of the Act.

Neither government, parliament, nor civil society had previously considered crime prevention as being an issue for inclusion in the Bill. However, submissions were made by civil society organisations calling for one of the objects of the Bill to be the prevention of crime, and this was readily accepted by the Committee.

In addition to the submissions, the Portfolio Committee allowed the Alliance to be represented at the deliberations on the Bill and actively participate in the proceedings, commenting on each clause of the Bill as the Committee proceeded through its first reading thereof. This opportunity that was afforded civil society should be seen as giving true substance to section 59 of the Constitution, which states that the National Assembly must facilitate public involvement in its legislative and other processes as well as those of its committees. Not all of civil society's submissions to the Committee were heeded. The Committee certainly gave serious consideration to the inputs made – but at times they disagreed, citing their duty as law makers for an electorate concerned about crime. The participatory approach adopted by the Committee is a good practice example of parliamentary participation. It has ensured that the Bill was rigorously debated and has culminated in a fairly balanced piece of legislation, reflecting both a child-rights based approach and a concern for the safety of society as a whole.

## CONCLUSION

The Child Justice Bill has had a tumultuous and protracted history. However, it is an example of a

piece of legislation that has been influenced by civil society expertise on the issue of children's rights and criminal procedure; civil society's ability to undertake credible research; the introduction of innovative methods of child justice practice; and targeted advocacy and lobbying.

While great frustration was expressed at times regarding the delays in the finalisation of the Child Justice Bill, it has to be acknowledged that the final product may indeed have benefited from the long process, if only because of new leadership at the Portfolio Committee, which allowed for a new level of public participation. As the Chairperson of the Portfolio Committee on Justice and Constitutional Development, Yunus Carrim, stated at the National Assembly debate on 25 June 2008:

While the Committee regrets the delay in finalising the Bill, we would like to think the delay served to, ultimately, produce a better Bill. Certainly, the Bill is the outcome of considerable negotiations among a range of stakeholders and there is now substantial consensus on its content between Parliament, the executive, NGOs and academic and other experts.

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