

SUBMISSION ON THE CHILDREN'S BILL (Section 75, B70 of 2003)

TO: THE NATIONAL COUNCIL OF PROVINCES

**BY: THE COMMUNITY LAW CENTRE, CHILDREN'S RIGHTS
PROJECT**

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**PLEASE NOTE THAT THE COMMUNITY LAW CENTRE WISHES TO
ADDRESS THE NCOP AT ANY PUBLIC HEARINGS THAT MAY OCCUR
AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO.**

LEGAL REPRESENTATION – CLAUSE 55

Introduction

Clause 55 of the Children's Bill is a wholly new provision introduced by the Portfolio Committee on Social Development. Although the Children's Rights Project has made a previous submission that also dealt with legal representation, in our opinion the effect of clause 55 is highly prejudicial to children appearing in the children's courts and the substance of the clause was never proposed by either the SALRC or the Department of Social Development prior to the Portfolio Committee approving its contents and it being passed by the National Assembly.

The Children's Rights Project submits as follows:

1. Clause 55 has the effect that where a children's court is of the opinion a child is in need of legal representation at state expense and that this is in the child's best interests, the court cannot order legal representation for the child and can merely refer the matter to the Legal Aid Board which will make a decision as to whether the child is entitled to legal aid based on section 3B of the Legal Aid Act 22 of 1969.
2. This does not conform with the present section 8A of the Child Care Act 74 of 1983, regulation 4A of the Child Care Act nor any of the proposals regarding legal representation contained in earlier versions of the Bill (albeit the fact that these versions were not optimal, they none the less allowed the children's court to order legal representation for a child in defined circumstances).

3. Clause 55 is therefore a step back in the provision of legal representation for children in the children's courts. In addition, it leaves the decision as to whether a child receives legal representation at state expense to the Legal Aid Board, which has no insight into whether it is in the best interest of the child **in the particular case** to receive legal aid, despite the contents of the Legal Aid Guide.
4. In addition, section 3B of the Legal Aid Act refers to criminal proceedings and although clause 55 states "read with the changes required by the context", it is submitted that the absence of proper and clear guidelines for presiding officers will hinder referrals of children where they need legal representation on account of the fact that section 3B (1)(a)(ii), which states "the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be" is not synonymous to proceedings in a children's court type of matter and there are NO guidelines provided by B70 of 2003 as to when such a referral should be made as the Legal Aid Act is not one of the pieces of legislation repealed or amended by Schedule 4 of B70 of 2003. Previous versions of the Children's Bill (SALRC version, the 19 June 2003 version of the Bill as well as the Child Care Act and Regulations provided such guides).
5. It is submitted that even if it is decided to retain the referral to the Legal Aid Board instead of the court ordering legal representation, which is not preferable, guidelines still need to be provided for presiding officers as the guide given by the Legal Aid Act is not sufficient, and the best interests principle, even though given substance in section 7 of the Children's Bill, does not cover all situations in relation to legal representation, e.g. , where any other party is legally represented or where there is more than one party contesting custody of the child. These guidelines are meant to give substance to the Constitutional provision embodied in section 28(1)(h) which guarantees legal representation at state expense for children in civil proceedings if a substantial injustice would otherwise result. The need for defining substantial injustice was the direct cause of the 1996 amendments to the Child Care Act and Regulations that provided for legal representation in the children's courts. To now remove these guidelines makes absolutely no sense and will lead to inconsistent application of the law and a less credible welfare court system for children.

6. In addition, the final decision of whether a child receives legal representation at state expense rests with a Legal Aid Board official. While, for cost reasons this may be necessary for adults, it is argued that children who appear in children's courts are in extremely vulnerable positions because they find themselves in a situation where they have been placed at risk by their very own parent or caregiver and therefore should receive legal representation at state expense if necessary, irrespective of the requirements set out by the Legal Aid Guide. In fact the Legal Aid Guide¹, in Chapter 3, while setting out that it prioritises the positive rights to legal aid enshrined in Section 28(1)(h) of the Constitution and vulnerable groups including children, **it does not set out ANY CLEAR** guide as to when legal aid should be granted for a particular case, despite its proviso that Justice Centres within a particular area may not, within available resources, be able to satisfy all the demands for legal aid within their areas.
7. The effect of Section 55 is therefore that not only do magistrates have no clear guide as to when to refer a matter to the Legal Aid Board, but Legal Aid Board officials have no guidance as to when to appoint a legal representative or not. This is contrary to previous attempts to provide for legal representation of children in the Children's Courts as these attempts recognised that not every matter requires legal representation, but at the very minimum they provided guidance on what matters involving children should receive legal representation for the children to avoid substantial injustice from occurring.
8. Legal Aid is only provided to those applicants that are indigent and comply with the requirements of the means test (in addition to other requirements). It is argued that section 28(1)(h) did not envisage that a child be excluded from obtaining legal representation at state expense if substantial injustice would result **MERELY** because the child's parents were able to afford legal representation. There might be the situation that a child is the subject of a children's court inquiry and his or her parents are able to afford an attorney for the child, however this would not be appropriate as the attorney is receiving financial instructions from a party who may be contesting what the child wants or a parent who may be an abuser of the child. This could again lead to substantial injustice in that the attorney may not adequately represent the voice of the child. It appears the Guide is either silent on this situation or, at worst, will exclude a child whose parents do not meet the means test.

¹ 11th edition, 2004, accessed at www.legal-aid.co.za/publications/guide/guide/htm on 29 September 2005

9. In addition, the Guide is silent on the situation where a child and parents are both applying for legal aid in a children's court matter.

THEREFORE IT IS SUBMITTED:

- 1. Children's Courts be given the power to order legal representation at state expense for children and not have to refer the matter to the Legal Aid Board for a decision.**
- 2. Section 55 be re-examined and re-drafted to its previous form as contained in the SALRC version or the 19 June 2003 version of the Children's Bill, which provides guidance on what could potentially constitute a substantial injustice.**